5-9-2017

State v. Fenton Respondent's Brief Dckt. 44546

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Appellant,	)	**NO. 44546**
	)	
v.	)	**NEZ PERCE CO. NO. CR 2016-1591**
	)	
LARRY GLENN FENTON, JR.,	)	**RESPONDENT'S BRIEF**
	)	
Defendant-Respondent.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

HONORABLE JAY P. GASKILL
District Judge

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STATEMENT OF THE CASE

Nature of the Case

The State appeals from the district court's orders granting the Mr. Fenton's motion to suppress and denying the State's motion for reconsideration. The State claims the district court erred when it held that the attenuation doctrine did not apply in this case.

Statement of the Facts and Course of Proceedings

In February of 2016, despite the fact that Mr. Fenton had committed no traffic infractions, and the registration on his car was current, Mr. Fenton was stopped by Lewiston Police Officer Stormes. (R., p.109.) Earlier that day, a different officer—Officer Eylar—was on patrol when he saw a red GMC Yukon that he thought was registered to a person he knew from "previous narcotic activity," so he started following it. (R., p.102; Tr., p.7, L.5 – p.8, L.15.)[1] The Yukon stopped at a store, and Officer Eylar took a position nearby, so he could watch it. (Tr., p.8, Ls.18-23.) He testified that "in his experience drug activity was common" at the store, but he did not see anyone exit the Yukon, and he did not see anyone make contact with the driver. (R., p.102; Tr., p.9, Ls.2-22.) When the vehicle left the parking lot, Officer Eylar thought it was being followed by a white Pontiac Grand Prix. (R., p.102; Tr., p.9, Ls.7-14.) He then called Officer Stormes to help him "keep an eye on the vehicles." (Tr., p.9, L.23 – p.10, L.3.) Officer Eylar followed the two vehicles until the Yukon parked at a gas station, and the Grand Prix pulled up to the gas pumps at the station. (R., p.102; Tr., p.10, Ls.4-17.) He then pulled into a parking lot to watch the vehicles, and Officer Stormes met up with him there. (R., p.102; Tr., p.10, L.19 - p.11, L.1.)

[1] All citations to the transcript refer to the transcript of the hearing on the motion to suppress held on August 4, 2016.

The officers discussed the situation, and Officer Stormes left the parking lot shortly thereafter. (R., p.102.) When the Grand Prix left the parking lot, Officer Eylar radioed Officer Stormes to let him know. (R., p.102.) Subsequently, Officer Stormes saw the Grand Prix driving and contacted dispatch to check if its registration was current. (R., p.102.) However, because Officer Stormes was "about 100 yards" away when he first called in the license plate information, he could not see the plate clearly and told dispatch that the plate was "Idaho plate 180728." (R., p. 102; Tr., p.19, L1 – p.20, L.15, p.21, L.21 – p.22, L.1.) Dispatch believed the plate was out of Idaho County and entered "Ida 180728" but found no record for that number. (Tr., p.19, L.1 – p.20, L.15; R., p.102.) Officer Stormes then asked dispatch to change the last number "from an 8 to a B to see if that made any difference in how the plate returned." (Tr., p.20, Ls.16-19; R., p.102.) But dispatch found no record for that number either. (R., p.102.) Officer Stormes then stopped the car to see if the registration was current. (R., p.102.) He told dispatch that he was making the stop, and read the license plate number a final time when he was close enough to the car to read the plate, but he did not hear back from dispatch before he made the stop. (R., p.103; Tr., p.22, Ls.6-24.)

Mr. Fenton was driving the Grand Prix, and he provided Officer Stormes with the current registration for the car. (R., p.103; Tr., p.23, L.3 – p.24, L.2.) Therefore, as the district court stated, "the registrations concerns were taken care of." (R., p.103.) However, Mr. Fenton did not have a current driver's license or insurance, so Officer Stormes decided to write citations for those violations. (R., p.103; Tr., p.24, Ls.3-12.) When Officer Stormes handed him the first citation, Mr. Fenton said he was on probation. (R., p.103; Tr., p.24, Ls.16-25.) Officer Stormes asked who his probation officer was and was able to determine that Mr. Fenton was on felony probation. (R., p.103; Tr., p.6-7.) Then, instead of issuing the second citation, Officer Stormes

went back to his vehicle and contacted the probation office.[2] (R., p.103.) He told the probation officer, Officer Jensen, that he had stopped Mr. Fenton for a traffic infraction and informed her about what he and Officer Eylar had seen at the store and the gas station. (R., p.103; Tr., p.25, L.23 – p.26, L.23.)

