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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SCOTT CHAMBERLIN,

Appellant.

bjh *E*

**BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON and WASHINGTON ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS**

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INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union of Washington (“ACLU”) is a statewide, nonpartisan, nonprofit organization of over 20,000 members, dedicated to the preservation of civil liberties, including privacy and due process. The ACLU strongly supports adherence to the provisions of Article 1, Section 7 of the Washington State Constitution, prohibiting unreasonable interference in private affairs, as well as the Fourteenth Amendment to the United States Constitution, prohibiting deprivation of liberty without due process of law. It has participated in numerous due process and privacy-related cases as *amicus curiae*, as counsel to parties, and as a party itself.

The Washington Association of Criminal Defense Lawyers (“WACDL”) is a nonprofit association of over 700 attorneys practicing criminal defense law in Washington State. As stated in its bylaws, WACDL was formed “to improve the quality and administration of justice” and its objectives include “to protect and insure by rule of law those individual rights guaranteed by the Washington and Federal Constitutions, and to resist all efforts made to curtail such rights.” WACDL has filed numerous amicus briefs in the Washington appellate courts.

STATEMENT OF THE CASE

This case asks whether a judge who authorized a search warrant may also preside over the later suppression hearing on a motion challenging the validity of the warrant. The relevant facts are as follows:

Island County Superior Court Judge Alan Hancock issued a warrant authorizing a search of Scott Chamberlin's residence. Appellant's Br. at 3. Judge Hancock found that an affidavit containing allegations of a jailed informant was sufficient to support probable cause. Appellant's Br. at 4. Based on evidence obtained during the execution of the warrant, the Island County prosecutor charged Chamberlin with one count of possession of marijuana with intent to deliver and one count of possession of methamphetamine with intent to deliver. Appellant's Br. at 3. Judge Hancock was assigned to rule on pretrial motions in the case.

Chamberlin moved to exclude the evidence obtained during the execution of the warrant, arguing that the affidavit was invalid on its face because it failed to establish the credibility of the informant. Appellant's Br. at 4. Chamberlin asked Judge Hancock to recuse himself from the suppression hearing, because he was the judge who had originally found the affidavit sufficient and issued the warrant. Appellant's Br. at 3. Judge Hancock denied the recusal motion, stating that he did not know why he would not be fair and impartial. Appellant's Br. at 4.

Judge Hancock then denied the motion to suppress and Chamberlin was convicted after a bench trial on stipulated facts. Appellant's Br. at 5. Chamberlin appealed, and the Court of Appeals certified the recusal question to this Court.

ARGUMENT

A. Allowing the same judge who issued a warrant to preside over a suppression hearing contesting the legality of the warrant would be inconsistent with Washington's exceptionally strong privacy protections.

1. Article 1, Section 7 of the Washington Constitution prohibits government intrusion into private affairs absent authority of law.

Article 1, section 7 of the Washington Constitution provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." It is well-established that Washington's privacy clause affords greater protection than both the federal fourth amendment and most state search-and-seizure provisions. *E.g.*, State v. Ladson, 138 Wn.2d 343, 979 P.2d 833 (1999) (pretext stops illegal under art. 1, § 7); State v. Boland, 115 Wn.2d 571, 800 P.2d 1112 (1990) (art. 1, § 7 prohibits warrantless garbage inspection); State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986) (placing pen register on telephone line without authority of law violates art. 1, § 7); State v. Myrick, 102 Wn.2d 506, 688

P.2d 151 (1984) (no “open fields” exception to the warrant requirement under art. 1, § 7).

In State v. Jackson, this Court rejected the lenient “totality of the circumstances” test for determining whether informants’ tips create probable cause under the federal fourth amendment. 102 Wn.2d 432, 433, 688 P.2d 136 (1984) (declining to follow Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)). Instead, Washington’s stronger privacy clause requires adherence to the Aguilar - Spinelli¹ rule, which provides that the affidavit in support of a warrant must establish both the basis of information and the credibility of the informant. Id.

