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Court of Appeals
Division III
State of Washington

No. 94208-1

NO. 32683-7-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

RAY LENY BETANCOURTH, Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Should the claim that the trial court did not base its ruling on the independent source doctrine be rejected because it was raised in reply briefing only?
2. Did the trial court base its ruling admitting the text messages as exhibits on the independent source rule?
3. Does the independent source rule operate to allow admission of the text messages despite the invalidity of the district court warrant?

II. ANSWERS TO ISSUES PRESENTED

1. Yes, the claim that the trial court did not base its ruling on the independent source doctrine should be rejected because it was raised in reply briefing only.
2. Yes, the trial court based its ruling admitting the text messages as exhibits on the independent source rule.
3. Yes, the independent source rule operates to allow admission of the text messages despite the invalidity of the district court warrant.

III. ARGUMENT

A. The claim that the trial court did not base its ruling on the independent source doctrine should be rejected because it was raised in reply briefing only.

Betancourth's supplemental brief states "In this case, the trial court concluded that the phone records were admissible – apparently under the independent source doctrine." Supplemental Brief at 13. Betancourth never claimed that the trial court based its ruling on something other than the independent source rule. Betancourth then went on to argue that the

independent source rule was inapplicable to the facts of this case.

Supplemental Brief at 11-13.

Then, during a reply to the State’s response brief, Betancourth made a new claim. That new claim is that the trial court “did not find that the records were admissible under the independent source rule” and “made no findings or conclusions regarding the independent source rule.” Reply Brief at 5. Because this claim was not raised during the opening brief, the Court should not entertain the claim now. In the previously-filed supplemental brief, Betancourth stated that the trial court’s conclusion was “apparently under the independent source doctrine” and argued how the facts of his case were distinguishable from *State v. Miles*, 159 Wn. App. 282, 244 P.3d 1030 (2011), and *State v. Gaines*, 154 Wn.2d 711, 716-7, 116 P.3d 993 (2005) (citation omitted). Supplemental Brief at 11-13. Both *Miles* and *Gaines* were cited by Betancourth for their analysis of the independent source doctrine. *Id.*¹

The State Supreme Court has held, “points not argued and discussed in the opening brief are abandoned and not open to consideration on their merits. In addition, a contention presented for the

¹ “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.

first time in the reply brief will not receive consideration on appeal.” *Fosbre v. State*, 70 Wn.2d 578, 583, 424 P.2d 901 (1967). “An issue raised and argued for the first time in a reply brief is too late to warrant consideration.” *Cowiche Canyon Conservancy v. Bosley*, 118 Wash. 2d 801, 809, 828 P.2d 549, 553 (1992), citing *In re Marriage of Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990).

In this case, the Court should refuse to consider an issue raised for the first time in a reply brief. In this case there were two opening briefs. The State did not object to the filing of a supplemental brief once new appellate counsel came on board. Therefore, Betancourth had two opportunities to raise whatever issues he wanted the court to consider. In both briefs, he never once argued that the court ruled that another doctrine or rule applied. He also did not argue that the trial court did not consider the independent source doctrine. And further, he never argued that the trial court found the records admissible under some other rule. Rather, it was apparent to him that the court made its conclusion under the “independent source doctrine.” See Supplemental Brief at 5. As such, his new claim should not be considered on appeal.

The State is also prejudiced in that Betancourth is being allowed to flesh out his argument on the new claim after an opinion has issued and after briefing is completed on a motion for reconsideration. For claims

timely raised in an opening brief, the State would typically have 60 days to reply to the arguments raised and analyze the caselaw raised by the defense.

Furthermore, when Betancourth untimely claimed that the trial court did not admit the phone records under the independent source doctrine, he failed to support his claim with any argument or analysis. His claim consisted of only two brief sentences and was void of any case cites or cites to the record. This is yet another reason to reject this afterthought. A reply brief must contain “the argument in support of the issues presented for review.” RAP 10.3(c). In sum, he made a brief and vague claim in his reply brief without any support for it. As such, his claim must be denied by this court.

B. The trial court based its ruling admitting the text messages as exhibits on the independent source rule.

When examining the record before this court, it is replete with references to the independent source doctrine and the caselaw surrounding it. Based on the record, it is undeniably clear that the trial court based its decision on the independent source doctrine. The State will go through the record at this time.

