

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
11/9/2018 4:15 PM  
BY SUSAN L. CARLSON  
CLERK

**NO. 96035-6**

IN THE SUPREME COURT OF THE  
STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Petitioner,

v.

**MARK MCKEE,**

Respondent.

---

**SUPPLEMENTAL BRIEF OF PETITIONER**

---

SKAGIT COUNTY PROSECUTING ATTORNEY  
RICHARD A. WEYRICH, PROSECUTOR

| By: ERIK PEDERSEN, WSBA #20015  
Senior Deputy Prosecuting Attorney  
Office Identification #91059

Courthouse Annex  
605 South Third Street  
Mount Vernon, WA 98273  
(360) 416-1600

## TABLE OF CONTENTS

	<u>Page</u>
I. SUMMARY OF SUPPLEMENTAL BRIEF OF PETITIONER .....	1
II. ISSUES PRESENTED FOR REVIEW .....	2
III. STATEMENT OF THE CASE.....	2
IV. ARGUMENT .....	6
1. The proper remedy for an overbroad warrant is suppression of evidence. ....	6
2. Whether the effect of suppression of evidence prevents sufficient evidence is a trial court decision.....	8
3. The trial testimony shows sufficient evidence was available. ....	10
4. Since there was no suppression in the trial court, the State is entitled to make a record of admissible evidence after suppression. .....	13
V. CONCLUSION.....	13

**TABLE OF AUTHORITIES**

**Page**

**WASHINGTON SUPREME COURT**

*City of Seattle v. Orwick*, 113 Wn.2d 823, 784 P.2d 161 (1989)..... 8  
*State v. Afana*, 169 Wn.2d 169, 233 P.3d 879 (2010)..... 6  
*State v. Betancourth*, 190 Wn.2d 357, 413 P.3d 566 (2018) ..... 7  
*State v. Gaines*, 154 Wn.2d 711, 116 P.3d 993 (2005)..... 6  
*State v. Kinzy*, 141 Wn.2d 373, 5 P.3d 668, 680 (2000)..... 9  
*State v. Marks*, 114 Wn.2d 724, 790 P.2d 138 (1990)..... 8  
*State v. Maxfield*, 125 Wn.2d 378, 886 P.2d 123 (1994)..... 10  
*State v. Neth*, 165 Wn.2d 177, 196 P.3d 658 (2008)..... 8  
*State v. Perrone*, 119 Wn.2d 538, 834 P.2d 611 (1992)..... 6, 7  
*State v. Prok*, 107 Wn.2d 153, 727 P.2d 652 (1986) ..... 8  
*State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992) ..... 13  
*State v. Smith*, 110 Wn.2d 658, 756 P.2d 722 (1988)..... 7  
*State v. Snapp*, 174 Wn.2d 177, 275 P.3d 289 (2012) ..... 7  
*State v. Thein*, 138 Wn.2d 133, 977 P.2d 582, 590 (1999)..... 8

**WASHINGTON COURT OF APPEALS**

*State v. Bennett*, 180 Wn. App. 484, 489, 322 P.3d 815 (2014)..... 10  
*State v. Cormier*, 100 Wn. App. 457, 997 P.2d 950 (2000)..... 9  
*State v. Leffler*, 142 Wn. App. 175, 178 P.3d 1042 (2007)..... 10  
*State v. McReynolds*, 104 Wn. App. 560, 17 P.3d 608 (2000) ..... 8

**FEDERAL CASES**

*United States v. Fitzgerald*, 724 F.2d 633, 637 (8th Cir.1983)..... 7

**I. SUMMARY OF SUPPLEMENTAL BRIEF OF PETITIONER**

The mother of a sixteen year-old reported her daughter had been hanging out with forty-one year-old Mark McKee. After an altercation with McKee, she ended up with his cell phone. She and others saw sexually explicit videos and photographs of her daughter on the phone before it was given to police. Officers obtained a search warrant for the phone. McKee moved to suppress the search results due to overbreadth. The trial court denied the motion.