Officer Jensen said she would come to the scene and search the car. (R., p.104.) Officer Stormes then told Mr. Fenton that Officer Jensen was coming and wanted him to "stand by." (R., p.104; DVD at 36:15 – 36:35.) He then gave Mr. Fenton the second citation and returned his identification to him. (DVD at 36:30 – 36:45; Tr., p.33, L.11 – p.34, L.8.) Officer Jensen did not arrive for over fifteen minutes. (DVD at 31:00 – 46:30.) When she arrived, Officer Stormes assisted her with a search, and methamphetamine was subsequently discovered. (R., p.104.)

Mr. Fenton was charged with one count of trafficking in methamphetamine. (R., p.52.) He filed a motion to suppress and argued that there was no reasonable suspicion for the traffic stop, the stop was unlawfully prolonged, and there were no reasonable grounds to conduct a probation search. (R., pp.66-75.)

The district court found that that Officer Stormes's mistake of fact regarding the license plate was not objectively reasonable. (R., p.108.) Therefore, it held that neither the registration issue nor Officer Eylar's observations at the store and gas station provided reasonable suspicion for the stop and granted the motion to suppress. (R., p.109.) However, the State filed a motion for reconsideration and argued that the attenuation doctrine applied because Mr. Fenton's status as a probationer was an intervening circumstance equivalent to a valid warrant. (R., pp.116-118.) The district court denied the motion and held that Mr. Fenton's status as a probationer was

[2] Officer Stormes was asked if this was "standard procedure" that he engaged in when he had "contact with someone who's on felony probation in the community," and he said it was. (Tr., p.25, Ls.19-22.)

not an intervening circumstance equivalent to a valid warrant. (R., p.179.) It went on to hold, "but for the officer's error, the Defendant's vehicle would not have been stopped, and the probation officer would not have been contacted—thus a search would not have occurred." (R., p.179.) The State filed a notice of appeal that was timely from the district court's order granting Mr. Fenton's motion to suppress.

ISSUE

Has the State failed to show that the district court erred when it granted Mr. Fenton's motion to suppress and denied the State's motion for reconsideration?

ARGUMENT

The State Has Failed To Show That The District Court Erred When It Granted Mr. Fenton's Motion To Suppress And Denied The State's Motion For Reconsideration

A. Introduction

The district court correctly held that Mr. Fenton's probationary status was not an intervening circumstance sufficient to attenuate the taint from Officer Stormes's unlawful traffic stop, and therefore the attenuation doctrine did not apply. Officer Stormes's discovery that Mr. Fenton was on probation is not the same as an officer's discovery that a warrant exists; it is a distinction with a difference.

The discovery of a valid warrant is an intervening circumstance that supports attenuation because the officer, upon discovering a warrant, has a *duty* to make an arrest or conduct a search. The officer is required to take action—to act on the warrant. No such duty exists when it is discovered that a driver is on probation. Indeed, the probationary search at issue here was conducted at the discretion of a third person, the probation officer. She had no duty to search either. In this case, the probation officer's decision to search was discretionary, and her decision exploited Mr. Fenton's unlawful detention. Probation is a status, not a call to action. Thus, the district court was correct in concluding that probation status is not a sufficient intervening circumstance to favor attenuation. Because the other relevant attenuation factors also supported the district court's holding, this Court should affirm the district court's orders granting Mr. Fenton's motion to suppress and denying the State's motion for reconsideration.

B. Standard Of Review

The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, the appellate court accepts the trial court's findings of fact that

were supported by substantial evidence but freely reviews the application of constitutional principles to the facts as found. *State v. Atkinson*, 128 Idaho 559, 561 (Ct. App. 1996).

