5-31-2017

State v. Fenton Appellant's Reply Brief Dckt. 44546

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 44546**
Plaintiff-Appellant,	)	
	)	**Nez Perce County Case No.**
v.	)	**CR-2016-1591**
	)	
LARRY GLENN FENTON, JR.,	)	
	)	
Defendant-Respondent.	)	
	)	

REPLY BRIEF OF APPELLANT

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

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ARGUMENT IN REPLY

The District Court Erred When It Granted Fenton's Suppression Motion Because The Valid Probation Search Of Fenton's Vehicle Was Attenuated From His Illegal Detention

Officer Stormes pulled over Fenton on the mistaken belief that Fenton's vehicle lacked proper registration, based on a misreading of Fenton's license plate. (R., pp.102-03.) During the resulting detention, Fenton volunteered that he was on probation and Officer Stormes, consistent with standard procedures, contacted Fenton's probation officer to explain the situation. (8/4/2016 Tr., p.24, L.19 – p.26, L.23.) The probation officer asked Officer Stormes to detain Fenton until she could arrive and conduct (based on the terms and conditions of Fenton's probation) a probation search of Fenton's vehicle. (Id., p.26, L.25 – p.27, L.25.) Before the search could take place, however, Fenton fled the scene on foot. (Id., p.28, L.11 – p.29, L.3.) While he was being apprehended, officers conducted the probation search of Fenton's car and discovered methamphetamine. (Id., p.29, Ls.4-20.) The district court suppressed that evidence, holding, "[i]n this case, 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.) This was error.

As articulated by the United States Supreme Court, while the exclusionary rule applies to evidence acquired as a result of a Fourth Amendment violation, "exclusion may not be premised on the mere fact that a constitutional violation was a 'but-for' cause of obtaining evidence." Hudson v. Michigan, 547 U.S. 586, 592 (2006). Evidence is not "fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of police." Wong Sun v. United States, 371 U.S. 471, 487-88 (1963). Rather, the question is whether police obtained the evidence "by

exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Id. at 488 (quotation omitted).

The Idaho Supreme Court has recognized at least three exceptions to the exclusionary rule, which include the independent source, inevitable discovery, and attenuated basis doctrines. State v. Stuart, 136 Idaho 490, 496-98, 36 P.3d 1278, 1284-86 (2001). To determine whether unlawful police conduct has been adequately attenuated, the Court has adopted a three-factor test, reviewing "(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." State v. Page, 140 Idaho 841, 846, 103 P.3d 454, 459 (2004) (citation omitted); see also Brown v. Illinois, 422 U.S. 590, 603-04 (1975). As explained in the state's opening brief, no one factor is dispositive and not all must be resolved in favor of the state before the doctrine of attenuation becomes applicable. See State v. Schrecengost, 134 Idaho 547, 549, 6 P.3d 403, 405 (Ct. App. 2000). "The test only requires a balancing of the relative weights of all the factors, viewed together, in order to determine if the police exploited an illegality to discover evidence." Id. (citing United States v. Seidman, 156 F.3d 542, 549-550 (4th Cir. 1998)).

The doctrine of attenuation applies to this case because, assuming that Fenton's initial detention was unlawful, balancing the relevant factors shows that officers did not exploit that detention to discover evidence. As set forth in the state's opening brief, the temporal proximity in this case, which was more remote than that in either Utah v. Strieff, 136 S.Ct. 2056 (2016), or Page, *supra*, should be accorded little (if any) weight toward suppression. At the time the evidence was discovered, Fenton was no longer

being detained for the traffic investigation; he was being detained at his probation officer's request. Second, the numerous intervening circumstances in this case strongly favor attenuation. These circumstances include Fenton volunteering that he was on probation (8/4/2016 Tr., p.24, Ls.16-25); the probation officer, after learning of the two officers' observations of potential drug activity (which occurred prior to any traffic stop), asking for Fenton to be detained and choosing to search Fenton's vehicle, consistent with the terms and conditions of Fenton's probation (id., p.25, L.12 – p.27, L.25); and Fenton's flight as officers began to conduct the probation search of his vehicle (id., p.28, L.11 – p.29, L.3). Third, Officer Stormes did not flagrantly abuse his authority; he misread Fenton's license plate. The lack of flagrancy in the officer's conduct also strongly favors attenuation.

In his respondent's brief, Fenton argues that, notwithstanding the considerable time that passed between the completion of the initial detention and the evidence that was discovered during the subsequent probation search, the temporal proximity in this case "strongly favors suppression." (Respondent's brief, p.12.) It does not. While the state has never argued that temporal proximity, by itself, favors attenuation in this case, it must be more favorable to attenuation than the much shorter time-lapse in Streiff. And in that case the Supreme Court found merely that the temporal proximity "favor[ed] suppressing the evidence," and not "strongly." Streiff, 136 S.Ct. at 2062. Fenton also argues that Officer Stormes' miscommunication with dispatch, resulting in the misidentification of Fenton's license plate, is the equivalent of flagrant, systemic, or recurrent police conduct that would favor suppression. (Respondent's brief, p.13.)