McKee was convicted of eight of the nine counts against him relating to providing drugs to minors, commercial sexual abuse and possession of depictions of minors.

The Court of Appeals held the warrant was overbroad because it lacked particularity since it described categories and was not limited to the data for which there was probable cause. The Court of Appeals provided the remedy of dismissal of the four possession of depictions charges. The State sought reconsideration noting the relief sought at the trial court and proper remedy under the exclusionary rule was suppression and remand to the trial court. The Court of Appeals did not revise the opinion.

This Court should reverse the decision of the Court of Appeals and continue to hold that the proper remedy under the exclusionary rule is to suppress the evidence improperly obtained. Because factual determinations are for the trial court, this Court must remand the case for the trial court to evaluate whether sufficient admissible evidence remains.

## **II. ISSUES PRESENTED FOR REVIEW**

1. Is the proper remedy for an overbroad warrant suppression of evidence obtained?
2. Where the trial court did not suppress evidence, but that decision was reversed by an appellate court, should the case be remanded to trial court to determine whether sufficient admissible evidence remains?

## **III. STATEMENT OF THE CASE**

McKee was convicted of three counts of Possessing Depictions of Minors Engaged in Sexually Explicit Conduct in the First Degree for video clips of sex with A.Z. and one count of Possessing Depictions of Minors Engaged in Sexually Explicit Conduct in the Second Degree for still images showing A.Z. unclothed. CP 23-4, CP 253-6. McKee was also convicted of Commercial Sex Abuse of a Minor for trading drugs with J.P. for sex, Delivery of Drugs to a Person under Age Eighteen to A.Z. and J.P., and Violation of a No Contact Order with A.Z. CP 25-6, 257-8, 261-2.<sup>1</sup>

Before trial, McKee moved to suppress the evidence located on his cell phone. CP 216, 223. McKee did not seek dismissal of the charges based upon the suppression. CP 216-230, CP 191-215. The trial court denied suppression. CP 232.

McKee's trial lasted five days. 6/1/15 RP 3, 6/5/15 RP 207. Multiple

---

<sup>1</sup> McKee was found not guilty of a delivery to one minor, M.G. CP 259-60.

civilian witnesses testified about their observations of McKee's cell phone and its contents before the phone was given to law enforcement.

A.Z. testified that she was sixteen between January and October of 2012, when she had a sexual relationship with the defendant who was forty-one or forty-two. 6/2/15AM RP 90, 6/2/15PM RP 9, 10, 18, 40. A.Z. described that McKee is "super hairy." 6/2/15PM RP 30, 33. A.Z. had run away. 6/2/15PM RP 62. McKee supplied her drugs. 6/2/15AM RP 113, 129-30. A.Z. was familiar with and identified McKee's phone. 6/2/15PM RP 22.

On October 28, 2012, A.Z.'s mother, father, brother and a friend took A.Z. from where she was staying with McKee. 6/2/15PM RP 62-3, 66, 76, 6/3/15AM RP 89, 6/3/15AM RP 58, 63-5. They took A.Z.'s phone from her. 6/2/15PM RP 67.

A.Z.'s brother, Robert Gora, testified he went to get A.Z. from McKee. 6/2/15AM RP 92, 6/3/15PM RP 4, 30, 36. Gora struck McKee after he opened the door. 6/3/15AM RP 35. McKee denied being with A.Z. to Gora. 6/3/15AM RP 35. Gora fought with McKee. 6/3/15AM RP 38-9. Gora took two phones that were at the house. 6/3/15AM RP 37.<sup>2</sup>

Gora identified one phone as McKee's based upon the contents and his familiarity with the phone. 6/3/15PM RP 42. Gora described the phone had a picture of his sister, A.Z., tied to a bed naked. 6/3/15PM RP 43. Gora also saw a video or picture of A.Z. with semen oozing out of her vagina.

---

<sup>2</sup> Gora identified one phone as belonging to Gary Ness and returned it to him.

6/3/15PM RP 44.<sup>3</sup> Gora said one video showed the two individuals having sex. 6/3/15PM RP 45.