2. Washington’s exclusionary rule mandates suppression of evidence obtained in violation of Article 1, Section 7.

Washington’s strong privacy clause is enforced by a robust exclusionary rule. During the time when most states refused to follow the United States Supreme Court’s adoption of an exclusionary remedy, Washington became the fifth state to do so in State v. Gibbons, 118 Wash. 171, 203 P.390 (1922) (following Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886)). Sanford E. Pitler, Comment, The Origin and Development of Washington’s Independent Exclusionary Rule:

¹ Spinelli v. United States, 393 U.S. 410, 21 L.Ed.2d 637, 89 S.Ct. 584 (1969); Aguilar v. Texas, 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509 (1964).

Constitutional Right and Constitutionally Compelled Remedy, 61 Wash. L. Rev. 459, 472 (1986). This Court concluded that “it is beneath the dignity of the state, and contrary to public policy, for the state to use for its own profit evidence that has been obtained in violation of law.” State v. Buckley, 145 Wash. 87, 258 P.1030 (1927).

Pressure to alter the automatic nature of Washington’s exclusionary rule increased when the United States Supreme Court decided against extending the federal exclusionary rule to the states in Wolf v. Colorado, 338 U.S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949). Pitler, 61 Wash.L.Rev. at 484. But this Court refused “to recede one iota” from its commitment to a mandatory exclusionary rule because “the wisdom of the ages has taught that unrestrained official conduct in respect to depriving men of their liberties would soon amount to a total loss of those liberties.” Id. at 485 (citing State v. Young, 39 Wn.2d 910, 917, 239 P.2d 858 (1952) and State v. Miles, 29 Wn.2d 921, 190 P.2d 740 (1948)).

In Mapp v. Ohio, the Supreme Court extended the exclusionary rule to all states, explaining that it was an element of the right to privacy. 367 U.S. 643, 655-56, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). “To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment.” Mapp, 367 U.S. at 656. The exclusionary rule not only protects the constitutional rights of individuals, but gives “to the courts,

that judicial integrity so necessary in the true administration of justice.”

Mapp, at 660.

As federal courts later retreated from their commitment to suppress illegally obtained evidence, this Court has consistently held firm, asserting that “the language of our state constitutional provision constitutes a mandate that the right of privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy.” State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). Thus, this Court has refused to adopt exceptions to the exclusionary rule accepted by federal and other state courts. See, e.g., id. (affirming Mapp and rejecting Michigan v. DeFillippo, 443 U.S. 31, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979)); State v. Morse, 156 Wn.2d 1, 9-10, 123 P.3d 832 (2005) (court has “long declined to create ‘good faith’ exceptions to the exclusionary rule”). Our exclusionary rule is mandatory because article 1, section 7 “clearly recognizes an individual’s right to privacy with no express limitations.” White, 97 Wn.2d at 110.

Indeed, instead of narrowing the exclusionary rule, this Court has “extended the exclusionary rule beyond the original Fourth Amendment context.” State v. Bonds, 98 Wn.2d 1, 9-10, 653 P.2d 1024 (1982) (citing as examples this Court’s suppression of evidence obtained pursuant to unlawful misdemeanor arrests and to evidence obtained in violation of

statutes). Bonds explains the rationale for a strong exclusionary rule in Washington: “first, and most important, to protect the privacy interests of individuals against unreasonable governmental intrusions; second, to deter the police from acting unlawfully in obtaining evidence; and third, to preserve the dignity of the judiciary by refusing to consider evidence which has been obtained through illegal means.” Bonds, 98 Wn.2d at 12; see also Mapp, 367 U.S. at 659 (“there is another consideration – the imperative of judicial integrity”).

3. A robust suppression motion procedure is required to support Washington’s strong privacy clause and exclusionary rule.

The principles underlying Washington’s exclusionary rule equally support maintaining a robust suppression motion procedure. The respect for personal privacy required by our constitution and exclusionary rule counsels against permitting the same judge who issued a warrant to rule on a subsequent suppression motion. Nor does it “preserve the dignity of the judiciary” for a judge to rule on the legality of his earlier action permitting government intrusion into an individual’s home. Some have argued that judicial integrity is not implicated where “the violation is complete by the time the evidence is presented to the court.” United States v. Janis, 428 U.S. 433, 458 n.35, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976) (contending

that the court is not involved in a police officer's violation of a defendant's Fourth Amendment rights, even if the court later admits the evidence obtained as a result of that violation). But in the context of a warrant challenge, the violation alleged is the court's earlier misvaluation of evidence presented to it. Concerns of judicial integrity are at their peak in such a situation, and can only be assuaged by prohibiting judges from determining the validity of their own warrants.

