

IN THE SUPREME COURT

STATE OF GEORGIA

MARK JOSEPH TATUM,
APPELLANT,

-vs-

STATE OF GEORGIA,
APPELLEE.

* DOCKET NO. S23G0955
*
* ON APPEAL FROM THE
* SUPERIOR COURT OF
* MADISON COUNTY
*
*

BRIEF ON BEHALF OF THE APPELLEE
BY THE DISTRICT ATTORNEY

PART I

STATEMENT OF THE CASE

On October 15, 2018 the Appellant was indicted by the Madison County Grand Jury for the offenses of 1. Peeping Tom; 2. Invasion of Privacy; 3. Tampering With Evidence (R-16). The Appellant entered a plea of not guilty at arraignment (R-24). On January 3, 2019 the Appellant filed a Motion to Suppress. (R-27). On October 9, 2019 a hearing was held on the Appellant's Motion to Suppress. On October 17, 2019 the Trial Court issued an Order denying the Appellant's Motion to Suppress. On May 19, 2021 the parties agreed on a stipulated bench trial. The stipulated bench trial commenced on October 21, 2021 and the Court found the Appellant guilty of the offenses of Peeping Tom and Invasion of privacy and not guilty of the offense of Tampering with Evidence

(R-64). A timely Notice of Appeal was filed on October 21, 2021. (R-1).

This appeal follows.

STATEMENT OF THE FACTS:

On July 15, 2018 at 10:34 p.m., the Madison County E911 center received a call for service from Megan and Mary Wickwire regarding an unknown individual taking photographs through Megan Wickwire's bedroom window with a cell phone (SOP-1). The Wickwires reside at 1031 Virginia Lane, Hull, Madison County, Georgia. The cell phone used to take the photographs was described as having a camera in the middle of the top of the back of the phone. Id. At that time, Deputy Will Townsend, with the Madison County Sheriff's Office, was on-duty sitting in the Ingles Parking lot in Hull. Id. Dep. Townsend was dispatched to Virginia Lane to meet with the Wickwires. Id. Within minutes of the initial 911 call, Deputy Townsend encountered the Defendant walking off of Virginia Lane on to Glenn Carrie Road. Id. Deputy Townsend testified that he regularly patrols this portion of Madison County, and that is was very unusual for there to be foot traffic in this area at this time of night. Deputy Townsend stopped his vehicle and began to speak to Defendant. Id. Defendant told Deputy Townsend that he was out walking around. Id. Deputy Townsend told the Defendant about the call that he had received, and asked the Defendant if he had a cell phone. Id. Defendant

responded that he did not have a cell phone. Deputy Townsend observed the outline of an object that appeared to be a cell phone in Defendant's front pants pocket and asked Defendant about the object. Id. Defendant then pulled a cell phone out of his pants pocket and told Deputy Townsend that he had forgotten that he had his phone with him. (SOP-2) Deputy Townsend noticed that the Defendant's hand was shaking and he appeared to be nervous. Id. Deputy Townsend also noticed that Defendant's phone had a camera lens in the center of the back of the phone. Id. Deputy Townsend asked the Defendant to show him the last picture he had taken. Id. After some back-and-forth the Defendant told Deputy Townsend that he would pull up the photo gallery and show the deputy. Id. As the Defendant was pulling up the gallery, he continuously tilted the phone away from the deputy. Id. Deputy Townsend believed that the Defendant was trying to delete a video and observed a thumbnail photograph of a girl standing in a room. Id. Deputy Townsend physically seized the cell phone from the Defendant's hand. Id. Deputy Townsend then watched the video which was displayed on the Defendant's cell phone. Id. The video depicted a white female standing in a bedroom, with her breasts exposed, folding laundry. Id. Deputy Townsend then locked the screen and did not further search the cell phone. Id. Investigator Scott Rice obtained and executed a search warrant for Defendant's phone. Id. On the cell phone were photographs and a video of Megan Wickwire. The video depicts

Ms. Wickwire folding laundry while not wearing a shirt, leaving her breasts exposed.

Further facts will be added as necessary to address the enumerations of error.

PART II

ARGUMENT AND CITATION OF AUTHORITY

A. THE INDEPENDENT SOURCE DOCTRINE DOES NOT REQUIRE CONSIDERATION OF WHETHER THE DECISION TO SEEK THE SEARCH WARRANT WAS PROMPTED BY A PRIOR, WARRANTLESS SEARCH OF THAT CELL PHONE (Enumeration of Error No. 1)

The question before this Court is whether the Independent Source Doctrine allows for the admission of cell-phone evidence without first considering whether the law enforcement would have sought to obtain a search warrant without the prior unlawful search of the Appellant's cell phone. This is admittedly a close call, as many of the cases listed by the Appellant require a two-part test, which is derived from language from the Supreme Court of the United States decision in Murray v. State, 487 U.S. 533 (1988). However, this case is distinguishable from the cases cited by the Appellant, because the lawful information contained in the search warrant was obtained prior to the illegal viewing of the Appellant's cell phone, making it virtually impossible for the illegal taint of Deputy Townsend's viewing of the Appellant's phone to have influenced the independent lawful

information contain in Investigator Rice's search warrant affidavit.

