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STATE OF WASHINGTON
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SUPREME COURT NO. 102134-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

MALCOLM MCGEE,

Respondent.

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

The Honorable LeRoy McCullough, Judge

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUE PRESENTED IN SUPPLEMENTAL BRIEF

Police unlawfully seized Malcolm McGee, questioned him, searched him, collected his phone number and other information, and entered into a confidential informant agreement with him. In a later murder investigation, the State relied on that unconstitutionally gathered information as "motive" evidence and used it to connect McGee to the crime and obtain multiple warrants for his phone records, cell site location information, and his arrest, all leading to McGee's conviction for second degree murder. Where the murder was neither the cause of the unlawful discovery of evidence, nor unforeseeable under the circumstances, did the trial court err in concluding that Washington's narrow attenuation doctrine permitted the State to rely on the unlawfully obtained evidence in support of its prosecution of McGee for murder?

B. SUPPLEMENTAL STATEMENT OF THE CASE[1]

On June 3, 2017, detective Alexander Hawley saw someone later identified as Keith Ayson, pacing on a sidewalk outside a library while looking at his cellphone. 1RP[2] 490-92; 4RP 2308-09; CP 365. Hawley watched as a silver Chrysler Sebring pulled up and Ayson got inside. 4RP 2309-10, 2313, 2335-36. Hawley could not see the driver. 1RP 506-07; 4RP 2313, 2316. The car drove one block, and two minutes later, Ayson got out of the car and put something into his pocket. 1RP 492-94, 506-07, 513; 4RP 2313-18, 2328-29; CP 365.

Hawley followed the car to the Whisperwood apartments. 1RP 495, 508; 4RP 2317-19. Hawley contacted the driver who identified himself as McGee. 1RP 495-97, 508-10; 4RP 2319-21. McGee provided Hawley with his phone number and agreed

[1] All relevant facts are set forth in McGee's Answer to the State's Petition for Review (Answer), at pages 2-21, and in the Brief of Appellant (BOA), at pages 5-48, and are incorporated herein.

[2] The index to the citations to the record is found in the BOA at 6, n.3.

to serve as a confidential informant and provide drug information to police to work off his possession of a controlled substance (VUCSA) charge from that day. 1RP 502; 4RP 2320-22, 2336-37, 2340; CP 365, 546 (FF h). McGee acknowledged knowing Ayson, but the confidential agreement specified no persons that McGee was to provide information about. 4RP 2320-21, 2388; Ex. 116. Hawley did not hear from McGee again. 4RP 2322-23, 2340.

On July 11, 2017, Ayson's decomposed body and his cellphone were discovered in a ravine. 4RP 1235, 1279-80, 1318, 1430-31, 1442, 1460-61, 1480, 1799, 1815, 1960-61, 2607-08, 2264-68, 2273-77, 2283, 2303. Police believed he had been shot on June 4, 2017. 4RP 1279-80, 1417, 1425-26, 1442-46, 1628-30, 1829-30, 2053, 2114-16, 2127, 2606-07.

When police searched Ayson's name in a police database, Hawley's report from June 3 appeared. CP 365-66. The report included McGee's name, phone number, and his association with the Chrysler he was driving on June 3. A

search for McGee’s number in the database found another report showing McGee was investigated on March 13, 2017. A later search of Facebook for McGee’s phone number led to McGee’s Facebook profile. CP 365-66. Officers investigating Ayson’s death also spoke to Hawley about the June 3 stop. 4RP 1966; CP 365.

The database search also identified Desiree Burchette as connected to Ayson. Burchette identified McGee as Ayson’s drug dealer during police interviews. 1RP 330-36, 344, 355, 372-76, 380-82, 385, 444; CP 367. She had observed McGee with Ayson several times and identified him as the person Ayson had previously gotten into the car with. 4RP 1656-59, 1964, 1987, 2009-10, 2219, 2500-05, 2514.

