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Oct 25, 2016

Court of Appeals

Division III

State of Washington

No. 32683-7-III

Yakima County Superior Court No. 12-1-01561-4

No. 94208-1

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

STATE OF WASHINGTON,
Plaintiff-Appellee,
v.

RAY LENY BETANCOURTH,
Defendant-Appellant.

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

The Honorable David A. Elofson, Judge

APPELLANT'S SECOND SUPPLEMENTAL OPENING BRIEF

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I.
SUPPLEMENTAL ARGUMENT

A. THE TRIAL COURT DID NOT BASE ITS RULING ADMITTING THE TEXT MESSAGES AS EXHIBITS ON THE “INDEPENDENT SOURCE” RULE

On May 4, 2015, Betancourth’s former counsel filed an opening brief. On June 22, 2015, new counsel filed a supplemental brief. In that brief Betancourth argued that the trial court must enter written findings and conclusions following a suppression hearing. CrR 3.6(b). Those findings and conclusions are considered necessary for appellate review. *State v. Head*, 136 Wn.2d 619, 622-23, 964 P.2d 1187 (1998). This Court may overlook this failure where the court comprehensively states the basis of its opinions orally. *State v. Cruz*, 88 Wn. App. 905, 907-09, 946 P.2d 1229 (1997); *State v. Smith*, 68 Wn. App. 201, 208, 842 P.2d 494 (1992). But the trial judge’s rulings here are too cryptic to explain his reasoning.

After receiving Betancourth’s supplemental brief, the counsel below for both parties drafted and submitted findings of fact and conclusions of law to the trial judge. Supp. CP _____, CrR 3.6 Findings of Fact and Conclusions of Law filed September 30, 2015.¹ The only relevant finding that the trial judge made was as follows:

¹ Betancourth filed a third supplemental designation of clerk’s papers on October 20, 2016. Because time is of the essence, he has also attached a copy of that document to this brief.

There is nothing that was requested based upon the invalid district court warrant that tainted the second warrant. It was really nothing more than a technical violation.

On November 15, 2015, the State filed its omnibus reply.

The trial judge made no mention of the independent source rule even though it had been briefed and argued to him at the time of trial. Despite that fact, the State argued that the trial judge had relied on that doctrine.

Betancourth replied to that argument. But if the trial court's oral statements or rulings are in conflict with its written findings, the written findings control.

Grundy v. Brack Family Trust, 151 Wn. App. 557, 571, 213 P.3d 619 (2009).

B. THIS COURT MAY NOT CONSIDER THE INDEPENDENT SOURCE RULE

The State briefed and argued the independent source rule below. The trial court did not mention that concept in his written ruling. This omission indicates that the trial judge considered and rejected the State's arguments that the rule was applicable. The State did not cross-appeal that ruling. Thus, this Court may not reconsider the seizure of the records under a theory specifically rejected by the trial judge.

C. THE INDEPENDENT SOURCE RULE DOES NOT OPERATE TO ALLOW ADMISSION OF THE TEXT MESSAGES

There was no "independent source" in this case. The State concedes that the district court warrant was invalid because it exceeded that court's

jurisdiction. The evidence admitted was the evidence seized by the use of the district court warrant. The second Superior Court warrant was directed to a different legal entity in a different state. Compare CP 9-14 with CP 85. But no records were ever obtained by use of the Superior Court warrant from the state in which the records were maintained. RP 148, 149. The independent source doctrine recognizes that probable cause may still exist based on legally obtained information after excluding the illegally obtained information. *State v. Green*, 177 Wn. App. 332, 344, 312 P.3d 669, 674 (2013). Here, once the trial court excluded the evidence illegally obtained via the district court warrant, there was no other evidence left to consider.

Even if records had been obtained by the second Superior Court warrant, the “independent source rule” would not support their admission. When the police intrude upon a person’s private affairs without valid authority of law, the illegality triggers a “nearly categorical” exclusion of the evidence gathered as a result under article I, section 7. *State v. Winterstein*, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009). Unlike the Fourth Amendment, article I, section 7 emphasizes “protecting personal rights rather than ... curbing governmental actions.” *Id.* The remedy of exclusion is automatic whenever the right to privacy is violated because article I, section 7 “clearly recognizes an individual’s right to privacy with no express limitations.” *State v. Afana*, 169

Wn.2d 169, 180, 233 P.3d 879 (2010), quoting *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982).

The court may not guess whether illegally obtained evidence would have been inevitably discovered had the police acted differently. *Winterstein*, 167 Wn.2d at 635. The Fourth Amendment's inevitable discovery doctrine "is incompatible with the nearly categorical exclusionary rule under article I, section 7." *Id.* at 636. Unlike the Fourth Amendment, there is no "good faith" exception to article I, section 7. *Afana*, 165 Wn.2d at 180. "When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed." *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999).