The Supreme Court of the United States addressed the Independent Source Doctrine in Murray v. State, 487 U.S. 533 (1988). The Court in Murray held:

"[T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred. . . . When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation."

Id. at 537.

The Court in Murray further held:

The dispute here is over the scope of this doctrine. Petitioners contend that it applies only to evidence obtained for the first time during an independent lawful search. The Government argues that it applies also to evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from activities untainted by the initial illegality. We think the Government's view has better support in both precedent and policy.

Id. at 537.

The Court in Murray further held

The independent source doctrine does not rest upon such metaphysical analysis, but upon the policy that, while the government should not profit from its illegal activity, neither should it be placed in a worse position than it would otherwise have occupied. So long as a later, lawful seizure is genuinely independent of an earlier, tainted one (which may well be difficult to establish where the seized goods are

kept in the police's possession) there is no reason why the independent source doctrine should not apply.

The ultimate question, therefore, is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here.

Id. at 542.

The Court in Murray further held:

Although these statements can be read to provide emphatic support for the Government's position, it is the function of the District Court rather than the Court of Appeals to determine the facts, and we do not think the Court of Appeals' conclusions are supported by adequate findings. The District Court found that the agents did not reveal their warrantless entry to the Magistrate, App. to Pet. for Cert. 43a, and that they did not include in their application for a warrant any recitation of their observations in the warehouse. It did not, however, explicitly find that the agents would have sought a warrant if they had not earlier entered the warehouse. The Government concedes this in its brief. Brief for United States 17, n. 5. To be sure, the District Court did determine that the purpose of the warrantless entry was in part "to guard against the destruction of possibly critical evidence," App. to Pet. for Cert. 42a, and one could perhaps infer from this that the agents who made the entry already planned to obtain that "critical evidence" through a warrant-authorized search. That inference is not, however, clear enough to justify the conclusion that the District Court's findings amounted to a determination of independent source.

Id. at 543.

Subsequent cases from Eleventh Circuit of the United States Court of Appeal have held that Murray stands for the proposition that the Independent Source Doctrine requires a two part test. First, the information must be from a

wholly independent source and second, that the officer would have sought the search warrant without any information from the unlawful search. *see*: United States v. Noriega, 676 F.3d 1252 (2012); United States v. Barron-Soto, 820 F.3d 409 (2016).

This Court has addressed the Independent Source Doctrine in State v. Lejune, 277 Ga. 749 (2004), Teal v. State, 282 Ga. 319 (2007), and Wilder v. State, 290 Ga. 13 (2011). In Lejune, this Court stated “suppressed evidence may still be admissible under the independent source rule if the police can show that they obtained it by a means untainted by and unrelated to the initial illegality.” Lejune at 754. In Teal, this Court stated “The independent source doctrine allows admission of evidence that was discovered by means wholly independent of any constitutional violation.” Teal at 323. In Wilder, this Court held “The independent source doctrine allows the prosecution to use evidence only if it was, in fact, obtained by fully lawful means. This doctrine typically operates when evidence discovered as the result of an initial unlawful search is later discovered in a second search conducted by lawful means using information gained independently of the initial search.” Wilder at 16. Further, this Court cites the Unites States Supreme Court’s decision in Murray in Lejune, Teal, and Wilder, and yet does not mention a two-part test or a requirement of an inquiry into the motivations of the officer seeking the search warrant.

When addressing the Independent Source Doctrine, this Court has never utilized a two-part test. This Court has instead focused on language such as “obtained by fully lawful means” and “wholly independent of any constitution violation” to describe the information obtained from the independent source. This language is consistent with the Supreme Court of the United States holding in *Murray*, which holds that the evidence must be “genuinely independent” from any illegality.


This case is distinguishable from cases in which law enforcement discovers evidence through illegal means, and only later comes to the same evidence through lawful means. In those cases, it is extremely important to ensure the lawful discovery of the evidence be wholly separate from the illegal discovery of the evidence. In this case, the lawful information contained in the search warrant was obtained prior to the unlawful search of the Appellant’s cell phone by Deputy Townsend. It is for this reason that we know the independent evidence was wholly independent from Deputy Townsend’s illegal viewing of the Appellant’s cell phone. This tells us with certainty that the lawful information that Investigator Rice would later set forth in the affidavit for the search warrant could not have been tainted by Deputy Townsend’s viewing of the phone’s contents, because the viewing of the phone’s contents had yet to occur.

CONCLUSION

For the foregoing reasons the State prays that this Court affirm the previous ruling on the Independent Source Doctrine by the Georgia Court of Appeals.

RESPECTFULLY SUBMITTED this the 4th day of December, 2023.

/s/ _____
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CERTIFICATE OF SERVICE

This is to certify that I have this day served the counsel for the Appellant with a true and correct copy of the foregoing Brief on Behalf of the Appellee upon:

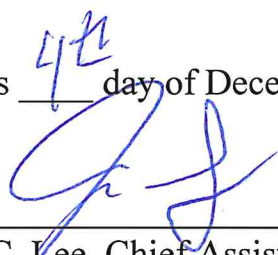
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I further certify that there is a prior agreement with said attorney's office to allow documents in a .pdf format sent via email to suffice for service.

RESPECTFULLY SUBMITTED this 4th day of December, 2023.

/s/



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