On July 13, police obtained a warrant for service provider records for both the phone found with Ayson’s body, and relying on information from the June 3 stop, the phone number Hawley obtained from McGee. CP 374-78. On July 26, police received records with call data for Ayson’s and McGee’s

phones. CP 382-86. These records indicated the last two outgoing calls from Ayson's phone had been placed to McGee's phone on June 4. The records included cell site location information suggesting both phones were in the same area at 3:43 p.m., the vicinity of Hawley's June 3 observation of McGee and Ayson. CP 382-83; 4RP 2424-25, 2428, 2431. The cell site location information showed that at 4:07 p.m., McGee's phone connected to a cell tower approximately one quarter mile from the place where Ayson's body was found. CP 383. Between 4:09 p.m. and 4:11 p.m., McGee's phone received several calls connecting through the same cell tower. His phone did not connect to that tower any other time that day. CP 383; 4RP 2428-32, 2437-39, 2443.

Relying on information obtained during the June 3 stop and the July 13 warrant, police obtained three subsequent search warrants: for service provider records of phone numbers that called McGee's phone around June 4; for searching the apartment of McGee's girlfriend, the silver Chrysler Sebring,

McGee's cell phone, and another vehicle associated with McGee; and for additional service provider records for McGee's phone, a cell phone belonging to McGee's girlfriend, and to search a third vehicle associated with McGee. CP 380-92, 394-407, 411-32.

On August 1, police obtained a warrant to arrest McGee based on the VUCSA charge stemming from the June 3 stop. McGee was not told he was the subject of a murder investigation. 1RP 532, 537; CP 399, 660-66. After the arrest, and while police were transporting McGee, McGee stated he had not called Hawley back because the person he was going to provide information on had been murdered. 1RP 532; 4RP 2508. While being interviewed, McGee acknowledged his cell phone number, the June 3 interaction with Ayson, and speaking by phone with Ayson the next day. He denied meeting Ayson on June 4. 4RP 1864-67, 2509, 2523, 2562; CP 432; Ex. 146.

The trial court ruled that Hawley did not have reasonable articulable suspicion for the June 3 stop. Reference to the drugs

Hawley found when searching McGee on June 3 were suppressed and the VUCSA charge dismissed. CP 547 (FF u); 1RP 553-54, 584-85.

McGee also moved to suppress evidence from the warrants. CP 336-432; 3RP 38-40, 70, 105-10; 4RP 738-47, 751-52, 755-59, 779-82. The trial court denied this motion, concluding the causal chain between the June 3 stop and the warrants was severed by Ayson's murder that occurred after the stop of June 3rd and the ensuing investigation. CP 545-49; 4RP 957-69.

McGee appealed his conviction for second degree murder. CP 448, 580. The Court of Appeals concluded the State failed to show the homicide attenuated the taint of Hawley's unconstitutional conduct. State v. McGee, 26 Wn. App. 2d 849, 860-62, 530 P.3d 211 (2023). As the Court of Appeals reasoned, the homicide was not an intervening act amounting to a superseding cause, because it was not what caused any of the State's June 3 evidentiary discoveries. Rather, the homicide

only led police to look again at the evidence already unlawfully obtained from McGee. Id. at 860.

The Court of Appeals recognized that if Hawley's June 3 discoveries from McGee could not be used under the attenuation doctrine, then each subsequent warrant failed. Because each subsequent warrant including the August 1 arrest warrant depended on information gathered from the June 3 seizure, the Court of Appeals suppressed all information learned from these warrants, including McGee's custodial statements on August 1. Id. at 862. Because the State failed to show there was "untainted evidence admitted at trial" that was "so overwhelming that it necessarily leads to a finding of guilt," the Court of Appeals reversed McGee's conviction.[3] Id.

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[3] The State has never disputed that evidence obtained from the June 3 seizure was vital to its case and has not sought review of the Court of Appeals conclusion that McGee was prejudiced by its admission. See State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (The State has the burden to prove beyond a reasonable doubt that constitutional error is harmless). McGee therefore does not address prejudice in this brief.