Pleadings

Betancourth filed a memorandum in support of a motion to

suppress cell phone information obtained pursuant to a superior court search warrant. CP 52-67. In that memorandum, Betancourth argued that “the issuance of a superior court search warrant nearly fourteen months after issuance of the district court search warrant does not cure the illegal “taint” of the cell phone records unlawfully seized. CP 53.

The State filed a memorandum in response to the defense motion. CP 37-39. The State explained that an officer sent a letter to Verizon to preserve the records prior to obtaining the district court warrant. CP 39. The prosecutor argued that, “The independent source doctrine set forth in *State v. Miles*...applies in the present case and the text messaging records should not be suppressed due to the subsequent Superior Court search warrant.” CP 39. This was the entirety of the State’s argument in response to the motion to dismiss. No other arguments were made for the admissibility of the text messages. No other doctrines or rules were cited or relied upon. Furthermore, no cases were cited other than *State v. Miles*, 159 Wn. App. 282, 244 P.3d 1030 (2011), which dealt extensively with the independent source doctrine.

Pre-hearing Argument

Prior to the Criminal Rule (CrR) 3.6 hearing, the prosecutor stated, “I anticipate that the evidence is going to show that there was a preservation letter that was sent before the first district court warrant was

obtained, and that those records were – preserved from that date until the present date, actually.” RP 143.

Testimony

During the CrR 3.6 hearing, the State elicited uncontested testimony about the preservation letter that was sent by a detective to Verizon prior to seeking any warrants in this case. RP 141, 154,157, 160, 163. A Verizon records custodian testified that if someone had made a request or got a search warrant between the date of the preservation letter and the time of the hearing, Verizon would be able to provide the records. RP 141.

Argument

At the conclusion of the testimony, the trial prosecutor argued that because of the preservation letter, “Verizon would have had the records at the time the second search warrant was served.” RP 171. The prosecutor raised the *Miles* case again, describing the case as one in which the defendant claimed the first search warrant “tainted” the second search warrant. RP 174. The prosecutor then set forth the two prongs to the analysis, whether information gained from the first warrant was used in order to secure a second warrant, and whether the officer was motivated by information discovered from the first warrant. RP 174. The prosecutor then compared the facts of this case to those in *Miles*, arguing “we have

the exact situation here. The officer testified that he didn't put any information about the texts in there, didn't put any additional information in the affidavit..." RP 175. It was entirely clear from the prosecutor's argument that he was relying on the independent source doctrine as the doctrine allowing admission of the text messages.

The defense responded with that understanding as well and discussed the *Miles* case. RP 177. The defense, however, argued the *Miles* case was distinguishable. RP 177-8. In rebuttal, the prosecutor raised the *Miles* case again. RP 183. The prosecutor argued that an invalid search warrant could be cured by getting a legal search warrant under *Miles*. RP 183-4.

Ruling

In a verbal ruling, the trial court denied the motion to suppress. RP 185. The court stated, "The issue seems to break down that there is a preservation letter that is sent by Toppenish Police Department, Det. Dunsmore, to Verizon." RP 185. The court stated:

The issue as to whether or not the district court warrant taints the superior court warrant -- And I think it -- whether this -- defense is addressing it or not, I will -- I don't believe it's tainted. There is nothing that's contained in the superior court return on that warrant that was not included in the original. There's nothing that was requested based on the invalid original district court --

there's nothing about the invalid district court effort that prompted or provided an incentive for the -- for law enforcement to go to superior court. It was really nothing more than a technical error that was corrected appropriately, and the results were provided. Is there a flaw in not requiring Verizon to provide a -- respond or a return on the superior court subpoena -- or, search warrant? No. I think it was -- would be a fruitless effort. The information, at least according to the testimony, would have been the same, and it -- again it is a technical violation and I can't see that there's any error in that.

RP 186-7 (emphasis added).

