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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 46194**
Plaintiff-Appellant,	)	
	)	**Canyon County Case No.**
v.	)	**CR14-17-21410**
	)	
MONICA F. WOLFE,	)	
	)	
Defendant-Respondent.	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

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District Judge

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

ARGUMENT

The District Court Erred When It Applied The Exclusionary Rule Where The Cell Phone In Question Was Searched Pursuant To A Valid Search Warrant

A. Introduction

The district court erred by suppressing evidence found on Wolfe's cell phone because, even assuming the initial seizure of the phone was improper, "the evidence obtained from the cell phone was the product of a search conducted under a valid search warrant, untainted by any illegality in the seizure of the phone." (Appellant's brief, p. 4.) Wolfe first argues the state is making this argument for the "first time on appeal," and that it is not preserved. (Respondent's brief, p. 9.) Specifically, she argues that the prosecution did not present the independent source doctrine and "arguably waived this exception at the hearing on its motion for reconsideration." (Respondent's brief, pp. 10-17.) Review of the record shows this argument to be meritless. The record shows that the issue was presented to the district court. More importantly, because seizure of the phone was not a but-for cause of the discovery of the evidence, it was Wolfe who failed to carry her burden before the trial court. Wolfe next argues the district court did not err on the merits because the state failed to demonstrate that the warrant was obtained independently of the seizure of the cell phone. (Respondent's brief, pp. 17-24.) However, it was Wolfe who bore the burden of showing that the seizure of the phone was a but-for cause of the discovery of the evidence, and because the seizure played no role in securing the search warrant Wolfe failed in that burden.

B. Whether Suppression Was The Proper Remedy For The Presumably Invalid Seizure Of The Cell Phone Was Preserved For Appellate Review

Wolfe moved to suppress the evidence found on her cell phone, contending officers seized it without a warrant, without consent, not incident to arrest, and without exigent circumstances. (R., p. 65.) The prosecution responded, arguing that the seizure did not violate Wolfe's search and seizure rights. (R., pp. 74-78.) The district court, however, determined that the warrantless seizure of the cell phone was not constitutionally justified. (R., pp. 117-20.) The state moved for reconsideration. (R., pp. 136-43.) In reconsideration the state argued that suppression of evidence found pursuant to execution of the search warrant for the phone was appropriate only if the warrant lacked probable cause once any illegally obtained evidence was excluded. (R., pp. 140-141 (citing State v. Russo, 157 Idaho 299, 306, 336 P.3d 232, 239 (2014).)

On appeal, the state contends that, even assuming the unconstitutionality of the initial seizure of the cell phone, suppression was erroneously granted because the proper remedy for an illegal seizure of the phone was to exclude any evidence obtained from the seizure from the warrant application and determine if the warrant was still based on probable cause. (Appellant's brief, p. 6 (citing Russo, 157 Idaho at 306, 336 P.3d at 239).) Where a party objects and the court's order is contrary to the objection, the merits of the objection are reviewable on appeal. State v. Miller, 157 Idaho 838, 841-42, 340 P.3d 1154, 1157-58 (Ct. App. 2014). Because the state objected before the district court to suppression where the search warrant was untainted by the seizure, using the same argument and even the same authority as the state relies upon on appeal, this issue is preserved for appellate review.

On appeal Wolfe candidly acknowledges the state's reliance on Russo before the district court, and acknowledges that Russo is "an independent source doctrine case." (Respondent's brief, p. 5.) In her argument that the independent source doctrine was not an issue raised to the district court Wolfe relies on an exchange at the hearing on reconsideration on whether the court was to apply the independent source or the attenuation doctrines. (Respondent's brief, pp. 13-14 (citing Tr., p. 111, L. 25 – p. 112, L. 10).) In that exchange the prosecutor did state that he was trying to "fit [Russo] within the realm of attenuation" or the "umbrella of attenuation" but that there was "overlap in the way the case could be interpreted as an independent source." (Tr., p. 112, Ls. 6-10.) This argument did not waive consideration of Russo, nor did it waive the argument, made in the reconsideration brief, that the proper remedy for an improper seizure of the cell phone "'is not to void the warrant. Rather, it is to disregard that information and determine whether there still remains sufficient information to provide probable cause for the issuance of the warrant.'" (R., p. 140 (quoting Russo, 157 Idaho at 307, 336 P.3d at 240).) The prosecutor's ill-advised attempt to shoehorn Russo into the attenuation doctrine did not waive his request that Russo be applied in this case.

