

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
11/13/2017 8:00 AM  
BY SUSAN L. CARLSON  
CLERK

NO. 94208-1

IN THE SUPREME COURT OF THE STATE OF  
WASHINGTON

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STATE OF WASHINGTON, Respondent,

v.

RAY LENY BETANCOURTH, Appellant.

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SUPPLEMENTAL BRIEF OF RESPONDENT

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Tamara A. Hanlon, WSBA #28345  
Senior Deputy Prosecuting Attorney  
Attorney for Respondent

JOSEPH BRUSIC  
Yakima County Prosecuting Attorney  
128 N. 2d St. Rm. 329  
Yakima, WA 98901-2621

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## **I. ISSUES RAISED**

1. Is the invalidity correction corollary to the independent source doctrine consistent with article I, section 7?
2. Can this Court uphold the search based on any correct ground, including the independent source doctrine?

## **II. STATEMENT OF THE CASE**

The appellant, Ray Leny Betancourth, was charged with first degree murder and first degree assault. CP 3-4. Prior to trial, there were multiple motion hearings, including a suppression hearing under Criminal Rule 3.6 that was held on June 2, 2014.

The suppression hearing involved Verizon Wireless phone records, specifically text message records. RP 138-9. Betancourth moved to suppress the records obtained by the Toppenish Police Department. At issue was the fact that Detective Brownell first secured a District Court warrant for the out-of-state phone records and then later sought and obtained a Superior Court warrant for the same records. RP 152-3.

Prior to obtaining any warrants, Detective Dunsmore sent a preservation letter to Verizon Wireless. RP 140, 154. A preservation letter is a request from law enforcement to Verizon to maintain certain records that would otherwise no longer be available after the lapse of a certain amount of time. RP 140. In this case, the letter was faxed to

Verizon on September 21, 2012. RP 162-3. This was within a few days of the homicide that took place on September 19, 2012. RP 162. Verizon preserved the text messages and even at the time of the suppression hearing, the messages were still preserved and maintained by Verizon. RP 141.

Detective Brownell testified that first he got a search warrant signed in Yakima District Court. RP 162. He then sought the second warrant to satisfy a ruling made on a different case by a Superior Court judge. RP 157. The factual basis for probable cause was identical for each search warrant affidavit. RP 153. Anything learned from the Verizon records provided pursuant to the first warrant was not included in the second search warrant application. RP 153. In addition, the second warrant did not seek any additional records that had not already been sent by Verizon. RP 167.

Melissa Sandoval, an executive relations analyst and records custodian for Verizon, testified that further documents were not provided by their company after the second search warrant because “the request didn’t include any additional information. It would have been the same information we already provided.” RP 147. Detective Brownell also testified that it was not intended that the same records would be sent again by Verizon. RP 157.

At the suppression hearing, Betancourth argued that there was no authority for either the District or Superior Court to issue a search warrant for records held in another State, and that the State could not “cure” an invalid warrant by getting a new warrant. RP 175, 181. The State, relying on *State v. Miles*, 159 Wn. App. 282, 244 P.3d 1030 (2010), argued that the case fell under the independent source exception. The State argued that no information was gained from the first search warrant that was used to get the second search warrant and that there was no evidence that any information gained from the search warrant motivated the second search warrant. RP 174-175.

The motion to suppress was denied. The trial 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 a fruitless effort. RP 186-7. The court concluded:

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 the superior court.

RP 186.

The Court of Appeals held that the text messages were properly admitted under a corollary to the independent source doctrine called the invalidity correction corollary. The Court found that the independent source doctrine did not apply because the text messages arrived pursuant to the invalid warrant. *State v. Betancourth*, 2016 Wash. App. LEXIS 2966, \*54 (Wash. Ct. App. Dec. 8, 2016). Betancourth petitioned this Court for review.

### **III. ARGUMENT**

#### **A. The invalidity correction corollary to the independent source doctrine is consistent with article I, section 7.**

Under the Fourth Amendment, a search occurs if the government intrudes on a subjective and reasonable expectation of privacy. *Katz v. United States*, 389 U.S. 347, 351-52, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). However, article I, section 7 of our state constitution provides, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” The “authority of law” requirement of article I, section 7 is satisfied by a valid warrant, subject to a few jealously guarded exceptions. *State v. Afana*, 169 Wn.2d 169, 176-77, 233 P.3d 879, 882 (2010). It is not disputed that text message conversations are private affairs protected by article I, section 7.

Betancourth notes that federal cases supporting the appellate court's decision are based on the Fourth Amendment. He argues that the court's reliance on those cases is wrong because of differences between the Fourth Amendment and article I, section 7. Specifically, he argues that the Court of Appeals adopted the invalidity correction corollary as "a guise for importing a good faith or reasonable analysis into Const., Art. 1, § 7," doctrines that do not apply to our State constitution. However, the court of appeals did not base its decision on those doctrines, nor was the court's decision an attempt to do so.

The United States Supreme Court has adopted the good faith exception to the exclusionary rule for evidence seized in violation of the Fourth Amendment. *See United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). The exception that court recognizes is based on the view that the exclusionary rule is intended simply to deter unlawful police action. Because the exclusionary rule "cannot be expected ... to deter objectively reasonable law enforcement activity," the United States Supreme Court has held that it should not be applied when police have acted in "good faith." *Id.* at 919. By "good faith," the Court means "objectively reasonable reliance" on something that appeared to justify a search or seizure when it was made. *Herring v. United States*, 555 U.S. 135, 142, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009). Thus, the

federal “good faith” exception is applicable when a search or seizure is unconstitutional but the police officer’s belief that it was constitutional was objectively reasonable at the time.