The independent source doctrine is one of the rare exceptions to article I, section 7's otherwise automatic suppression of unlawfully seized evidence. *State v. Gaines*, 154 Wn.2d 711, 722, 116 P.3d 993 (2005); *State v. Miles*, 159 Wn. App. 282, 291, 244 P.3d 1030, *rev. denied*, 171 Wn.2d 1022, 257 P.3d 663 (2011). But this doctrine is narrowly construed. It requires a separate source of valid legal authority to obtain the information sought and the State also bears the "onerous burden" of proving "that no information gained from the illegal entry affected either the law enforcement officers' decision to seek a warrant," or the magistrate's decision to grant it. *Murray v. United States*, 487 U.S. 533, 540, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988). The "ultimate question" is

whether the second search is “in fact a genuinely independent source of the information and tangible evidence at issue.” *Id.* at 542.

The State relied on *United States v. Herrold*, 926 F.2nd 1131 (3rd Cir. 1992) in its previous briefing. But *Herrold* was decided under the Fourth Amendment without our State’s overlay of the Art. 1 §7. And, the warrant in that case was for the same address that the officer’s had previous entered, not a different address. Moreover, the result is explained by the Third Circuit’s recognition that unsecured, fully loaded, semi-automatic weapons pose a serious danger. The same cannot be said of the documentary evidence in this case.

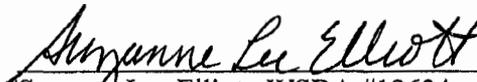
As argued above, all of the evidence obtained here derived from the invalid district court warrant. Thus, the State cannot meet its heavy burden.

II. CONCLUSION

For the reasons stated above, the reasons stated in the brief filed by former counsel, and Betancourth’s first supplemental brief, this Court should reverse the conviction.

DATED this 24 day of October, 2016.

Respectfully submitted,


Suzanne Lee Elliott, WSBA #12634
Attorney for Ray Betancourth

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by email and First Class United States Mail, postage prepaid, one copy of this brief on the following:

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10/24/2016
Date

Peyush Boni
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5

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'15 SEP 30 P5:12

5 SUPERIOR COURT
YAKIMA CO. WA.
6 **IN THE SUPERIOR COURT OF WASHINGTON**
7 **FOR YAKIMA COUNTY**

8 STATE OF WASHINGTON,
9 Plaintiff,

10 vs.

11 RAY LENY BETANCOURTH,
12 Defendant.

} NO. 12-1-01561-4

} **CrR 3.6 FINDINGS OF FACT**
} **AND CONCLUSIONS OF LAW**

14 TO: Clerk, Superior Court-Yakima County

15
16
17 THIS MATTER having come on upon the motion of the defense,
18 and the Court having considered the testimony of Toppenish Police
19 Department Detective Jaban Brownell, Detective Damon Dunsmore and
20 Verizon custodian of records Melissa Sandoval, together with two
21 pleadings filed by the defense: MOTION TO SUPRESS EVIDENCE
22 FROM CELLCO PARTNERSHIP DBA VERIZON WIRELESS OF
23 BEDMINISTER NEW JERSEY; I PHONE CELLULAR NO. (509) 314-
24 1688 and DEFENDANT BETANCOURTH'S MEMORANDUM IN
25 SUPPORT OF MOTION TO SUPRESS CELL PHONE INFORMATION
26 OBTAINED PURSUANT TO SUPERIOR COURT SEARCH
27 WARRANT; and two pleadings filed by the State: STATES
28
29

30 CrR 3.6 FINDINGS OF FACT AND
31 CONCLUSIONS OF LAW

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1 MEMORANDUM OF AUTHORITIES RE: CrR 3.6 CHALLENGE TO
2 SUPERIOR COURT SEARCH WARRANT and STATES
3 MEMORANDUM IN RESPONSE TO CrR 3.6 MOTION FILED ON
4 JANUARY 13, 2014; the argument and memoranda of counsel, and the
5 file herein, now enters the following:

6 **I. FINDINGS OF FACT**

- 7
- 8 1. On September 25, 2012, a Yakima County District Court Judge, Donald
9 Engle issued a warrant for Ray Betancourth's phone records to Celco
10 Partnership, dba Verizon Wireless in New Jersey.
 - 11 2. That warrant was faxed to (888) 667-0026. Celco responded and provided
12 records associated with phone number (509) 314-1688.
 - 13 3. Verizon Wireless does business within the State of Washington, but the
14 Verizon Wireless office which responds to search warrants is
15 geographically located outside of the State of Washington.
 - 16 4. Subsequently, one of the Yakima County Superior Court Judges ruled in
17 another case that this procedure was problematic because a District Court
18 Judge does not have authority to issue out-of-State search warrants.
 - 19 5. As a result, Deputy Prosecuting Attorney David Soukup, who was
20 assigned to this case, contacted Toppenish Police Department Detective
21 Brownell in October 2013 and requested that he obtain the same warrant
22 from a Superior Court Judge. Mr. Soukup requested that he use exactly the
23 same information which he used in obtaining the search warrant from the
24 District Court Judge.
 - 25 6. Detective Brownell complied with Mr. Soukup's request. The only
26 information he added to the affidavit presented to Superior Court Judge
27
28
29

30 CrR 3.6 FINDINGS OF FACT AND
31 CONCLUSIONS OF LAW

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1 Susan Hahn on October 9, 2013 was that there had been a search warrant
2 granted on the same information earlier by a District Court Judge, and that
3 he had been requested by the Prosecutor's Office to reapply for the warrant
4 to a Superior Court Judge.