Even if the state had not adequately raised the issue below it would be reviewable because the district court necessarily reached and determined the issue of what remedy Wolfe was entitled to. Russo clearly sets forth that the *remedy* for the illegality alleged by Wolfe and found by the court is to exclude any illegally obtained evidence from the search warrant application. Russo, 157 Idaho at 306, 336 P.3d at 239. By granting the remedy of suppression the district court necessarily ruled on the question of what remedy was appropriate for the violation, and ruled erroneously that the remedy was to void the warrant

and suppress the evidence obtained thereby rather than merely excise wrongly obtained evidence from the warrant.

That the proper remedy for any illegal cell phone seizure was to excise any wrongly gained evidence from the warrant application is both required by Russo and consistent with general Fourth Amendment jurisprudence. In a different context the Idaho Court of Appels has held that, although "the state bears the ultimate burden of persuasion to prove that the challenged evidence is untainted," before the government must meet that burden the "defendant bears an initial burden of going forward with evidence to show a factual nexus between the illegality and the state's acquisition of the evidence." State v. Kapelle, 158 Idaho 121, 127, 344 P.3d 901, 907 (Ct. App. 2014). "This requires a prima facie showing that the evidence sought to be suppressed would not have come to light but for the government's unconstitutional conduct." State v. Dahl, 162 Idaho 541, 546, 400 P.3d 629, 634 (Ct. App. 2017). Where evidence is obtained pursuant to a warrant untainted by illegally seized evidence "the threshold 'but for' requirement" of the exclusionary rule is not met. Segura v. United States, 468 U.S. 796, 815 (1984). Because the independent source doctrine goes to but-for causation, it was Wolfe's burden to establish that but for the illegal seizure of the phone the state would not have secured the search warrant.

Wolfe argues that it was the state that bore the burden of showing that she was not entitled to suppression due to an independent source. (Respondent's brief, p. 17.) She is only half right. Her argument fails to recognize that there are two prongs that must be met before it is proper to suppress evidence because of a Fourth Amendment violation. Although the state bears the burden of showing the lack of taint, before the government must meet that burden the defendant must prove that the state would not have acquired the

evidence but for the illegality. Dahl, 162 Idaho at 546, 400 P.3d at 634; Kapelle, 158 Idaho at 127, 344 P.3d at 907. That initial burden was not met in this case.

To support her argument that the state had the burden of proof, Wolfe cites Nix v. Williams, 467 U.S. 431, 444 & n. 5 (1984). (Respondent's brief, p. 17.) In Nix, police illegally obtained statements from the defendant, Williams, regarding where the body of his ten-year-old murder victim was and where he had abandoned articles of her clothing. Nix, 467 U.S. at 435-37. Williams was granted a new trial, where his statements were suppressed as obtained in violation of his right to counsel, but evidence gathered as a result of the statements, including evidence related to the victim's body, was not. Id. at 436-37. In addressing whether the derivative evidence should have been suppressed, the Court noted the independent source doctrine, which "allows admission of evidence that has been discovered by means wholly independent of any constitutional violation." Id. at 443. That doctrine "[did] not apply here," however, because the illegally obtained statements "indeed led police to the child's body." Id. The Court then adopted, and applied, the inevitable discovery doctrine. Id. at 444-46.[1]

Nix has no application in this case. It addressed inevitable discovery and not independent source *because the evidence was discovered as a result of the primary*

[1] In addressing the application of the inevitable discovery doctrine, the Court stated that, "[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means—here the volunteers' search—then the deterrence rationale has so little basis that the evidence should be received." Id. at 444. In a footnote the Court stated that the preponderance of the evidence standard applied at suppression hearings, and rejected an argument that clear and convincing proof should be required, stating that the inevitable discovery doctrine "does not require a departure from the usual burden of proof at suppression hearings." Id. at 444, n.5.

illegality. In other words, it was the very fact that the but-for standard was met that made the independent source doctrine inapplicable. That the state has the burden of showing inevitable discovery because the evidence was in fact obtained because of the illegality is unremarkable. It does not demonstrate that the state has the burden of showing that evidence was not in fact obtained as a result of the illegality. That burden is on the defendant.