Gora told Brenda Brickley what he saw on the phone and that he did not want her to see it. 6/3/15PM RP 45-6. Nonetheless, Brickley took the phone and viewed the contents. 6/3/15PM RP 46.

Gora showed his friend Chris Deason some of the contents. 6/3/15PM RP 72. Deason described one picture had an extremely explicit photograph of a girl with no clothing. 6/3/15PM RP 72. Gora told Deason that was his sister. 6/3/15PM RP 72. Deason described that Gora found a lot on the phone and became extremely upset. 6/3/15PM RP 73. Deason was present when Gora told Brickley about the contents. 6/3/15PM RP 73.<sup>4</sup>

A.Z's mother, Brenda Brickley, testified that the day they took A.Z. away from McKee, Gora got McKee's phone. 6/2/15AM RP 91-2, 6/3/15AM RP 95. Brickley looked at the pictures and contents. 6/3/15AM RP 97. The phone appeared to be McKee's based upon the contents. 6/3/15AM RP 97. She saw pictures of McKee. 6/3/15AM RP 97. Brickley also saw pictures and videos of her daughter on the phone. 6/3/15AM RP 97.

Brickley described that in one photograph her daughter was unclothed and tied to a bed. 6/3/15AM RP 99-100. In another photograph,

---

<sup>3</sup> Gora used more vulgar terms.

<sup>4</sup> Gora also testified that McKee had contacted him saying that Gora was being charged with assault, burglary and a "whole bunch of crimes" and that Gora was looking at serious time. 6/3/15 RP 81. McKee tried to persuade Gora to lie to say the SIM card on the phone didn't exist and that McKee would make all Gora's charges go away. 6/3/15AM RP 82, 84.

A.Z. was on her knees and McKee was naked. 6/3/15AM RP 100. In one picture, A.Z. was shown unclothed, shot from the waist up graphically showing her breasts when she appeared to be engaging in sexual activity. 6/3/15AM RP 105. The pictures were sexually graphic. 6/3/15AM RP 100.

Brickley also saw videos on the phone, testifying she saw three. 6/3/15AM RP 101. She saw her daughter's face in some of the videos. 6/3/15AM RP 101. The videos showed the person having vaginal intercourse. 6/3/15AM RP 101.

After Brickley contacted the Mount Vernon Police Department, she turned over the phone to them. 6/3/15AM RP 102-3.

On appeal, McKee sought reversal of only the possession of depictions charges with a single assertion as to the remedy of dismissal.

Therefore, all fruits from the search of McKee's phone - which formed the basis for the charges in counts 1 through 4 - should have been suppressed. McKee's convictions on these counts should be reversed and dismissed.

Brief of Appellant at 16. His conclusion only indicated that the convictions should be vacated. Brief of Appellant at 24.

The Court of Appeals held the cell phone search warrant contained broad descriptions of items to be searched and seized, thereby violating particularity. *State v. McKee*, 3 Wn. App. 2d. 11, 14, 30, 413 P.3d 1049 (2018). The Court of Appeals did not discuss the remedy, instead concluding that the four counts of possession of depictions of a minor engaging in

sexually explicit conduct must be dismissed. *Id.* at 30.

However, three witnesses viewed the contents of the phone before it was given to law enforcement. . 6/3/15AM RP 102-3. They described the individuals and sexual activity of A.Z. and McKee depicted on the phone. 6/3/15AM RP 99-101, 6/3/15PM RP 43-5, 72.

The State sought reconsideration, contending the proper remedy was remand to trial court to determine if sufficient admissible evidence remained. Reconsideration was denied.

#### **IV. ARGUMENT**

##### **1. The proper remedy for an overbroad warrant is suppression of evidence.**

“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). Evidence obtained pursuant to an unconstitutional search and fruits of an illegal search must be suppressed. *State v. Perrone*, 119 Wn.2d 538, 556, 834 P.2d 611 (1992).