In the written findings of fact and conclusions of law, the court found that pursuant to the preservation letter, the phone records would have been in Verizon's possession when the detective obtained the Superior Court search warrant. CP 214-18. The court concluded as a matter of law, "There is nothing that was requested based on the invalid district court warrant that tainted the second warrant." *Id.*

The only reason the court would make a conclusion as to whether one warrant tainted another warrant is to determine if the independent source doctrine applies – a doctrine that had been briefed and argued by the parties extensive. Therefore, the trial court undeniably based its ruling

on the independent source doctrine.²

C. The independent source rule operates to allow admission of the text messages despite the invalidity of the district court warrant.

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.

² Nonetheless, the court may affirm on any ground the record supports. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

Id.

Accordingly, in Washington, courts have interpreted the requirements in *Murray* to have two prongs, both of which must be satisfied. 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. This doctrine is consistent with the requirements of article 1, section 7, of the Washington State Constitution. *Gaines*, 154 Wn.2d 711. Whether or not specific evidence is the unusable yield of an unlawful search or is admissible because knowledge of its availability was obtained from an independent source is a question of fact which must be peculiar to each case. *State v. O'Bremski*, 70 Wn.2d 425, 523 P.2d 530 (1967).

In *State v. Hilton*, 164 Wn. App. 81, 261 P.3d 683 (2011), a warrant was deemed invalid due to a lack of specificity. The search pursuant to the warrant had turned up ammunition. 164 Wn. App. at 86. The court ruled that the purchase records were admissible because well prior to the search warrant, police had recognized the unusual ammunition and decided to trace it. *Id.* at 91. The court held that evidence was admissible under the independent source doctrine. *Id.* at 89.

In *State v. Miles*, the state obtained a search warrant for bank records after evidence obtained through the issuance of an administrative subpoena was suppressed. 159 Wn. App. 282, 244 P.3d 1030 (2011). While the supreme court's decision invalidating the administrative subpoena prompted the request for the warrant, the court held that the application of the independent source doctrine would turn on whether evidence seen in the review of the documents from the subpoena prompted the request for the search warrant and whether the officers would have sought a warrant if they had not seen the documents initially obtained by the administrative subpoena. *Id.* at 296-8.

Here, both prongs of *Miles* are satisfied. First of all, the issuance of the search warrant was not based on untainted, independently obtained information. This is apparent from the fact that the affidavit for the second warrant was the same as the first one. CP 214-18.

Second, officers were not motivated by what they illegally discovered by way of the district court warrant. There are two ways to analyze the motivation prong: 1) whether the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, and 2) whether the agents would have sought a warrant. *Murray*, 487 U.S. at 542-3. *See, e.g. United States v. Hanhardt*, 155 F. Supp. 2d 840, 848-9 (N.D. Ill. 2001) (the court determined the state agents were not motivated

by what they illegally discovered and the evidence was admissible under the independent source doctrine); *United State v. Johnson*, 994 F.2d 980, 987 (2nd Cir. 1993) (“the warrant application was prompted not by the prior review but by the obvious relevance of the evidence and the district court’s indication that a warrant was necessary”); *United States v. Mulder*, 898 F.2d 239, 241 (9th Cir. 1989) (motivation to seek the warrant was the outcome of the appeal process and independent of the initial search). Put another way, the analysis requires a review of what the police were doing and what motivated them to take the action they did. *Hilton*, 164 Wn. App. at 92.

Here, the motivation was a decision in another case that ruled that a district court warrant could not be used to obtain information from outside of the State of Washington. CP 214-18. As a result of that decision, the trial prosecutor asked the detective to get a Superior Court warrant. CP 214-18. The facts behind the detective’s motivation were specifically set forth by the trial court. CP 214-18. On appeal, Betancourth did not challenge these facts. It is clear from the trial court’s findings of fact and conclusions of law that the detective’s motivation was entirely independent of anything found in the initial search.

Betancourth argues that because officers did not get a second set of the records, the independent source doctrine does not apply. Appellant’s

Supplemental Brief at 13. He suggests 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 department'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.

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*, this court should conclude that although the records were 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.

IV. CONCLUSION

Based on the foregoing argument, the Court should rule that the trial court based its ruling on the independent source rule and that the independent source rule operates to allow admission of the text messages despite the invalidity of the district court warrant.

Respectfully submitted this 24th day of October, 2016,

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DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on October 24, 2016, by agreement of the parties, I emailed a copy of the above document to 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 October, 2016 at Yakima, Washington.

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