The State sought review of the Court of Appeals decision, suggesting the Court of Appeals opinion was an unprecedented novel application of State v. Mayfield[4] and Washington's attenuation doctrine. See Petition for Review. This Court granted review on November 13, 2023.

C. SUPPLEMENTAL ARGUMENT[5]

The fruits of the search warrants are inadmissible under Washington's narrow attenuation doctrine because the State cannot demonstrate a genuine break in the causal chain between McGee's unlawful seizure and the murder evidence ultimately obtained.

Article I, section 7 of the Washington Constitution protects individuals' private affairs against government intrusion: "[n]o person shall be disturbed in his private affairs ... without authority of law." Washington courts apply an exclusionary rule for evidence obtained in violation of this provision. State v. Mayfield, 192 Wn.2d 871, 888-89, 434 P.3d 58 (2019). The

[4] State v. Mayfield, 192 Wn.2d 871, 434 P.3d 58 (2019).

[5] McGee incorporates the arguments in his BOA at 49-76, Reply Brief of Appellant at 1-9, and Answer at 21-28.

exclusionary rule applies when there is a proximate causal connection between the misconduct and the discovery of evidence. Id. at 889, 891. Any use of derivative evidence that is the fruit of the illegality is prohibited. Id.; State v. Samalia, 186 Wn.2d 262, 279-80, 375 P.3d 1082 (2016); State v. Hinton, 179 Wn.2d 862, 869 n.2, 319 P.3d 9 (2014).

The attenuation doctrine is a recognized exception to exclusion and applies, when the connection between official misconduct and the discovery of evidence may "'become so attenuated'" as to dissipate the taint of the misconduct and allow the evidence to be used despite the misconduct playing a role in its discovery. See Wong Sun v. United States, 371 U.S. 471, 491, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963) (quoting Nardone v. United States, 308 U.S. 338, 341, 60 S. Ct. 266, 84 L. Ed. 307 (1939)).

Article 1, section 7 is more protective of privacy than the Fourth Amendment of the United State Constitution. Mayfield, 192 Wn.2d at 878. Washington follows a "nearly categorical" rule of excluding from trial evidence obtained in violation of

article 1, section 7, with "no exceptions that rely on speculation, the likelihood of deterrence, or the reasonableness of official misconduct." Id. at 888. Thus, Washington law permits no exception to the exclusionary rule if that exception would allow the state to benefit from an illegal search. Id. at 891.

The "narrow, Washington-specific attenuation doctrine" applies "if, and only if, an unforeseeable intervening act genuinely severs the causal connection between official misconduct and the discovery of evidence." Id. at 897-98. This is a "highly-fact-specific inquiry that must account for the totality of the circumstances" in keeping with the "narrowly and carefully applied" article I, section 7, attenuation doctrine. Id. at 898-99. The State bears the burden of proving the attenuation exception applies. Id. at 888. This burden is not met by "merely showing that there are one or more additional proximate causes of the discovery of the evidence." Id.

To determine whether an intervening act is sufficiently attenuating, courts look to the doctrine of superseding cause. Id.

at 897. Under this standard, when "'an independent, intervening act of a third person is one which was not reasonably foreseeable then there is a break in the causal connection between the ... negligence and the ... injury.'" Id. at 897 (quoting Schooley v. Pinch's Deli Mkt., Inc., 134 Wn.2d 468, 482, 951 P.2d 749 (1998)).

Here, because the murder was neither the cause of the unlawful discovery of evidence, nor unforeseeable under the circumstances of this case, reliance on that act to justify subsequent use of the unlawful June 3 evidence is inconsistent with both our state exclusionary rule and the "carefully and narrowly applied" attenuation doctrine. Mayfield, 192 Wn.2d at 882, 891, 894, 897-98.

a. The murder was not the proximate cause of the unlawfully discovered evidence, and thus did not genuinely sever the causal connection between the initial misconduct.