If the trial court's ruling here is affirmed, there is a real risk that suppression motions would become an illusory remedy, because they would require judges to find their own rulings illegal. The practice of allowing judges to review the validity of their own warrants could reduce the constitutional requirement of a proper warrant to "a form of words." Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392, 40 S. Ct. 182, 64 L. Ed. 319 (1920) (extending exclusionary rule to the "fruit of the poisonous tree" in order to prevent fourth amendment from becoming illusory). Defendants should not have to appeal to get a fair and impartial review of the legality of a search warrant for their home. Nor, as is discussed below in Section B, should their failure to live in a large county with more judges diminish their access to the protections of the constitution and the exclusionary rule.

The State characterizes the trial court’s practice as legitimate essentially because both in issuing the warrant and in deciding the suppression motion the judge was just doing his job as a superior court judge. Br. of Resp’t at 5. But surely the State would agree that the court in this instance deviated from standard practice – while superior court judges have the authority to approve warrants and regularly decide suppression motions, they do not usually do both in the same case. This Court should stop that practice before it expands because “illegitimate and unconstitutional practices get their first footing ... by silent approaches and slight deviations from legal modes of procedure.” Boyd, 116 U.S. at 630. “It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.” Id.; see also Mapp, 367 U.S. at 647 (“independent tribunals of justice . . . will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution”); Id. at 666 (we must avoid “ignoble shortcuts” to conviction, or the constitutional right to privacy will become an “empty promise”).

Not only would the trial court’s practice undermine the exclusionary rule, it would weaken the force of the constitutional clause itself. The Jackson court’s insistence that magistrates apply a higher standard in determining probable cause under article 1, section 7 would be

undercut by the removal of an independent check on this determination. If Washington allows judges to rule on the legality of their own search warrants, our state may as well adopt the Gates standard, under which the warrant is to be upheld if there is a substantial basis for a “fair probability” that evidence will be found in a particular place. Jackson, 102 Wn.2d at 436. This Court rejected that standard because it would result in a magistrate being little more than a “rubber stamp” rather than making an “independent judgment” about the sufficiency of the affidavit. Id. at 437. Similarly, although a magistrate’s determination of probable cause is entitled to deference, a suppression judge must apply independent judgment rather than simply rubber stamping the issuance of a warrant. To ensure the application of independent judgment, this Court should hold that a judge may not rule on a motion to suppress evidence obtained under a warrant that the same judge issued. See Bonds, 98 Wn.2d at 13 (court may invoke its supervisory power to create procedural rules enforcing substantive laws).

B. Allowing the same judge who issued a warrant to preside over a suppression hearing contesting the legality of the warrant would violate due process, the appearance of fairness doctrine, and the Code of Judicial Conduct.

Recusal here is mandated not only by the privacy clause and the exclusionary rule, but also by due process and the appearance of fairness

doctrine. See In re Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 106 S. Ct. 1580, 89 L. Ed. 2d 823 (1986); U.S. Const. amend. 14. Due process requires an absence of not just actual bias, but “even the probability of unfairness.” Murchison, 349 U.S. at 136. In Murchison, the Court held that the judge who served as a one-man grand jury out of which a contempt charge arose could not later preside at the contempt hearing. Id. at 134. Because he had served as “part of the accusatory process,” he “[could] not be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused.” Id. at 137. Similarly here, a judge who issues a search warrant is part of the investigatory process – law enforcement officers present evidence in an ex parte proceeding at which the defendant is not present, does not submit evidence, and is not represented by counsel. The judge who has served as part of this investigatory process cannot be wholly disinterested in the suppression or admission of the evidence thereby obtained. Nor can the later suppression hearing be characterized as a “motion for reconsideration” since the defendant’s rights were not represented in the original proceeding. See Br. of Resp’t at 6.

