

No. 94208-1

No. 32683-7-III
Yakima County Superior Court No. 12-1-01561-4

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 Elofson, Judge

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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I.
SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The trial court erred in failing to enter findings of fact and conclusions of law pursuant to CrR 3.6(b) at the close of the evidentiary hearing on the motion to suppress.
2. The trial court in failing to suppress the cell phone records received from Cellco pursuant to the September 2012 warrant.
3. The trial court erred in failing to suppress the cell phone records because the Yakima County Superior Court has no jurisdiction outside the state of Washington.

II.
SUPPLEMENTAL ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

1. Where the Yakima County District Court had no authority to issue warrants outside of the state of Washington, must the Cellco phone records be suppressed?
2. Is there any constitutional authority for a Washington State Superior Court to subject citizens of another state to its laws on search and seizure notwithstanding RCW 10.96.060?
3. Even if RCW 10.96.060 permits the seizure of cell phone records outside of the state of Washington, were both warrants in this case invalid because they failed to comply with the statute?

4. Where the prosecutor mischaracterized the application of accomplice liability in closing argument to deprive Betancourth of the statutory defense available in felony murder, and where Betancourth objected, but the trial court failed to strike the argument, is Betancourth entitled to a new trial?

**III.
SUPPLEMENTAL STATEMENT OF THE CASE**

A. FACTS RELATED TO THE WARRANT

On September 25, 2012, a Yakima County District Court judge issued a warrant for Betancourth's phone records to Celco Partnership, dba Verizon Wireless in New Jersey. CP 9-14. That warrant was faxed to (888) 667-0026. Celco responded and provided records associated with phone number (509) 314-1688. CP 9.

In October 2013, the State asked police to seek an identical search warrant from a Superior Court judge because a district court judge did not have the power to issue a warrant for records held outside the State of Washington. RP 153. On October 15, 2013, Detective Dunsmore faxed the new warrant to a different entity, "Verizon Legal Compliance" at a different phone number – (908) 306-7491. CP 85. The facsimile face page stated:

These records were requested by a district court warrant previously. Based on recent court ruling [sic] they need to be based on a superior court warrant.

Id. No records were ever provided under this warrant. RP 148. The police did not try to get a warrant in the state where the records were retained. RP 159.

In responding to the defense motion to suppress the records, the State argued that the “independent source doctrine set forth in *State v. Miles*, 160 Wash. 2nd 236, 156 P.3rd 864 (2007) applies in the present case and the text messaging records should not be suppressed due to the subsequent Superior Court search warrant.” CP 39.

The trial court made an oral ruling, but no findings of fact and conclusions of law were entered. The judge stated that the Yakima County Superior Court warrant was entitled to “full faith and credit throughout the United States.” RP 186. He found that the district court warrant did not “taint” the superior court warrant because “it was really nothing more than a technical error that was corrected appropriately.” *Id.* Finally, he ruled that requiring the phone company to respond to the second warrant would have been a “fruitless effort.” RP 187. He stated that the State’s failure to include mandatory language from RCW 10.96 was also a technical violation that did not merit suppression. RP 430-31.

B. FACTS RELATED TO THE AFFIRMATIVE DEFENSE

RCW 9A.32.050 provides that it is a defense to second degree felony murder by assault that the defendant:

(i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and

(ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and

(iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and

(iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

The jury was instructed on this defense. CP 169.

During the jury instruction conference, the State agreed that the case was based “entirely on” accomplice liability. RP 1377-78.

In closing argument, the prosecutor agreed that Betancourth did not commit the homicidal act. He argued, however, that the jury could not acquit because Betancourth also had

to show that he didn’t solicit, request, importune...or aid in the commission of the homicidal act. Well, he provided – importune means provide the opportunity. He provided the opportunity for the homicidal act, didn’t he? He brought Marcos to the scene where the shooting took place. Rode around with him in a truck looking for [the victims].