C. The District Court Properly Held That Officer Stormes' Discovery That Mr. Fenton Was On Probation Was Not Equivalent To The Discovery Of A Valid Warrant, And The Attenuation Doctrine Did Not Apply

The State does not challenge the district court's holding that the stop was unlawful. (App. Br., p.6.) Instead, it relies on *State v. Page*, 140 Idaho 841 (2004) and *Utah v. Strieff*, 136 S. Ct. 2056 (2016)—both warrant cases—to argue that the attenuation doctrine should have been applied in this case. (App. Br., pp.9-13.) But here, Officer Stormes did not discover a valid warrant that would have imposed a mandatory duty on him to arrest Mr. Fenton, and thus these cases are inapposite. The State cites no authority to support its claim that this Court should expand the attenuation doctrine. The district court did not err in concluding the doctrine does not apply to a driver's probation status.

The Fourth Amendment protects the people's right to be free from unreasonable searches and seizures. U.S. CONST., amend. IV; *see also* ID. CONST., art. I, § 17; *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (the Fourth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment). Evidence that the State obtains in violation of the Fourth Amendment is generally excluded from a prosecution of the victim of the violation. *Page*, 140 at 846; *Wong Sun v. United States*, 371 U.S. 471, 484–85 (1963). The "exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct . . . ." *Herring v. United States*, 555 U.S. 135, 144 (2009). This rule applies to evidence obtained directly from the illegal government action and evidence discovered through the exploitation of the original illegality. *Page*, 140 Idaho at 846; *Wong Sun*, 371 U.S. at 484–85. Once a defendant makes a showing that the evidence to be suppressed was causally connected to the illegal state action, the burden shifts to

the State to show that the unlawful conduct did not taint the evidence. *State v. Cardenas*, 143 Idaho 903, 908–09 (Ct. App. 2006).

"[T]he ultimate question is whether the police acquired the evidence from 'exploitation of [the] illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *State v. Bigham*, 141 Idaho 732, 734 (Ct. App. 2005) (quoting *United States v. Green*, 111 F.3d 515, 520 (7th Cir. 1997), and *Wong Sun*, 371 U.S. at 488). The Idaho Supreme Court, in *Page*, stated that courts consider the following three factors to determine whether the attenuation doctrine applies: "(1) the elapsed time between the misconduct and the acquisition of the evidence, (2) the occurrence of intervening circumstances, and (3) the flagrancy and purpose of the improper law enforcement action." 140 Idaho at 846 (citing *Green*, 111 F.3d at 521 and *Brown v. Illinois*, 422 U.S. 590, 603–04 (1975)). Recently, the United States Supreme Court confirmed that this is the proper analysis. *See Strieff*, 136 S. Ct. at 2062-63.

In *Strieff*, a detective was investigating an anonymous tip regarding "narcotics activity" at a residence. *Id.* at 2059. He saw Mr. Strieff leave the house and walk towards a store and then detained him in the parking lot. *Id.* at 2060. After requesting Mr. Strieff's identification, the detective called dispatch and discovered that Mr. Strieff had a valid outstanding warrant. *Id.* The detective arrested Mr. Strieff and then found methamphetamine in the search incident to the arrest. *Id.*

Mr. Strieff filed a motion to suppress and argued that he was unlawfully detained. *Id.* The prosecutor conceded that the stop was not based on reasonable suspicion "but argued that the evidence should not be suppressed because the existence of a *valid arrest warrant* attenuated the connection between the unlawful stop and the discovery of contraband." *Id.* (emphasis added). The trial court agreed and denied the motion to suppress. *Id.* Mr. Strieff entered a

conditional guilty plea and reserved his right to appeal the trial court's decision on the motion to suppress. *Id.* The Utah Court of Appeals affirmed, but the Utah Supreme Court reversed. *Id*. It held that only a voluntary act, such as a confession, could attenuate the connection between the illegal stop and the discovery of contraband. *Id.* The United States Supreme Court granted certiorari "to resolve disagreement about how the attenuation doctrine applies where an unconstitutional detention leads to the discovery of a valid arrest warrant." *Id.*