Due process prohibits a judge who has already formed an opinion about witness credibility to rule on that same question at a later proceeding. Thus, an appellate court will disqualify a judge from presiding

upon remand if the record shows that the judge formed a definite opinion about the credibility of a key witness at the first trial. Reserve Mining Co. v. Lord, 529 F.2d 181 (8th Cir. 1976) (judge disqualified due to bias where he announced during first trial that witness could not be believed); Deauville Realty Co. v. Tobin, 120 So.2d 198, 202 (Fla. App. 1960), cert. denied, 127 So.2d 678 (Fla. 1961) (statement by trial judge that he felt party lied during trial does not affect validity of the verdict but might operate to disqualify judge if there were a retrial); Keating v. Superior Court of San Francisco, 45 Cal.2d 440, 289 P.2d 209, 210-11 (1955) (judge disqualified from retrial because at first trial he stated that he had “no confidence at all in [the defendant’s] integrity and veracity”). In the scenario presented by Mr. Chamberlin, it is the magistrate’s job to determine the veracity and credibility of the informers. Jackson, 102 Wn.2d at 433. Thus, he or she cannot later rule on the same question without offending due process.

As noted in Appellant’s Opening Brief, a judge’s failure to recuse himself or herself in this situation also violates the Code of Judicial Conduct, which, consistent with due process, provides that “[j]udges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned.” CJC Canon 3(D)(1); Appellant’s Br. at 7. In other words, judges should disqualify themselves from proceedings

in which “a reasonably prudent and disinterested person” might question their impartiality. State v. Carlson, 66 Wn. App. 909, 918, 833 P.2d 463 (1992). The standard is not what a reasonable judge might think – “an observer of our judicial system is less likely to credit judges’ impartiality than the judiciary.” United States v. Jordan, 49 F.3d 152, 156-57 (5th Cir. 1995). The use of the word “might” indicates that judges “should err on the side of caution by favoring recusal to remove any reasonable doubt” as to their impartiality. Leslie W. Abramson, Appearance of Impropriety: Deciding When a Judge’s Impartiality “Might Reasonably Be Questioned”, 14 Geo. J. Legal Ethics 55, 80 and n.3 (2000).

Inconvenience is an insufficient reason for denying recusal. Id. at 83. It is true that prohibiting a judge from playing the role of issuing magistrate and suppression judge in the same action may place a minor administrative burden on smaller counties. But most courts already manage to avoid the problem. And convenience cannot justify an erosion, however incremental, of our state’s paramount protection of privacy and commitment to judicial integrity. Washington law has always recognized the right to seek suppression, and that right should not be weakened by the judicial assignment process.

Another concern here is the possibility that a judge could be a material witness in a suppression hearing over which he or she is

presiding. Washington allows magistrates to testify at suppression hearings about “the experience and special knowledge” he or she brought to bear in issuing a warrant. State v. Jansen, 15 Wn. App. 348, 351, 549 P.2d 32 (1976) (citing CrR 2.3(c)); see also State v. Myers, 117 Wn.2d 332, 343, 815 P.2d 761 (1991) (magistrate should testify if there is no recording of a telephonic affidavit). But the Code of Judicial Conduct mandates disqualification of a judge who is likely to be a material witness in the same proceeding. CJC Canon 3(D)(1)(d)(iii). Where the suppression judge and issuing magistrate are one and the same, he may well be testifying in his own head, perhaps subconsciously, about the experience and special knowledge he applied in finding probable cause. Because this information is supposed to be exposed and subject to cross-examination, the same judge should never rule on a suppression motion attacking his or her own warrant. See Murchison, 349 U.S. at 138 (when judge calls on his own personal knowledge and impression of what had occurred in early proceeding, the accuracy of which cannot be tested by adequate cross-examination, due process is violated).

Thus, although some states have ruled that a judge’s ruling on the validity of his or her own warrant does not violate the Canon, e.g., State v. Monserrate, 479 S.E.2d 494, 501 (N.C. Ct. App. 1997), this court should not follow those jurisdictions. See Abramson, 14 Geo. J. Legal Ethics at

58 (judge should not review the correctness of his or her own issuance of a search warrant; states endorsing this practice have created a “troubling exception” to the rule). Even if the jurisdictions condoning this practice had correctly construed the appearance of fairness doctrine and Canon 3(D), our exceptionally strong privacy clause and exclusionary rule would mandate a different result. See Part A, *supra*.

CONCLUSION

For the foregoing reasons, the ACLU and WACDL respectfully ask this Court to hold that a judge may not rule on a motion to suppress evidence obtained during execution of a warrant that the same judge issued.

Respectfully submitted this 13th day of April 2007.

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