This case is indistinguishable, in any meaningful way, from Segura. In that case officers seized the object of the later search, an apartment. Segura, 468 U.S. at 800-01. They later executed a search warrant, whereby they obtained the evidence the defendant sought to suppress. Id. at 801-02. In addressing independent source, the Court stated that "[n]one of the information on which the warrant was secured was derived from or related in any way to the initial entry." Id. at 814. The Court first held that the evidence was not suppressible under the theory the taint was dissipated by execution of the untainted search warrant. Id. at 814-15. However, the Court also found exclusion improper under the but-for standard, holding it was "clear" that the "illegal entry into petitioner's apartment did not contribute in any way to discovery of the evidence seized under the warrant." Id. at 815. The Court expressly rejected the theory that taking control of the evidence was the but-for causation of its discovery pursuant to the warrant. Id. at 815-16.

The exclusionary rule has two components: the but-for component and the attenuation component. The independent source doctrine addresses the first of these components: whether the evidence was discovered as a result of the illegality or rather through an independent source. Wolfe's remedy for the illegal seizure of the phone was to have any evidence gained as a result of that seizure excised from the warrant application.

Wolfe bore the burden of showing that the illegality she claimed resulted in the discovery of the evidence; the state did not have to argue or independently establish the lack of but-for discovery of the evidence. Because it was her burden below, she cannot claim the state failed to preserve its claim that the district court granted the wrong remedy.

C. Wolfe Has Failed To Show That The Evidence Would Not Have Been Obtained But For The Seizure

As Russo makes clear, the remedy Wolfe was entitled to for her claimed Fourth Amendment violation was to excise evidence found pursuant to the seizure of the phone from the warrant application, not to simply void the warrant. 157 Idaho at 306-07, 336 P.3d at 239-40 (where a cell phone was improperly seized and subsequently searched pursuant to a warrant "the proper remedy is not to void the warrant" but is to "disregard that information and determine whether there still remains sufficient information to provide probable cause for the issuance of the warrant"). There is no reasonable dispute on the record that the district court granted an erroneous remedy. (R., pp. 117-19, 168-70.) Moreover, application of the correct remedy shows Wolfe was not entitled to suppression.

First, the district court expressly found that Wolfe was not challenging the validity of the search warrant. (R., p. 118 ("There does not appear to be any challenge to the validity of the warrant to search the phone; rather the challenge is to the legality of the seizure and the delay until the warrant was obtained.").) The natural consequence of this finding by the district court is that Wolfe was not entitled to suppression because she failed to even claim that the state would not have obtained the evidence but for the claimed illegality.

Second, even if this court should address the conceded issue of the validity of the search warrant, the record shows its validity. The district court found: "The parties do not

dispute that Detective Siebel [sic] had probable cause to seize the phone." (R., p. 118.) In other words, Detective Seibel had probable cause to believe the phone contained evidence of a crime before the seizure. That is the same probable cause used to obtain the warrant. (See State's Exhibit 1 (Aug., pp. 9-11).) Applying the correct remedy as stated in Russo shows that probable cause was established independently of the seizure.

Wolfe argues that suppression was appropriate because the evidence did not establish Detective Seibel's subjective intent to obtain a search warrant before, as opposed to after, the seizure of the phone. (Respondent's brief, pp. 17-20.) The standard advocated by Wolfe is wrong, and based on a misreading of Murray v. United States, 487 U.S. 533, 542 (1988).

The Court's opinion in Murray begins by noting that in Segura the Court "held that police officers' illegal entry upon private premises did not require suppression of evidence subsequently discovered at those premises when executing a search warrant obtained on the basis of information wholly unconnected with the initial entry." 487 U.S. at 535. The Court in Murray was "faced with the question whether, again assuming evidence obtained pursuant to an independently obtained search warrant, the portion of such evidence that had been observed in plain view at the time of a prior illegal entry must be suppressed." 487 U.S. at 535. In the present case, as in Segura, Deputy Seibel obtained no evidence as a result of the seizure of the cell phone. Thus Segura, and not Murray, controls in this case.

This conclusion is further supported by the analysis in Murray. Applying the "general sense" of the "concept of 'independent source'" "identifies *all* evidence acquired in a fashion untainted by the illegal evidence-gathering activity." Murray, 487 U.S. at 537-38 (emphasis original). "Thus, where an unlawful entry has given investigators knowledge

of facts *x* and *y*, but fact *z* has been learned by other means, fact *z* can be said to be admissible because derived from an 'independent source.' This is how we used the term in *Segura*." Id. at 538. Applying this rule, "evidence found for the first time during the execution of the valid and untainted search warrant was admissible because it was discovered pursuant to an 'independent source.'" Id. The Court went on to note that in the "specific sense" independent source means that evidence discovered by *both* tainted and untainted means is still admissible. Id. at 538-39.