Washington’s exclusionary rule is nearly categorical. *State v. Afana*, 169 Wn.2d 169, 180, 233 P.3d 879 (2010). The rule’s paramount concern is protecting an individual’s right to privacy but also aims to deter unlawful police action. *Id.* If the officer lacks authority of law, “any evidence seized unlawfully will be suppressed.” *Id.*

The exclusionary rule does not apply to the acts of private individuals.<sup>5</sup> *State v. Smith*, 110 Wn.2d 658, 666, 756 P.2d 722 (1988) (private individual must act as government agent to apply exclusionary rule).

This Court has recognized that even under the exclusionary rule, suppression of the evidence is not merited if the same records were admissible under the independent source doctrine. *State v. Betancourth*, 190 Wn.2d 357, 413 P.3d 566 (2018) (jurisdictionally invalid district court warrant did not require the evidence to be re-seized after a valid superior court warrant for the same records was subsequently issued).

And under the severability doctrine infirmity of part of a warrant requires the suppression of evidence seized pursuant to that part of the warrant but does not require suppression of anything seized pursuant to valid parts of the warrant. *State v. Perrone*, 119 Wn.2d at 556, 834 P.2d 611, quoting *United States v. Fitzgerald*, 724 F.2d 633, 637 (8th Cir.1983).

But the severability doctrine is not to be applied when doing so would render the standards of particularity which prevent general searches meaningless. *Id.* at 558.

Application of the exclusionary rule is so generally understood to result in suppression and remand to the trial court that this Court frequently provides the remedy without citation to authority. *State v. Snapp*, 174 Wn.2d 177, 202, 275 P.3d 289 (2012) (reversal of conviction and remand for further

---

<sup>5</sup> At the trial court, McKee sought to suppress the contents viewed on the phone by A.Z.'s relatives and friend. CP 116-26. McKee abandoned that argument on appeal.

proceedings for improper warrantless search of vehicle incident to arrest of recent occupant); *State v. Neth*, 165 Wn.2d 177, 186, 196 P.3d 658 (2008) (in absence of probable cause to search the defendant's car, the evidence obtained should have been suppressed, the conviction was reversed and the case remanded to the trial court for further proceedings), *State v. Thein*, 138 Wn.2d 133, 151, 977 P.2d 582, 590 (1999) (reversal of conviction and remand with order to suppress evidence from search of defendant's residence based upon generalized statements that do not establish nexus).

Here, the Court of Appeals granted dismissal without any analysis as to why it failed to apply the exclusionary rule. "Dismissal is not justified when suppression of evidence will eliminate whatever prejudice is caused by the action or misconduct." *State v. McReynolds*, 104 Wn. App. 560, 579, 17 P.3d 608 (2000) (case remanded for fact finding hearing on whether evidence was tainted by unlawful search).

Dismissal is also inappropriate when there is credible and admissible evidence obtained against the defendant that is untainted by the governmental misconduct. See *Orwick*, 113 Wn.2d at 829, 784 P.2d 161; *State v. Prok*, 107 Wn.2d 153, 157, 727 P.2d 652 (1986).

*State v. Marks*, 114 Wn.2d 724, 730–31, 790 P.2d 138 (1990).

Dismissal is not an automatic remedy under the exclusionary rule.

**2. Whether the effect of suppression of evidence prevents sufficient evidence is a trial court decision.**

McKee moved the trial court to suppress the contents of the cell phone. CP 208, 216, 223. McKee did not seek dismissal. Since the trial court

did not suppress the evidence, there was no consideration of evidentiary sufficiency of any charges following suppression; and the State did not present solely the evidence that could have been used to establish the possession of depictions, which was available before the unlawful search.

