

No. 94208-1

COA 32683-7-III

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

RAY LENY BETANCOURTH, Petitioner.

ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

The Respondent is the State of Washington.

B. COURT OF APPEALS DECISIONS

At issue is the unpublished court of appeals decision filed on December 8, 2016 in Division Three of the Court of Appeals.

C. ISSUE PRESENTED FOR REVIEW

1. Does the unpublished court of appeals decision meet the criteria for review under RAP 13.4(b)?

D. STATEMENT OF THE CASE

The appellant, Ray Leny Betancourth, was charged with first degree murder and first degree assault. CP 3-4. He was found guilty of both counts. CP 182, 184. Prior to trial, there were many motion hearings, including a CrR 3.6 hearing.

During the 3.6 hearing, Betancourth moved to suppress Verizon Wireless phone records. At issue was the fact that detectives first secured a District Court warrant for the out-of-state phone records and then later obtained a Superior Court warrant for the same records. RP 152-3. Detective Brownell testified that he sought the second warrant to satisfy a previous ruling made on a different case by a Superior Court judge. RP 157. The second warrant did not seek any new records not already obtained from the first warrant. RP 167. Prior to obtaining any warrants,

however, a preservation letter had been sent to Verizon Wireless. RP 140, 154.

The court ruled that the second warrant was to correct a technical error and that demanding the physical records be sent a second time would have been fruitless. RP 186-7. The motion to suppress was denied. *Id.*

Betancourth appealed. Division III reversed the felony murder conviction and remanded for a new trial. The court initially declined to consider the issue of the Verizon records but after a motion for reconsideration, held that the text message were properly admitted.

E. ARGUMENT WHY REVIEW SHOULD BE DENIED

1. The trial court properly admitted Verizon phone records after a second warrant corrected a technical error.

Under RCW 10.96.060, only a Superior Court judge may issue a warrant to recipients outside of the State of Washington. That statute provides as follows:

10.96.060. Issuance of criminal process.

A judge of the superior court may issue any criminal process to any recipient at any address, within or without the state, for any matter over which the court has criminal jurisdiction pursuant to RCW 9A.04.030.

This section does not limit a court's authority to issue warrants or legal process under other provisions of state law.

Betancourth argued below that because officers did not get a second set of records, the independent source doctrine does not apply. He suggested that after getting a Superior Court warrant, officers would have had to return the records obtained from the invalid District Court warrant to the phone company and ask for a new set of records identical to the ones they returned.

But Courts have held that the independent source doctrine applies even where the seized goods are kept in the police's possession. *See, e.g., State v. Herrold*, 962 F.2d 1131 (3d Cir. 1992). If the item seized in this case was marijuana, there would be no need to return the marijuana and then seize it again after securing the Superior Court warrant. Demanding such a result would be senseless.

The independent source doctrine is a “well-established exception to the exclusionary rule.” *State v. Miles*, 159 Wn. App. 282, 291, 244 P.3d 1030 (2011). The United States Supreme Court's decision in *Murray v. United States*, 487 U.S. 533, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988), is the “controlling authority’ defining the contours of the independent source exception.” *Id.* at 292. In *Murray*, the court held that the Fourth Amendment does not require the suppression of evidence discovered during police officers' illegal entry if that evidence is also discovered during a later search pursuant to a valid search warrant that is independent

of the illegal entry. *Murray*, 487 U.S. at 542. The Supreme Court stated that:

The ultimate question . . . is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here. This would not have been the case if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant.

Id.

Accordingly, in Washington, courts have interpreted the requirements in *Murray* to have two prongs, both of which must be satisfied. "Under the independent source exception, an unlawful search does not invalidate a subsequent search if (1) the issuance of the search warrant is based on untainted, independently obtained information and (2) the State's decision to seek the warrant is not motivated by the previous unlawful search and seizure." *Miles*, 159 Wn. App. at 285.

In *State v. Green*, the Court of Appeals distinguished two federal cases and noted that "valid warrants in *Herrold* and *United State v. May*, 214 F.3d 900 (7th Cir. 2000), specifically authorized the search and seizure of the evidence at issue (the gun and cash), providing a clear

independent source to seek and seize the evidence.” *State v. Green*, 177 Wn. App. 332, 346, 312 P.3d 669 (2013).

In *Herrold*, police officers made an initial unlawful entry into a trailer and saw drugs and a loaded gun in plain view. 962 F.2d at 1134. They waited for a search warrant to seize the drugs but seized the gun during the initial entry. *Id.* at 1134-35. The search warrant affidavit included observations of the gun and drugs inside the trailer. *Id.* at 1135. They executed a search warrant later that night and seized the drugs. *Id.* The Third Circuit held that the drugs and gun were admissible under the independent source doctrine because, even excluding information obtained during the initial entry, the warrant was still supported by probable cause. *Id.* at 1140-44. The court concluded that although the gun was seized during the illegal entry, it should be treated as seized under the search warrant, which specifically authorized the seizure of firearms. *Id.* at 1143.

The court stated:

It would be dangerous to require officers to leave a fully-loaded, semi-automatic weapon unsecured until they obtained a warrant, and senseless to require the formality of physically re-seizing the gun already seized during the initial entry. Thus, the only logical implication under *Murray* is that the gun is as admissible under the independent source doctrine as the other, non-dangerous evidence, seen during the initial entry but

not seized until the warrant-authorized search.

Id.

Similarly, it would be senseless to require the formality of returning the records to the phone company and having them hand over the same exact records back to the officers. An executive relations analyst for Verizon Wireless testified at the CrR 3.6 hearing. RP 138. She indicated that no documents were sent after the second search warrant because “it would have been the same information we had already provided.” RP 147. Like the gun in *Herrold*, although the records were first subpoenaed pursuant to an invalid District Court warrant, they should be treated as seized under the valid Superior Court search warrant that was subsequently issued. In summary, the records were properly admitted under the independent source doctrine.

In the opinion below, however, the Court of Appeals held that the records were properly admitted under the invalidity correction corollary. Regardless of what you call the basis for admission of the records, either the independent source doctrine, or the invalidity correction corollary, the records were properly admitted at trial. The Court of Appeal’s decision does not violate Article 1, Section 7.

F. CONCLUSION

This case does not meet any of the criteria in RAP 13.4(b). First of all, the decision is not in conflict with a decision of the Supreme Court or another decision of the Court of Appeals. Second, a significant question of law under the Constitution of the State of Washington or of the United States is not involved. Lastly, the petition does not involve an issue of substantial public interest that should be determined by the Supreme Court. As such, his petition for review should be denied.

Respectfully submitted this 24th day of April, 2017,

s/Tamara A. Hanlon
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DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on April 24, 2017, by agreement of the parties, I emailed a copy of STATE'S ANSWER TO PETITION FOR REVIEW to Ms. Suzanne Lee Elliott at suzanne-elliott@msn.com.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 24th day of April, 2017 at Yakima, Washington.

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