"Evidence is inadmissible as 'fruit of the poisonous tree' where it has been gathered by exploitation of the original

illegality." State v. Aydelotte, 35 Wn. App. 125, 131, 665 P.2d 443 (1983). The evidence illegally obtained from McGee on June 3 formed the probable cause for issuance of the warrants which then discovered evidence related to the murder.

The July 13 warrant affidavit requested searches of both Ayson and McGee's phone numbers for evidence related to the murder. CP 361. As multiple paragraphs within the warrant affidavit detail, detective Michael Glasgow's knowledge of McGee's identity, phone number, and Chrysler license plate came directly from Hawley and his illegal June 3 seizure. CP 365-66. From that information, Glasgow then searched McGee's phone number in the police database and discovered its connection to McGee via Facebook and an earlier March 2017 investigation. CP 365-66. The affidavit also connected McGee to the silver Chrysler based on matching the license plate noted by Hawley during his June 3 stop. CP 366.

Because Glasgow's affidavit for probable cause is based on information illegally obtained by Hawley, there is no break

in the causal chain between the unconstitutional law enforcement conduct and the murder evidence ultimately obtained. As the Court of Appeals properly recognized, the murder "led the State to look again at its June 3, 2017 discoveries, but it did not cause those discoveries to occur." McGee, 26 Wn. App. 2d at 860. In short, evidence related to the murder was obtained "'by exploitation of that illegality" rather than "by means sufficiently distinguishable to be purged of the primary taint.'" Mayfield, 192 Wn.2d at 893 (quoting Wong Sun, 371 U.S. at 488).

Mayfield's disavowal of Utah v. Strieff, 579 U.S. 232, 126 S. Ct. 2056, 195 L. Ed. 2d 400 (2016), is instructive here. In Strieff, an officer investigating potential drug dealing at a specific home observed Strieff exiting the home, unlawfully seized him, requested his identification, and discovered an active arrest warrant. The officer then arrested Strieff on the warrant and discovered drugs during a search incident to arrest. 579 U.S. at 235-36.

The U.S. Supreme Court reasoned, "the existence of a valid warrant favors finding that the connection between unlawful conduct and the discovery of evidence is 'sufficiently attenuated to dissipate the taint.'" Id. at 240 (quoting Segura v. United States, 468 U.S. 796, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984)). Mayfield, however, explicitly denounced this reasoning, explaining that application of the federal attenuation doctrine in Strieff "clearly conflicts with our state exclusionary rule by admitting illegally seized evidence and allowing the State to benefit from the unconstitutional actions of its officers." 192 Wn.2d at 894.

State v. Morrell, 16 Wn. App. 2d 695, 698-99, 482 P.3d 295 (2021), further illustrates what a proper application of our state's narrow attenuation doctrine encompasses. There, an officer acting on an uncorroborated tip, stopped Morrell's car. 16 Wn. App. 2d 695, 698-99, 482 P.3d 295 (2021). The officer spotted methamphetamine in the car. Methamphetamine, heroin, and two cellphones were seized pursuant to a

subsequent search warrant. Id. A search of the cellphones showed Facebook and text messages implicating Morrell in drug transactions. Id. at 699.

After Morrell's August 9 stop, an arrest warrant was issued. Id. at 699. On September 28, the same officer stopped Morrell on the outstanding warrant while he was driving a different car. Again, the officer saw what he believed was methamphetamine inside the car and a K9 subsequently confirmed this. Another search warrant was obtained, and methamphetamine, heroin, scales, packaging, and cash were seized. Morrell was arrested and charged for both the August and September incidents. Id. at 699-700.

The Court of Appeals suppressed all evidence from both stops, concluding all the evidence was proximately linked to the initial illegal August 9 stop. Id. at 704-05. As the court explained, the second stop and search had a direct causal connection to the warrant issued from the first stop. "No separate, unforeseeable act, severed the causal connection

between Mr. Morrell's initial unlawful detention and the two vehicle searches." Id. at 704-05.

