

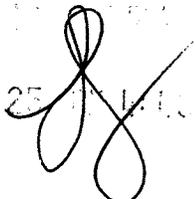
63934-0

63934-0

REC'D

MAR 25 2010

King County Prosecutor
Appellate Unit
NO. 63934-0

FILED
2010 MAR 25 11:11


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

STATE OF WASHINGTON,

Respondent,

v.

M. H.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY, JUVENILE
DIVISION

The Honorable Leroy McCullough, Judge

REPLY BRIEF OF APPELLANT

ANDREW P. ZINNER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
1. THE GUN M.H. DROPPED MUST BE SUPPRESSED BECAUSE IT WAS A PRODUCT OF AN UNLAWFUL SEIZURE.....	1
B. <u>CONCLUSION</u>	4

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Ladson
138 Wn.2d 343, 979 P.2d 833 (1999)..... 2

State v. Tan Le
103 Wn. App. 354, 12 P.3d 653 (2000)..... 3

State v. Warner
125 Wn.2d 876, 889 P.2d 479 (1995)..... 1

State v. White
97 Wn.2d 92, 640 P.2d 1061 (1982)..... 2

State v. Winterstein
167 Wn.2d 620, 220 P.3d 1226 (2009)..... 1

FEDERA CASES

Wong Sun v. United States
371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)..... 1

RULES, STATUTES AND OTHER AUTHORITIES

Wash. Const. I, § 7..... 1, 2

A. ARGUMENT IN REPLY¹

1. THE GUN M.H. DROPPED MUST BE SUPPRESSED BECAUSE IT WAS A PRODUCT OF AN UNLAWFUL SEIZURE.

The state contends that even if this Court concludes Officer McDaniel unlawfully seized Harris by taking him home, "the discovery of the gun is attenuated from the detention and is not the fruit of the poisonous tree." Brief of Respondent (BOR) at 17.

For this proposition the state relies on the federal exclusionary rule. See BOR at 17-18, (citing Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963), and State v. Warner, 125 Wn.2d 876, 889 P.2d 479 (1995)). But in his brief, M.H. relied primarily on the state constitutional right to privacy articulated in article I, section 7, in contending Officer McDaniel unlawfully seized him by ordering him into the car and taking him home, where the gun was discovered. Brief of Appellant (BOA) at 10, 15.

The exclusionary rule under article I, section 7 provides greater protection to a criminal defendant than does the federal exclusionary rule. State v. Winterstein, 167 Wn.2d 620, 631-632, 220 P.3d 1226 (2009). The

¹ M.H. stands on the first two arguments made in the Brief of Appellant at 6-25 for the proposition he was seized in violation of article I, section 7 of the Washington Constitution and the Fourth Amendment and adds nothing further here.

language of article I, section 7 commands that "the right of privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy." State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). Because the state constitutional intent was to protect private rights rather than restrict state actions, "we recognized that 'whenever the right is unreasonably violated, the remedy must follow.'" Winterstein, 167 Wn.2d at 631-32 (quoting White, 97 Wn.2d at 110). This state exclusionary rule provides a remedy for individuals whose rights have been violated and protects the integrity of the judicial system by not tainting the proceedings with illegally obtained evidence. State v. Ladson, 138 Wn.2d 343, 359-60, 979 P.2d 833 (1999).

Therefore, because the seizure here violated article I, section 7, the remedy of suppression of the evidence, in this case the gun, inevitably follows.

The result is the same even under the state's federal theory. To show that evidence has been purged of taint, the state has the burden of establishing "(1) intervening circumstances have attenuated the link between the illegality and the evidence; (2) the evidence was discovered through a source independent from the illegality; or (3) the evidence would inevitably have been discovered through legitimate means." State

v. Tan Le, 103 Wn. App. 354, 361, 12 P.3d 653 (2000) (footnotes omitted).

The state relies on the first justification, contending that by the time Harris dropped the gun at his mother's home in McDaniel's "plain view," McDaniel had relinquished custody to Harris's mother. BOR at 18. This claim lacks merit. In an undisputed finding of fact, the trial court found M.H. "walked upstairs at the order of Officer McDaniel, and a 9 mm handgun fell from [M.H.'s] pants." CP 43 (FOF 20). This finding alone defeats the state's assertion that McDaniel's unlawful seizure somehow ended once he and M.H. reached the apartment.

Under either the state or the federal exclusionary rule, the remedy for McDaniel's unlawful seizure is suppression of the handgun.

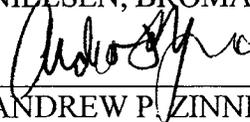
B. CONCLUSION

For the reasons cited herein and in his Brief of Appellant, M.H. requests this Court to find McDaniel's seizure and continued detention of M.H. unlawful, suppress the gun, and remand for dismissal of the adjudication with prejudice.

DATED this 25 day of March, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



ANDREW P. ZINNER

WSBA No. 18631

Office ID No. 91051