Contrary to Fenton's argument, misreading a license plate does not show a flagrant abuse of police authority.

Fenton, however, focuses his argument on the intervening circumstances prong. (Respondent's brief, pp.6-12.) Fenton asserts that "Officer Stormes' discovery that [he] was on probation is not the same as an officer's discovery that a warrant exists" and claims that the state is seeking to expand the attenuation doctrine beyond the discovery of arrest warrants. (Id.) But the discovery of arrest warrants is not the only intervening circumstance recognized by the Court. On the contrary, Streiff is itself an expansion of intervening circumstances to the discovery of arrest warrants from the defendant's voluntary acts. See Streiff, 136 S.Ct. at 2060-62. As explained by the Supreme Court in that case, the issue is simply whether "the connection between the unconstitutional police conduct and the evidence … has been interrupted by *some* intervening circumstance," not whether it was interrupted by the discovery of an arrest warrant. Id. at 2061 (emphasis added).

In addition to arrest warrants, appellate courts (including the United States Supreme Court) have found several other circumstances to be "intervening" for purposes of an attenuation analysis. Examples of other intervening circumstances include voluntary confessions following illegal detentions, see Brown, *supra*, or voluntary confessions given after Miranda[1] warnings where an earlier confession was obtained before Miranda warnings, see Oregon v. Elstad, 470 U.S. 298, 314 (1985), a lawful arrest following the flight or resistance of the defendant, see United States v. Nooks, 446 F.2d 1283, 1288 (5th Cir. 1971); United States v. Dawdy, 46 F.3d 1427,

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

1431 (8th Cir. 1995), and voluntary acts by third-parties, such as a witness's decision to testify, though that witness would have been unknown but for unlawful police conduct, see United States v. Ceccolini, 435 U.S. 268, 280 (1978), a third-party incidentally identifying the defendant during an illegal detention as a suspect in another crime, see Mosby v. Senkowski, 470 F.3d 515, 522-23 (2d Cir. 2006), or the defendant's interaction with a third-party agent or agency that had no involvement in the initial Fourth Amendment violation, see United States v. Yorgensen, 845 F.3d 908, 914-15 (8th Cir. 2017).

Moreover, Fenton acknowledges (albeit in a footnote) that at least one appellate court has held, in a case where the officer detained the defendant based on a perceived traffic violation, that the defendant's probationary status was a sufficient intervening circumstance to trigger application of the attenuation doctrine. See People v. Durant, 205 Cal. App. 4th 57, 64-66 (2012). And though a separate California appellate court took a different approach in a case where the officer "purposefully" pulled over a car—without suspicion of any wrongdoing, merely hoping that the defendant would be in the car, see People v. Bates, 222 Cal. App. 4th 60, 70-71 (2013), that case is no more persuasive than Durant. Rather, under the specific facts of this case, including the officer's mistaken perception of a traffic violation, the court's analysis in Durant is far more relevant.

Finally, Fenton notes that "the probationary search at issue here was conducted at the discretion of a third person, the probation officer." (Respondent's brief, p.6.) This is correct and, as shown above, it is a factor that significantly favors attenuation. See Yorgensen, 845 F.3d at 914-15. The probation officer had the discretion to demand

access to Fenton's vehicle and to search that vehicle at any time. (R., pp.98-99.) The probation officer did not have to wait until Fenton was detained or in custody to exercise that discretion. That Fenton had been (at least arguably) unlawfully detained was incidental to the probation officer's decision to search Fenton's vehicle. Because the probation officer—a third-party with no connection to any unlawful police conduct—chose to search Fenton's vehicle, and that search was based on Fenton's consent under the terms of his probation and not on Officer Stormes' traffic investigation, there was no exploitation of the initial detention.

The balance of the relevant factors strongly favors attenuation. Officer Stormes' mistaken belief that Fenton's registration was invalid, even if not reasonable, was also not flagrant. And no evidence was discovered until there had been several intervening circumstances, including voluntary actions by Fenton in informing the officer of his probationary status and his later flight, and decisions by the third-party probation officer who had no involvement in the initial detention. The probation search in this case was valid because the probation officer did not exploit any primary illegality. That probation search resulted in the discovery of the evidence Fenton sought to suppress. Because the evidence was acquired during the valid probation search, the district court erred when it granted Fenton's suppression motion.

CONCLUSION

The state respectfully requests that this Court reverse the district court's erroneous order granting Fenton's suppression motion and that it remand this case for further proceedings.

DATED this 31st day of May, 2017.

/s/ Russell J. Spencer
RUSSELL J. SPENCER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 31st day of May, 2017, served a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT by emailing an electronic copy to:

REED P. ANDERSON
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/s/ Russell J. Spencer
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RJS/dd