Like the situation in Strieff and Morrell, here the chain of causation between the unlawful seizure and murder investigation is unbroken. Absent the information obtained from the unlawful June 3 seizure, police could not have connected McGee to Ayson in that moment. McGee's arrest and prosecution was the direct result of the evidence gathered from the unlawful seizure. Because unconstitutionally obtained information provided the probable cause for the warrants, this Court must suppress evidence seized pursuant to them. State v. Young, 123 Wn.2d 173, 196, 867 P.2d 593 (1994). To hold otherwise would allow the State to "benefit from its officers' unconstitutional actions." Mayfield, 192 Wn.2d at 898.

b. Reliance on the intervening murder as a superseding cause under the facts of this case is inconsistent with Washington's "carefully and narrowly applied" attenuation doctrine.

A subsequent act is not a superseding cause based merely on its being criminal. Anderson v. Soap Lake School District, 191 Wn.2d 343, 368, 423 P.3d 197 (2018) (citing Johnson v. State, 77 Wn. App. 934, 942, 894 P.2d 1366 (1995)). Rather, when an act of misconduct is followed by a subsequent criminal act, it is a superseding cause only if it is not foreseeable as that term is used in tort law. Id. at 897-98.

An act is "unforeseeable" only if it is "so highly extraordinary or improbable as to be wholly beyond the range of expectability." Anderson, 191 Wn.2d at 368. Certain factors may play a role in determining reasonable foreseeability, including, "whether (1) the intervening act created a different type of harm than otherwise would have resulted from the actor's negligence; (2) the intervening act was extraordinary or resulted in extraordinary consequences; (3) the intervening act

operated independently of any situation created by the actor's negligence." Campbell v. ITE Imperial Corp., 107 Wn.2d 807, 812-13, 733 P.2d 969 (1987). Analyzing these factors leads to the conclusion that the murder cannot act as a superseding cause under the facts of this case.

Under the first two factors, Ayson's murder fell squarely within the scope of risk created by the police's unlawful seizure of McGee. "[E]ven criminal conduct of a third party does not constitute a superseding cause '[i]f the likelihood that a third party may act in a particular manner is … one of the hazards which makes the actor negligent.'" Campbell, 107 Wn.2d at 815 (quoting §449 of Restatement (Second) of Torts)). The pertinent inquiry is "whether the actual harm fell within a general field of danger which should have been anticipated." McLeod v. Grant County School District No. 128, 42 Wn.2d 316, 321, 255 P.2d 360 (1953). Reprisals against perceived police informants is a potential hazard known to police. See e.g., State v. Wilke, 55 Wn. App. 470, 479, 778 P.2d 1054

(recognizing fear of reprisal is a valid reason to protect an informant's identity), review denied, 113 Wn.2d 1032, 784 P.2d 531 (1989); Whitford v. Boglino, 63 F.3d 527, 535 (7th Cir. 1995) (revealing names of informants could cause them injury or death in reprisal). That Ayson may have been viewed as an informant and harmed as a result, fell within the general field of danger which should have been anticipated. It was not unforeseeable.

Additionally, the murder did not operate independently of the situation created by the unlawful seizure. Rather, the alleged actions were induced by the unlawful June 3 seizure. McGee was facing criminal charges and forced to work as a confidential information to avoid prosecution. The prosecution's entire "theory of the case is that the defendant killed the victim because he believed the victim was responsible for his arrest and may also be working with police." CP 617; 1RP 891-93. As the prosecution recognized, the unlawful seizure created the motive for the murder.

That the murder was the result of McGee's alleged willful act does not change the analysis. While the murder creates a separate independent basis to investigate McGee, under Mayfield it does not create an exception for using the intervening illegality of McGee's alleged crime to justify invasion of his privacy and exploitation of the original unlawful seizure. Pre-Mayfield cases which carved a narrow exception for admitting evidence of assaults allegedly committed in response to an illegal seizure are distinguishable.