Defense counsel objected and argued that “he’s referring to second degree assault.” The judge overruled the objection. The prosecutor then stated:

So he [Betancourth] gave him [Marcos] the opportunity, and he – and he aided it...He can’t show that by a preponderance of the

evidence that he didn't do that. So you should deny it on that basis alone.

RP 1451.

The prosecutor also argued that the jury could not find that “any other participant intended to engage in conduct likely to result in death – or serious physical injury” when Betancourth stated that he was “going to beat the heck out of whoever he found.” RP 1452-53.

On rebuttal, the prosecutor returned to the theme that Betancourth had not proved the defense by a preponderance of the evidence because “he assisted him [Marcos] by driving him to the scene.” RP 1493. The prosecutor also argued that Betancourth “encouraged it.” He said

I mean he told his girlfriend, “I’m going to beat the S out of Terrance and his friend.”

RP 1494.

IV. SUPPLEMENTAL ARGUMENT

A. THIS COURT MUST REVERSE ON THE CRR 3.6 ISSUES BECAUSE THE TRIAL COURT FAILED TO ENTER FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER THE HEARING ON THE MOTION TO SUPPRESS

A 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.

B. CELL PHONE RECORDS RECEIVED FROM CELLCO PURSUANT TO THE SEPTEMBER 2012 WARRANT MUST BE SUPPRESSED BECAUSE THERE WAS NO VALID WARRANT AUTHORIZING THEIR SEIZURE

In 2008 the Legislature passed RCW 10.96.060, which purports to permit a judge of Yakima County the authority to issue warrants "to any recipient at any address, within or without the state" in any criminal case. However, the power is limited to warrants "signed by a superior court judge." RCW 10.96.010(3). And, district courts have authority to issue search warrants only in the district where they have "authority to hear the matter." *State v. Davidson*, 26 Wn. App. 623, 613 P.2d 564, *review granted*, 94 Wn.2d 1020 (1980), *appeal dismissed*, 95 Wn.2d 1026 (1981). The Yakima County District Court has no authority to hear matters in New Jersey. The evidence seized under that warrant must be suppressed.

Absent an exception to the warrant requirement, a warrantless search is impermissible under both article I, section 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution. *See State v. Johnson*, 128 Wn.2d 431, 446-47, 909 P.2d 293 (1996). Evidence seized during an illegal

search is suppressed under the exclusionary rule. *See State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). In addition, evidence derived from an illegal search may also be subject to suppression under the fruit of the poisonous tree doctrine. *See State v. O'Bremski*, 70 Wn.2d 425, 428, 423 P.2d 530 (1967) (citing *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)).

C. THE YAKIMA COUNTY SUPERIOR COURT WARRANT AUTHORIZING THE SEIZURE OF RECORDS HELD IN ANOTHER STATE WAS ALSO INVALID

A warrant issued without authority is inherently void and cannot authorize a search. *Bosteder v. City of Renton*, 155 Wn.2d 18, 29, 117 P.3d 316 (2005), *superseded by statute on other grounds*, *Wright v. Terrell*, 162 Wn.2d 192, 170 P.3d 570 (2007). A search conducted without authorization by a warrant violates the Fourth Amendment to the United States Constitution. *State v. Garcia-Salgado*, 170 Wn.2d 176, 184, 240 P.3d 153 (2010). The remedy for a Fourth Amendment violation is the exclusion of the illegally obtained evidence. *State v. Eserjose*, 171 Wn.2d 907, 913 n. 5, 259 P.3d 172 (2011).

RCW 10.96.060 purports to give a judge of Yakima County the authority and jurisdiction to issue warrants “to any recipient at any address, within or without the state in any criminal case.” This statute violates principles of comity and conflicts with other state statutes. Thus, warrants issued under its terms are invalid.