5 7. In seeking the October 2013 warrant the police used an affidavit for
6 probable cause identical to the one used in September 2012.

7
8 8. Judge Hahn authorized the search warrant. Detective Brownell did not ask
9 Verizon to send the records again.

10 9. On October 15, 2013, Detective Dunsmore faxed the new warrant to a
11 different entity, "Verizon Legal Compliance" at a different phone number
12 -- (908) 306-7491.

13 10. The facsimile face page stated: "These records were requested by a district
14 court warrant previously. Based on recent court ruling [sic] they need to be
15 based on a superior court warrant." No new records were ever provided
16 under this warrant.

17
18 11. Shortly after the date of the crime Toppenish Police Department Detective
19 Damien Dunsmore had sent a letter to Verizon Wireless requesting that
20 any texts messages in their system at that time be "held" and not "purged".
21 This letter is not a search warrant. It is simply a request to maintain the
22 records that exist in Verizon's care.

23
24 12. Verizon Wireless records custodian Melissa Sandoval testified that the text
25 message documents originally provided by Verizon pursuant to the search
26 warrant obtained from the District Court Judge on September 25, 2012
27 were still being held as of the trial in this matter pursuant to Detective
28 Dunsmore's preservation letter. Thus, said documents would have also
29

1 been in Verizon Wireless's possession when Detective Brownell obtained
2 the Superior Court search warrant on October 9, 2013.

3 13. The police did not try to get a warrant in the state where the records were
4 retained.

5 14. RCW 10.96.020(2) provides that: "Criminal process issued under this
6 section must contain the following language in bold type on the first page
7 of the document: "This [warrant, subpoena, order] is issued pursuant to
8 RCW [insert citation to this statute]. A response is due within twenty
9 business days of receipt, unless a shorter time is stated herein, or the
10 applicant consents to a recipient's request for additional time to comply."
11 Neither warrant contained this language.

12 Having made the above findings of fact, the Court now reaches the
13 following:
14

15 **II. CONCLUSIONS OF LAW**

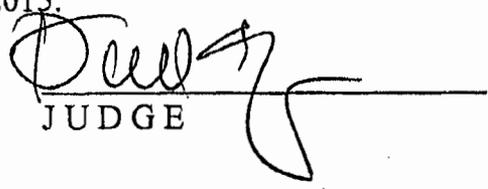
16
17 1 The legislature has explicitly provided in RCW 10.96.060 that "[a] judge
18 of the superior court may issue any criminal process to any recipient at any
19 address, within or without the state, for any matter over which the court
20 has criminal jurisdiction pursuant to RCW 9A.04.030" (emphasis added).
21 The crime in the present case is alleged to have been committed in
22 Toppenish, Washington. Yakima County Superior Court has criminal
23 jurisdiction over crimes committed in the State of Washington. Therefore,
24 a Washington State Superior Court Judge was authorized to issue a search
25 warrant for items located outside of the State in this case.
26

27 2. Once the search warrant is signed it is entitled to full faith and credit
28 throughout the United States.
29

- 1 3. There is nothing that was requested based on the invalid district court
2 warrant that tainted the second warrant. It was really nothing more than a
3 technical error that was corrected.
4 4. The language from RCW 10.96.020(2) is mandatory. However, it is an
5 instructional caution that goes to the recipient of the warrant and does not
6 rise to the level of a defendant that would prevent the instruction the
7 evidence that was the subject of the warrant.
8

9
10 Defendant's motion to suppress evidence is DENIED.

11
12 DATED: September 30, 2015.

13
14 
15 JUDGE

SUZANNE LEE ELLIOTT LAW OFFICE

October 24, 2016 - 4:33 PM

Transmittal Letter

Document Uploaded: 326837-Betancourth Second Supplemental Brief FINAL 10.24.16.pdf

Case Name: State of Washington v. Ray Leny Betancourth

Court of Appeals Case Number: 32683-7

Party Represented: Ray Leny Betancourth

Is This a Personal Restraint Petition? Yes No

Trial Court County: Yakima - Superior Court # 12-1-01561-4

Type of Document being Filed:

- Designation of Clerk's Papers / Statement of Arrangements
- Motion for Discretionary Review
- Motion: _____
- Response/Reply to Motion: _____
- Brief
- Statement of Additional Authorities
- Affidavit of Attorney Fees
- Cost Bill / Objection to Cost Bill
- Affidavit
- Letter
- Electronic Copy of Verbatim Report of Proceedings - No. of Volumes: _____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition / Reply to Response to Personal Restraint Petition
- Petition for Review (PRV)
- Other: _____

Comments:

Appellant's Second Supplemental Opening Brief

Proof of service is attached and an email service by agreement has been made to Tamara.hanlon@co.yakima.wa.us.

Sender Name: Suzanne L Elliott - Email: peyush@davidzuckermanlaw.com