Here, the court did not import a good faith analysis into article I, section 7 because the court expressly stated it was not relying on that analysis, and nothing in the court’s analysis involves the good faith belief of the detective. Under the good faith exception, a court would analyze whether the detective’s belief that the first search was constitutional was objectively reasonable at the time. Here, if that exception were used, the entire focus would be on the detective’s belief at the time of the first warrant and not on whether the second warrant was tainted by the first warrant. The second warrant would not even be a factor under a good faith analysis.

But Division Three upheld the second warrant as a valid warrant and found that reproducing the records was not needed since the police had already seized the records. As the court reasoned, requiring a second production of the text messages is overly technical. Essentially, the court considered whether you “re-seize” evidence you already have pursuant to a subsequent valid warrant.

The adoption of the invalidity correction corollary also was not a guise for importing a reasonableness analysis into article I, section 7. By

finding that the second warrant was untainted by the first, and that there was no need to “re-seize” records, the court did not employ a “reasonableness” analysis or suggest it was using one. The analysis Division Three used was actually more akin to that of the independent source doctrine, in that the court found that the second warrant was not “tainted” by the first one.

Furthermore, this Court has already repeatedly held that the independent source rule is compatible with article I, section 7. *State v. Gaines*, 154 Wn.2d 711, 717-18, 722, 116 P.3d 993 (2005); *see State v. Winterstein*, 167 Wn.2d 620, 634, 220 P.3d 1226 (2009); *see also State v. Smith*, 113 Wn. App. 846, 856, 55 P.3d 686 (2002), *review denied*, 149 Wn.2d 1014 (2003). In *Gaines*, 154 Wn.2d at 712-3, the police discovered an assault rifle and other evidence during a warrantless search of a locked automobile trunk. However, the police subsequently obtained a search warrant for the vehicle, including the trunk, based on information independent from the initial, warrantless search. *Id.* The evidence was seized during the search pursuant to that warrant. *Id.* This Court held that the admission of evidence pursuant to the independent source exception complies with article I, section 7 of the Washington Constitution. *Id.* at 713.

As explained in *Gaines*:

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. *See Warner*, 125 Wn.2d at 888-89; *O'Bremski*, 70 Wn.2d at 429. This result is logical. According to the plain text of article I, section 7, a search or seizure is improper only if it is executed without "authority of law." But a lawfully issued search warrant provides such authority. *See Ladson*, 138 Wn.2d at 350. Furthermore, the inclusion of illegally obtained information in a warrant affidavit does not render the warrant per se invalid, provided that the affidavit contains facts independent of the illegally obtained information sufficient to give rise to probable cause. *See State v. Maxwell*, 114 Wn.2d 761, 769, 791 P.2d 223 (1990); *Franks v. Delaware*, 438 U.S. 154, 171-72, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

154 Wn.2d at 718.

For similar reasons, the invalidity correction corollary to the independent source doctrine is consistent with article I, section 7. Here, there was a valid warrant providing the "authority of law" for the search. If inclusion of illegally obtained information in a warrant affidavit does not render a warrant per se invalid, neither should a failure to "re-seize" records already in the police department's possession. Like the independent source exception, this result is also logical.

The cases cited by Betancourth are distinguishable based on their facts. For example, in *State v. Davidson*, 26 Wn. App. 623, 613 P.2d 564 (1980), a King County District Court judge issued a warrant for a residence located in Snohomish County. The evidence was suppressed by the trial court and the Division One affirmed the suppression. That court held that because King County did not have authority to hear the case, it had no jurisdiction to issue a warrant to search premises in Snohomish County. *Id.* at 625. Betancourth's case is distinguishable because after getting the warrant signed in district court, Detective Brownell followed up with getting a valid Superior Court warrant. The *Davidson* case did not analyze whether the independent source doctrine or any other exception applies because the officer's actions in that case ended with getting an invalid district court warrant.

**B. This Court may uphold the search based on any correct ground, including the independent source doctrine.**

Betancourth claims that the court cannot consider the independent source doctrine because the Court of Appeals rejected that doctrine as applying in this case. However, this court may affirm the trial court on any correct ground. *State v. Gresham*, 173 Wn.2d 405, 419, 269 P.3d 207, 212-13 (2012) (citing *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54

(1986)). Here, the search was proper under either the independent source doctrine or the invalidity correction corollary.

**IV. CONCLUSION**

In sum, for the foregoing reasons, the State asks that the court affirm Betancourth's convictions.

Respectfully submitted this 10th day of November, 2017,

s/Tamara A. Hanlon  
TAMARA A. HANLON, WSBA 28345  
Senior Deputy Prosecuting Attorney

DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on November 10, 2017, by agreement of the parties, I emailed a copy of the State's SUPPLEMENTAL BRIEF OF RESPONDENT to Suzanne L. Elliott at [suzanne-elliott@msn.com](mailto: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 10th day of November, 2017 at New York City, New York.

s/Tamara A. Hanlon  
TAMARA A. HANLON WSBA#28345  
Senior Deputy Prosecuting Attorney  
Yakima County, Washington  
128 N. Second Street, Room 329  
Yakima, WA 98901  
Telephone: (509) 574-1210  
Fax: (509) 574-1211  
[tamara.hanlon@co.yakima.wa.us](mailto:tamara.hanlon@co.yakima.wa.us)

**YAKIMA COUNTY PROSECUTING ATTORNEY'S OFF**

**November 10, 2017 - 8:56 PM**

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**Appellate Court Case Title:** State of Washington v. Ray Leny Betancourth  
**Superior Court Case Number:** 12-1-01561-4

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Address:  
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