First, RCW 10.96.060 conflicts with at least two other statutory provisions that limit superior court jurisdiction to Washington State. RCW 2.08.190 states:

Any judge of the superior court of the state of Washington shall have power, ***in any county within his or her district***: (1) To sign all necessary orders and papers in probate matters pending in any other county in his or her district; (2) to issue restraining orders, and to sign the necessary orders of continuance in actions or proceedings pending in any other county in his or her district; (3) to decide and rule upon all motions, demurrers, issues of fact, or other matters that may have been submitted to him or her in any other county. All such rulings and decisions shall be in writing and shall be filed immediately with the clerk of the proper county: PROVIDED, That nothing herein contained shall authorize the judge to hear any matter outside of the county wherein the cause or proceeding is pending, except by consent of the parties.

(Emphasis added). And RCW 2.08.210 states:

The process of the superior courts shall extend to all parts of the state: PROVIDED, That all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon, real estate, shall be commenced in the county in which the real estate, or any part thereof, affected by such action or actions is situated.

(Emphasis added).

Second, there is no constitutional authority for one state court to subject citizens of another state to its laws on search and seizure. *State v. Jacob*, 185 Ohio App.3d 408, 924 N.E.2d 410 (2009) (The Ohio court was utterly without jurisdiction to issue a warrant to search premises in California). And, while not directly pertaining to search warrants, the United States Supreme Court has

stated that, in criminal matters, the constitutional right of a defendant to subpoena witnesses does not extend to witnesses from without the State. *Minder v. Georgia*, 183 U.S. 559, 562, 22 S.Ct. 224, 225, 46 L.Ed. 328, 330 (1902) (the “lawmaking power of the state is powerless to make any provision which would result in the compulsory attendance of the [out-of-state] witnesses.”). Despite the broad statement of legislative purpose, the Washington state legislature has no power to declare state court warrants valid in any other jurisdiction.

Furthermore, the New Jersey legislature has not granted Yakima County Superior Court judges reciprocal authority to issue warrants in their state.

A search warrant may be issued by a judge of a court having jurisdiction in the municipality where the property sought is located.

N.J. Ct. R. 3:5-1. Yakima County judges have no jurisdiction in any New Jersey municipality.

When the states have intended to give certain rights and respect to criminal process, they have enacted reciprocal legislation. For example, the right to compulsory process is inherent in criminal law so the states passed the Uniform Attendance of Witnesses Act, RCW 10.55. This Act provides, through the voluntary cooperation of courts of other states having similar legislation, for securing the attendance of witnesses from other states to give testimony in a

criminal prosecution in this state. But there is no similar Uniform Act regarding the execution of search warrants among various states.

D. EVEN IF RCW 10.96.060 PERMITS THE SEIZURE OF THE CELL PHONE RECORDS HELD IN NEW JERSEY (OR ANY OTHER STATE), BOTH WARRANTS IN THIS CASE FAILED TO COMPLY WITH THE MANDATES OF STATE LAW

There was a second warrant signed by a Superior Court judge in October 2013. But that warrant was also invalid. RCW 10.96.060 purports to give a judge of Yakima County the authority to issue warrants “to any recipient at any address, within or without the state” in any criminal case. But, this extraordinarily expansive jurisdiction is premised on:

(2) Criminal process issued under this section **must** contain the following language in bold type on the first page of the document: “This [warrant, subpoena, order] is issued pursuant to RCW [insert citation to this statute]. A response is due within twenty business days of receipt, unless a shorter time is stated herein, or the applicant consents to a recipient's request for additional time to comply.”

RCW 10.96.020(2) (emphasis added). Using the word “must” makes the inclusion of this language mandatory. The warrant issued by the district court also failed to include this mandatory language.

Issues of statutory construction and constitutionality are questions of law subject to de novo review. *State v. Rice*, 174 Wn.2d 884, 892, 279 P.3d 849, 853 (2012). Our courts presume “that the legislature intends to enact effective laws,” *State v. Bryan*, 93 Wn.2d 177, 183, 606 P.2d 1228 (1980), and where possible

“we construe statutes so as to preserve their constitutionality,” *State v. Williams*, 171 Wn.2d 474, 476, 251 P.3d 877 (2011). Our Supreme Court has interpreted a statute to be directory or simply permissive, notwithstanding use of the word “shall,” when necessary to render the statute constitutional when otherwise consistent with legislative intent. *Rice*, 174 Wn.2d at 899-900.