The "general sense" of Segura applies here. Because Detective Seibel did not open the phone or review its contents, the evidence contained therein was not obtained by tainted means, any more than the evidence found in the unlawfully secured apartment was tainted in Segura. Because the evidence on the phone was acquired *exclusively* through the warrant, and not both as a result of the warrant and a prior illegal search, the general sense of independent source applies and the inquiry ends.

Further analysis of Murray does not undercut this conclusion. In that case officers conducting a marijuana trafficking investigation forced entry into a warehouse where they saw bales of marijuana. Murray, 487 U.S. at 535. They then left, maintained surveillance, and obtained a search warrant. Id. The warrant application did not mention the prior entry or rely on the observations of bales of marijuana. Id. at 535-36. The defendants argued that allowing admission of the evidence found first by illegal means would "remove all deterrence to, and indeed positively encourage, unlawful police searches" because "law enforcement officers will routinely enter without a warrant to make sure that what they expect to be on the premises is in fact there. If it is not, they will have spared themselves the time and trouble of getting a warrant; if it is, they can get the warrant and use the

evidence despite the unlawful entry." Murray, 487 U.S. at 539. The Court concluded that the evidence seized pursuant to a warrant would not be from an independent source unless "the agents would have sought a warrant if they had not earlier entered the warehouse." Id. at 543. The Court's statement that the practice of illegally searching to confirm the presence of suspected evidence and then seeking a warrant only if it is found would not be condoned does not support Wolfe's arguments, and does not establish a requirement that the officers form the intent to obtain a search warrant prior to a seizure of the object to be searched.

Here there was no concern that Deputy Seibel only sought the warrant because she confirmed that the incriminating evidence was in fact on the phone. The fact that she did not look at the contents of the phone disproves that. Wolfe's argument based on Murray is meritless.

Wolfe also argues that evidence of her statements to Detective Seibel should be excluded from the warrant application because they are the fruit of the seizure of the phone, and that without those statements the warrant application does not establish probable cause. (Respondent's brief, pp. 22-24.) This argument lacks merit for several reasons, including but not limited to the following: First, Wolfe cites neither authority nor facts in the record showing that her statements were suppressible. State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) ("When issues on appeal are not supported by propositions of law, authority, or argument, they will not be considered."); State v. Hoisington, 104 Idaho 153, 159, 657 P.2d 17, 23 (1983) (court will not search record). Her argument that the district court should have suppressed her statements is not fairly presented on appeal.

Second, as noted above, the district court specifically found that Wolfe was not challenging the validity of the search warrant. (R., p. 118 ("There does not appear to be any challenge to the validity of the warrant to search the phone; rather the challenge is to the legality of the seizure and the delay until the warrant was obtained.").)

Finally, there is no merit to the claim that the seizure rendered Wolfe's statements involuntary.[2] "In determining whether a statement was involuntary, the inquiry is whether the defendant's will was overborne by police coercion." State v. Hays, 159 Idaho 476, 485-86, 362 P.3d 551, 560-61 (Ct. App. 2015) (citing Arizona v. Fulminante, 499 U.S. 279, 286 (1991)). See also Colorado v. Connelly, 479 U.S. 157, 177 (1986) (police coercion is a necessary prerequisite to finding a statement involuntary). There is nothing in the record suggesting that Wolfe's statements to Detective Seibel were rendered involuntary by the presumably illegal seizure of the cell phone.

The facts of this case are that police learned nothing by the seizure of the phone because they did not search it. Therefore, the state obtained the evidence exclusively through execution of the search warrant. Because the discovery of the evidence was by the independent source of execution of the search warrant, the seizure of the phone was not a but-for causation of the state's acquisition of the evidence. The district court erred by suppressing evidence that was obtained from a source independent of the found illegality.

[2] Although Wolfe does not articulate any theory whereby her statements would have been excluded, the state notes that she was given *Miranda* warnings. (Tr., p. 27, Ls. 2-6.)

CONCLUSION

The state respectfully requests this Court to reverse the district court's order granting suppression in part, and to remand for further proceedings.

DATED this 30th day of January, 2019.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 30th day of January, 2019, served a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT to the attorney listed below by means of iCourt File and Serve:

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