At the Court of Appeals, McKee sought the remedy of suppression of the evidence and reversal of the conviction. Brief of Appellant at 16. He summarily sought dismissal but failed to provide any authority to support a remedy different from the exclusionary rule. *Id.*

Following the Court of Appeals grant of dismissal and the State's Motion for Reconsideration, McKee provided a string citation to authority for the proposition that when insufficient admissible evidence remains, the proper remedy is dismissal. Answer Opposing Reconsideration at 3. Of the five cases cited, in three cases, the trial court had suppressed the evidence and thus there had been a trial court finding. The other two cases involved drug crimes where effect of the suppression of the evidence would result in insufficient evidence. *State v. Kinzy*, 141 Wn.2d 373, 394, 5 P.3d 668, 680 (2000) (suppression of evidence of cocaine eliminated sole basis for conviction); *State v. Cormier*, 100 Wn. App. 457, 460, 997 P.2d 950 (2000) (where evidence sought to be suppressed was drugs, a motion to dismiss and a motion to suppress would lead to the same result of dismissal based upon an unconstitutional seizure).

McKee then contended that the evidence presented at trial showed it was unlikely witnesses could sufficiently identify the video or images in order to prove the charges. Answer Opposing Reconsideration at 4-5.

By his argument, McKee acknowledges that there must be a determination that there was insufficient evidence after suppression in order to grant dismissal. Since the trial court did not grant suppression, McKee had no ruling from the trial court upon which to rely.

Likewise, there was no determination by the Court of Appeals that insufficient evidence remained following suppression. And, opposed to drug charges where suppression of the contraband prevents admission of evidence, here there was other evidence. Furthermore, as a court of review, the Court of Appeals could weigh whether sufficient evidence remained.

An appellate court will not independently review evidence following a suppression hearing. See *State v. Maxfield*, 125 Wn.2d 378, 385, 886 P.2d 123 (1994); *State v. Bennett*, 180 Wn. App. 484, 489, 322 P.3d 815 (2014) (“Our appellate courts do not weigh evidence and do not find facts.”).

The proper remedy was to remand the case to the trial court to evaluate the evidence. *State v. Leffler*, 142 Wn. App. 175, 178 P.3d 1042 (2007) (remand to trial court for factual determinations of whether police would have sought a warrant with information obtained before an improper search and whether sufficient untainted evidence remained to prove guilt).

### **3. The trial testimony shows sufficient evidence was available.**

The testimony at trial shows the victim’s mother, brother and friend

would be able to describe that McKee's phone had depictions of A.Z. engaged in sexually explicit conduct.

Three witnesses testified to viewing the contents of the phone prior to it being given to law enforcement. 6/3/15PM RP 43-6, 72-3, 6/3/15AM RP 97-103. They described sexual activity of A.Z. and McKee on the phone. 6/3/15PM RP 43-5, 72, 6/3/15AM RP 97-103. A.Z.'s brother described a picture of his sixteen year-old sister:

Q. Okay. Now, here is my question is, you looked at photos, could you remember who was in the photo that jumped out at you?

A. My sister.

Q. Okay. Can you tell me about one of the photos that you remember seeing on the phone?

A. Her tied up with some –

Q. Here, actually, you know what? Hold on one second. Are you going to be fine?

A. I'm going to be fine.

Q. Okay. Where was she tied up on?

A. On a bed.

Q. Was she wearing anything?

A. No.

Q. Okay. And was it graphic?

A. She was naked.

6/3/15PM RP 43. Gora also saw a video or picture of A.Z. with semen oozing out of her vagina. 6/3/15PM RP 44.

A.Z.'s mother described the photograph of A.Z. tied to the bed naked. 6/3/15AM RP 99-100. She also described videos of A.Z. having intercourse.

Q. Did you watch any of the videos?  
A. Yes, I did.  
Q. Okay. Did you see your daughter's face in any of the videos that you watched?  
A. Yes, I did.  
Q. Okay. Was that in one particular video?  
A. I believe so, yes. I think, if I remember correctly, there's three videos.  
...  
A. Well, it left nothing to the imagination.  
Q. Okay. When you say that, does that mean they were -- well --  
A. Well, it was obvious that the person was behind her, videotaping it. It was -- that was obvious.  
Q. And when you say videotaping it, what was being videotaped?  
A. Sex.  
Q. Okay. When you say sex, would you say that would be characterized as vaginal intercourse?  
A. Yes.  
Q. Okay. Very graphic?  
A. Pretty much, yeah.  
Q. Okay. And are all the videos of that same thing?  
A. Yes

6/3/15AM RP 102.