Interpreting the word “must” as mandatory, this statute is the very least this Court can do to avoid significant issues of comity and constitutional validity described above.

E. BECAUSE NO RECORDS WERE RECEIVED PURSUANT TO THE SECOND WARRANT, THE “INDEPENDENT SOURCE” RULE HAS NO APPLICATION. FURTHER WASHINGTON HAS REJECTING INEVITABLE DISCOVERY DOCTRINE UNDER ARTICLE I, § 7.

“Generally, evidence seized during an illegal search is suppressed under the exclusionary rule.” *State v. Gaines*, 154 Wn.2d 711, 716-17, 116 P.3d 993 (2005) (citation omitted). “In addition, evidence derived from an illegal search may also be subject to suppression under the ‘fruit of the poisonous tree doctrine.’” *Gaines*, 154 Wn.2d at 717 (citations omitted). Unlike the Fourth Amendment, Article I, § 7 focuses on the rights of the individual rather than on the reasonableness of the government action and is, thus, not subject to the good faith or inevitable discovery exception to the exclusionary rule. *State v. Winterstein*, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009) (rejecting inevitable discovery doctrine under Article I, § 7); *State v. Afana*, 169 Wn.2d 169, 184,

233 P.3d 879 (2010) (rejecting good faith doctrine under Article I, § 7). Rather, the exclusionary rule is mandatory under our state constitution because it “saves article I, section 7 from becoming a meaningless promise. . . . Exclusion provides a remedy for the citizen in question and saves the integrity of the judiciary by not tainting our proceedings by illegally obtained evidence.” *State v. Ladson*, 138 Wn.2d 343, 359-60, 979 P.2d 833 (1999) (citations omitted).

The independent source doctrine is a viable exception to the exclusionary rule under article I, section 7. *Gaines*, 154 Wn.2d at 722.

Under the independent source exception, evidence tainted by unlawful governmental action is not subject to suppression under the exclusionary rule, provided that it ultimately is obtained pursuant to a valid warrant or other lawful means independent of the unlawful action.

Gaines, 154 Wn.2d at 718 (emphasis added). Stated differently, “[t]he independent source exception applies where the government lawfully seizes evidence that was originally seized by means of an unlawful search ‘[s]o long as [the] later, lawful seizure is genuinely independent of [the] earlier tainted one.’” *State v. Miles*, 159 Wn. App. 282, 295, 244 P.3d 1030, review denied, 171 Wn.2d 1022, 257 P.3d 663 (2011) (emphasis added) (quoting *Murray v. United States*, 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988)). Thus, unlike the inevitable discovery doctrine which focuses on whether the police would have discovered the illegally obtained evidence through other lawful means, the independent source doctrine asks whether the police actually did obtain the

evidence tainted by a prior illegality through legal means. *Miles*, 159 Wn. App. at 297 (citing *Winterstein*, 167 Wn.2d at 634).

In this case, the trial court concluded that the phone records were admissible – apparently under the independent source doctrine. But no records were ever seized under the second warrant. The only “source” for the text messages admitted was the first, invalid district court warrant. Unlike *Gaines*, where police initially and illegally observed firearms in the trunk of a car but then seized them pursuant to a valid warrant, the police never actually seized the records pursuant to any lawful means independent of the invalid district court warrant. That the police might have acquired those records under a valid warrant at some later date is exactly the type of “speculative” inquiry the Supreme Court rejected when it concluded that the inevitable discovery doctrine is incompatible with Article I, § 7.