In State v. Mierz, this Court held that the defendant's assault against a police officer after an initial illegal entry by officers was outside the scope of the exclusionary rule, because it was sufficiently distinguishable from any initial police illegality to purge the taint. 127 Wn.2d 460, 473-74, 901 P.2d 286 (1995). Similarly, in State v. Rousseau, 40 Wn.2d 92, 95-96, 241 P.2d 447 (1952), overruled on other grounds by State v. Valentine, 132 Wn.2d 1, 935 P.2d 1294 (1997), after an initial illegal search and detention, a detainee pushed an officer into

the path of an oncoming car, giving the officer a new and legal justification to arrest the detainee and lawfully perform a search incident to arrest. Finally, in Aydelotte, after an illegal entry, the defendant brandished a weapon towards approaching officers, and the court allowed evidence of these assaults. 35 Wn. App. at 127.

Each of these cases were concerned with officer safety. Specifically, Mierz held that excluding *evidence of the assault* would allow the defendant to respond with unlimited force and be effectively immunized from criminal responsibility. 127 Wn.2d at 474 (citing Aydelotte, 35 Wn. App. at 132). But Mierz implicitly limits the exception to admission of evidence of the assault: "Even if the entry or arrest by law enforcement officers was unlawful, the exclusionary rule does not foreclose admission of evidence of the assaults where the officers are identified as such, are performing official duties in good faith, and there was no exploitation of any constitutional violation." Id. at 475.

It stands to reason that crimes against police officers following a Fourth Amendment or article I, section 7, violation must be admitted in a prosecution for those crimes. The policy for admitting evidence of an assault allegedly committed in the immediate aftermath of an illegal seizure, however, has no application to evidence of other crimes discovered because of exploitation of the original illegality. To hold otherwise is a threat to individual privacy interests that potentially encourages unlawful police action and disrespect for the court. See State v. Bonds, 98 Wn.2d 1, 12, 653 P.2d 1024 (1982). As articulated nearly 40 years ago, "[t]he purpose of the exclusionary rule, promoting respect for the Fourth Amendment, would be eroded if law enforcement personnel could cure their illegal conduct by properly handling other aspects of a case." State v. Jensen, 44 Wn. App. 485, 495, 723 P.2d 443 (McInturff, J., dissenting), review denied, 107 Wn.2d 1012 (1986).

As in Mayfield, the evidence utilized at trial was not the fruit of any superseding cause but rather fruit of the poisonous

tree, the initial illegal seizure. See 192 Wn.2d at 898. The remedy is suppression of the evidence and reversal of McGee's conviction. See State v. Larson, 93 Wn.2d 638, 645, 611 P.2d 771 (1980).

c. This Court should reject any argument that this case creates additional hurdles for police investigations.

The State may claim, as it does in its petition, that the circumstances of this case will create additional barriers to police investigations. Petition at 21-22. This Court should reject any such claim. To use an illegal search as a springboard for correcting defects in a subsequent investigation and establishing the existence of incriminating evidence is to benefit from the illegality and is inconsistent with Washington's "carefully and narrowly applied" attenuation doctrine.

McGee's case involves a rarely occurring factual context. See Petition at 20. Police database information is only at risk of exclusion when, as here, it was found to have been obtained illegally in the first instance, and then also, exclusively relied

upon in a subsequent investigation involving the very same person from which it was illegally obtained.

The Court of Appeals properly applied the "narrowly and carefully applied" article I, section 7, attenuation doctrine established by this Court in Mayfield. The Court of Appeals decision should be affirmed.

D. CONCLUSION

This Court should affirm the Court of Appeals, reverse McGee's conviction, and remand for a new trial.

I certify that this document contains 4,025 words, excluding those portions exempt under RAP 18.17.

DATED this 5th day of January, 2024

Respectfully submitted,
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