The Court wrote, "Evidence is admissible when the connection between the unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance. . . ." *Id.* at 2061. The Court held that the attenuation doctrine was not limited to situations in which there were "independent acts by the defendant." *Id.* It also noted that the three-factor balancing test from *Brown v. Illinois* was the proper analysis. *Id.* at 2061-62. It found that the "temporal proximity between the initially unlawful stop and the search" favored suppression because the officer discovered the contraband "only minutes after the illegal stop." *Id.* at 2062. With respect to the second factor, the Court noted that the discovery of a valid warrant supported application of the attenuation doctrine. *Id.*

Notably for this case, it held that, once the officer "discovered the warrant, he had an obligation to arrest Strieff. 'A warrant is a judicial mandate to an officer to conduct a search or make an arrest, and the officer has a sworn duty to carry out its provisions.'" *Id.* (quoting *United States v. Leon*, 468 U.S. 897, 920, n. 21 (1984)). The Court went on to note that the officer's "arrest of Strieff thus was a ministerial act that was *independently compelled* by the pre-existing warrant." *Id.* at 2063 (emphasis added).

Finally it found that the third factor favored the State because the officer was "at most negligent." *Id.* at 2063. Therefore, it held that the evidence was admissible because the officer's

discovery of the valid arrest warrant "attenuated the connection between the unlawful stop and the evidence seized from Strieff incident to arrest." *Id.* at 2064.

In this case, despite the State's claim that there were "many intervening circumstances," its argument boils down to whether an officer's discovery of a person's probationary status is so much like the discovery of a valid warrant that it supports attenuation. (App. Br. pp.12-13.) It is not. And the State cites to no authority, controlling or otherwise, which holds that it is. The State relies exclusively on cases where arrest warrants were discovered. (App. Br., pp.9-13.) As noted above, *Strieff* held that a valid arrest warrant was a sufficient intervening circumstance because the officer had an obligation to arrest Mr. Strieff. It stated that a warrant was a "judicial mandate" to arrest Mr. Strieff. *Id.* at 2062. Similarly, in *Page*, the discovery of a warrant was crucial to this Court's holding that attenuation applied. It wrote, "Other jurisdictions . . . have also adopted the rule that an outstanding arrest warrant gives the officer independent probable cause to arrest such that, had the officers acted unlawfully, the warrant would constitute an intervening circumstance dissipating the taint of an unlawful seizure." *Page*, 140 Idaho at 846.

Officer Stormes's discovery that Mr. Fenton was on probation was not a mandate to act because it did not impose a duty to arrest Mr. Fenton, and it did not constitute independent probable cause to arrest. Further, as the State acknowledges, Officer Jensen's search was not mandated; it was discretionary. (App. Br., p.13.) The State explains, "That search was conducted on Probation Officer Jensen's authority, not Officer Stormes' authority, and it was Probation Officer Jensen's *decision* to search the vehicle, not Officer Stormes' decision." (App. Br., p.13 (emphasis added).) As such, Officer Jensen exploited the fact that Mr. Fenton was stopped without reasonable suspicion, and the district court correctly held, "While a probationer may have agreed to a diminished expectation of privacy in exchange for being

placed on probation, this is not equivalent to an active . . . warrant, which authorized the immediate arrest of an individual." (R., p.179.)

This issue was addressed in *People v. Bates*, 165 Cal. Rptr. 3d 573 (Cal. Ct. App. 2013).[3] There, after responding to a report of a theft, one of the deputies learned that a potential suspect, Marcus Bates, was on felony probation with a warrantless search condition. *Id.* at 575-76. The deputy also learned that Mr. Bates lived in an apartment complex nearby. *Id.* at 576. Several deputies went to the complex to search the suspect's residence, and one of them saw a person matching the suspect's description walking towards a mobile home park. *Id.* One of the deputies drove to the mobile home park's access road and signaled for an exiting car to pull over. *Id.* When the deputy approached the car, the suspect identified himself as Marcus Bates, and the deputy ordered him out of the car and searched him. *Id.* at 576-77. Mr. Bates filed a motion to suppress but, because of Mr. Bates's "probation search condition," the trial court held that the deputies could detain and search him. *Id.* at 577.