This testimony was not based upon the “fruit of the poisonous tree” of the warrant determined to be overbroad.

The State had to show the defendant knowingly possessed depictions of a minor engaged in sexually explicit conduct with intercourse for first degree and depictions of genitals or unclothed breasts of females for second degree. CP 58-60, 62. The evidence described above would be sufficient to support the depictions were of A.Z. a sixteen year-old known to McKee and engaging in sexually explicit conduct with McKee. Viewing the evidence in

a light most favorable to the State, sufficient evidence would exist for a rational trier of fact to find the elements of the charges beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

**4. Since there was no suppression in the trial court, the State is entitled to make a record of admissible evidence after suppression.**

The trial court did not suppress the videos or photographs. Without suppression, the State was not required to present solely the evidence obtained before the warrant was sought. The State is entitled to ask additional questions from the testimony at trial to have the trial court evaluate whether viewing the evidence in a light most favorable to the State, sufficient evidence is available after suppression. Reviewing the trial testimony alone as to evidentiary sufficiency is improper, since the State was not required to show that the witnesses had independently observed A.Z. engaging in sexually explicit activity in the images on the phone. Remand to the trial court is required.

**V. CONCLUSION**

For the reasons set forth above, this Court should adhere to the remedy of suppression of evidence for an overbroad warrant. Whether sufficient evidence remains after suppression is a matter for the trial court to consider. This Court must reverse the dismissal of the four charges granted by the Court of Appeals and remand the case to the trial court to evaluate whether sufficient admissible evidence remains to pursue the charges.

Respectfully submitted this 9<sup>th</sup> day of November, 2018.

Respectfully submitted,

By:   
ERIK PEDERSEN, WSBA#20015  
Senior Deputy Prosecuting Attorney  
Attorney for Petitioner, State of Washington  
E-Mail: [erikp@co.skagit.wa.us](mailto:erikp@co.skagit.wa.us)

Skagit County Prosecutor's Office  
Office Identification #91059  
605 South Third Street  
Mount Vernon, WA 98273  
Ph: (360) 416-1600  
Fax: (360)416-1648  
E-Mail: [skagitappeals@co.skagit.wa.us](mailto:skagitappeals@co.skagit.wa.us)

#### DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by;  Electronic Service, a true and correct copy of the document to which this declaration is attached, to: David B. Koch, of Nielsen, Broman & Koch, PLLC, e-mail address: [Sloanej@nwattorney.net](mailto:Sloanej@nwattorney.net) ***under agreement reached pursuant to GR 30(b)(4)***. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington, this 9<sup>th</sup> day of November, 2018

  
KAREN R. WALLACE, DECLARANT

# SKAGIT COUNTY PROSECUTOR

November 09, 2018 - 4:15 PM

## Transmittal Information

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 96035-6  
**Appellate Court Case Title:** State of Washington v. Marc McKee  
**Superior Court Case Number:** 12-1-01009-8

### The following documents have been uploaded:

- 960356\_Supplemental\_Pleadings\_20181109161206SC179282\_7609.pdf  
This File Contains:  
Supplemental Pleadings  
*The Original File Name was Supplemental Brief of Petitioner.pdf*

### A copy of the uploaded files will be sent to:

- Sloanej@nwattorney.net
- kochd@nwattorney.net
- rlynn.Bartlett@gmail.com
- rlynn.vix@gmail.com
- rosemaryk@co.skagit.wa.us
- skagitappeals@co.skagit.wa.us

### Comments:

Supplemental Brief of Petitioner

---

Sender Name: Karen Wallace - Email: karenw@co.skagit.wa.us

**Filing on Behalf of:** Erik Pedersen - Email: erikp@co.skagit.wa.us (Alternate Email: )

### Address:

Skagit County Prosecuting Attorney's Office  
605 South 3rd Street  
Mount Vernon, WA, 98273  
Phone: (360) 416-1600 EXT 1621

**Note: The Filing Id is 20181109161206SC179282**