F. THE PROSECUTOR’S IMPROPER CLOSING ARGUMENT VIOLATED DUE PROCESS AND DEPRIVED BETANCOURTH OF HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE. THE TRIAL COURT ERRED IN FAILING TO STRIKE THIS ARGUMENT WHEN DEFENSE COUNSEL OBJECTED.

The prosecutor mischaracterized the application of the accomplice liability instruction to deprive Betancourth of the statutory defense available to a defendant who participates in the underlying felony but has no reason to believe that a nonparticipant will be killed, and who did not commit the homicidal act.

There is no evidence that Betancourth committed the homicide. In order to satisfy the first prong of the felony murder provision of the second degree murder statute (by establishing that Betancourth committed a predicate felony), the State had to prove that Betancourth was an accomplice to the underlying assault. Only in that way could the State establish that he was a “co-participant” required by the felony murder provision of the second degree murder statute. Therefore, the accomplice liability mechanism was necessary to establish that Betancourth was a “co-participant” and potentially liable for killing J.M.R.

But the felony murder doctrine had its origin in the common law during an era when nearly all felonies were punishable by death. American Law Institute, Model Penal Code and Commentaries, Part II, Section 210.2 (1980). Because this often resulted in a barbaric application, the doctrine passed through judicial and, later, legislative restrictions and limitations. *Id.* The “defense” in Washington’s statutes was intended to alleviate a harsh result by giving the defendant the opportunity to persuade a jury he not only had nothing to do with the killing itself, but was unarmed and did not understand that any of his confederates was armed or intended to kill another even though he was an accomplice to the underlying felony.

Here, the prosecutor incorrectly argued that any accomplice liability in the underlying felony negates the defense. He said that because Betancourth had encouraged an assault, he could not satisfy an element of the defense. But

all of the elements of the defense refer to the “homicidal act,” not to the assault. In doing so, Washington’s felony murder statute gives a non-killer defendant a chance to extricate himself from liability for murder, though not from liability for the underlying felony. In other words, the conditions under which a non-killer defendant may extricate himself are described in the statute as an affirmative defense to the homicidal act – notwithstanding the defendant’s accomplice liability in the underlying felony. Otherwise, no defendant would ever be able to avail himself of the defense.

Arkansas has a virtually identical statute. Ark. Code Ann. § 5-10-101(a)(1). In *Walker v. State*, 308 Ark. 498, 503, 825 S.W.2d 822, 824 (1992), the prosecutor made the same improper argument and, when the defense objected, the judge agreed.

In closing argument, the deputy prosecutor misspoke, indicating the appellant had not met his burden regarding his affirmative defense because the evidence showed he aided in the robbery. Appellant objected, correctly explaining to the trial judge that all appellant had to show was that he did not aid in the commission of the homicides. The judge agreed, and asked how appellant wanted to cure the deputy prosecutor’s misrepresentation. Appellant responded, requesting the judge to “read the instruction and say the homicide offense.” The judge said, “The instructions there. You [deputy prosecutor] drop your argument.” Appellant concluded by thanking the judge.

This error was not harmless. When the prosecutor mischaracterizes the law and there is a substantial likelihood that the misstatement affected the jury verdict, the defendant is denied a fair trial. *State v. Gotcher*, 52 Wn. App. 350,

355, 759 P.2d 1216 (1988). A prosecutor's misstatement of the law is a serious irregularity having the grave potential to mislead the jury. *State v. Davenport*, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984).

The only issue in this case was whether the jury would find that Betancourth satisfied the elements of the statutory defense. And he only had to establish those criteria by a preponderance of the evidence. Thus, in this case, the prosecutor's misstatement of the law was enormously prejudicial. And, defense counsel had objected. When the trial judge overruled that objection, the only conclusion the jurors could reach was that the prosecutor's argument was a correct statement of the law.

**V.
CONCLUSION**

For the reasons stated above, and the reasons stated in the brief filed by former counsel, this Court should reverse the conviction.

DATED this 22 day of June, 2015.

Respectfully submitted,


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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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