After concluding that the stop was unlawful, the *Bates* court held that Mr. Bates's "probation search condition was an insufficient attenuating circumstance."[4] *Id.* at 582. Like *Strieff*, the court pointed out the importance of the fact that "[i]n the case of an arrest warrant, officers essentially have a *duty* to arrest an individual once the outstanding warrant is confirmed." *Id.* (emphasis added). It went on to state, "A probation search condition, on the other hand, is a *discretionary* enforcement tool and therefore a *less compelling intervening circumstance* than an arrest warrant." *Id.* at 581-82 (emphasis added).

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[3] Like Idaho, California employed the same three-factor test when *Bates* was decided. *Id.* at 580-81. Thus *Strieff* did not alter its application of the attenuation doctrine.

[4] It noted that another California appellate court—in *People v. Durant*, 140 Cal.Rptr.3d 103 (Cal. Ct. App. 2012)—did not consider whether the traffic stop at issue there was illegal but held that, even if it was, "the defendant's search condition attenuated any taint." *Id.* at 581. The *Bates* court, however, declined to adopt this reasoning. *Id.*

The *Bates* Court was also concerned with the long-term implications of holding that Mr. Bates's probation search condition was equivalent to a warrant. It wrote,

> We take no issue with the lawfulness of probation search conditions, nor with the ability of law enforcement to conduct suspicionless searches of known probationers. Our discomfort is in extending these concepts to situations where an individual's probation status is wholly unknown to law enforcement at the time of the initial detention and is used only after the fact to justify an otherwise unlawful search.

Id. at 582.

This case is no different. In short, the State's position is not only unsupported by *Strieff* or *Page*, it is also an attempt to unreasonably expand those holdings. Discovery of a person's probation status is not equivalent to the discovery of an active warrant. Therefore, the intervening circumstance here is not compelling and favors suppression.

The other relevant factors also favor suppression. The State argues that the temporal proximity between Officer Stormes's unlawful detention and the discovery of the evidence is "far more remote" than in *Strieff* or *Page* and therefore this factor only "weakly" favors suppression. (App. Br., pp.13-14.) This argument ignores several key facts. First, the main reason for the delay was that the police officers had to wait over fifteen minutes for Officer Jensen to arrive. (DVD at 31:00 – 46:30.) Second, less than fifty minutes elapsed from the time Officer Stormes stopped Mr. Fenton to when the evidence was discovered (DVD at 2:30 – 50:30), far less than the nearly two hours in *Brown* that was found to be insufficiently lengthy. See *Strieff*, 136 S. Ct. at 2062 ("Our precedents have declined to find that this factor favors attenuation unless 'substantial time' elapses between an unlawful act and when the evidence is obtained," noting that, in *Brown*, a period of less than two hours favored suppression.) *Id.* Therefore, in this case, this factor strongly favors suppression.

Officer Stormes's conduct when making the stop also favors suppression. He called in the license plate information before he could see the plate clearly. (Tr., p.21, L.21 – p.22, L.1.) Then, once he was close enough to the car to actually see the plate clearly, he did not bother to wait until dispatch got back to him to tell him that the car's registration was indeed current. (Tr., p.22, Ls.22-24; R., pp.102-03.) Instead, he just stopped the car. This is the kind of "deliberate, reckless, or grossly negligent" conduct that should be deterred by suppression. Therefore, the State has not met its burden to show that Officer Stormes's unlawful conduct did not taint the evidence.

In light of these factors, this Court should affirm the district court's orders granting Mr. Fenton's motion to suppress and denying the State's motion for reconsideration.

CONCLUSION

The district court properly suppressed the evidence seized as a result of the unlawful stop. Therefore, Mr. Fenton respectfully requests that this Court affirm the order suppressing the evidence.

DATED this 9th day of May, 2017.

_____/s/_____
REED P. ANDERSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 9th day of May, 2017, I served a true and correct copy of the foregoing RESPONDENT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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