



EVIDENCE SEIZED DURING UNCONSTITUTIONAL STOP MAY NOT BE EXCLUDED

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Attenuation Doctrine-“The Fruit of the Poisonous Tree has Been Sanitized”

All officers are taught that when evidence is improperly seized that the evidence is subject to being excluded based on the exclusionary rule. There are a number of exceptions to exclusion including the “attenuation doctrine” which legally means that while the evidence was tainted by improper law enforcement conduct, that taint has been “attenuated” by some intervening fact. In simplifying this attenuation doctrine, officers should think about a concept taught to officers, which is identified as “fruit of the poisonous tree”, which essentially means if the stop or arrest (the tree) is bad then any evidence (fruit) seized as a result is poisoned and cannot be used. Simply stated, “attenuation” means that based on some intervening fact, the fruit has been washed off and can be used against the suspect in a criminal trial.

In *Utah v. Strieff*,ⁱ the United States Supreme Court considered whether learning of an arrest warrant during an unconstitutional investigatory stop was sufficient to attenuate the stop or “clean the fruit.”

The United States Supreme Court outlined the facts as follows:

This case began with an anonymous tip. In December 2006, someone called the South Salt Lake City police’s drug-tip line to report “narcotics activity” at a particular residence. Narcotics detective Douglas Fackrell investigated the tip. Over the course of about a week, Officer Fackrell conducted intermittent surveillance of the home. He observed visitors who left a few minutes after arriving at the house. These visits were sufficiently frequent to raise his suspicion that the occupants were dealing drugs.

One of those visitors was respondent Edward Strieff. Officer Fackrell observed Strieff exit the house and walk toward a nearby convenience store. In the store’s parking lot, Officer Fackrell detained Strieff, identified himself, and asked Strieff what he was doing at the residence.

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As part of the stop, Officer Fackrell requested Strieff's identification, and Strieff produced his Utah identification card. Officer Fackrell relayed Strieff's information to a police dispatcher, who reported that Strieff had an outstanding arrest warrant for a traffic violation. Officer Fackrell then arrested Strieff pursuant to that warrant. When Officer Fackrell searched Strieff incident to the arrest, he discovered a baggie of methamphetamine and drug paraphernalia.

The State charged Strieff with unlawful possession of methamphetamine and drug paraphernalia. Strieff moved to suppress the evidence, arguing that the evidence was inadmissible because it was derived from an unlawful investigatory stop. At the suppression hearing, the prosecutor conceded that Officer Fackrell lacked reasonable suspicion for the stop 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 the contraband.

The trial court agreed with the State and admitted the evidence. The court found that the short time between the illegal stop and the search weighed in favor of suppressing the evidence, but that two countervailing considerations made it admissible. First, the court considered the presence of a valid arrest warrant to be an "extraordinary intervening circumstance." Second, the court stressed the absence of flagrant misconduct by Officer Fackrell, who was conducting a legitimate investigation of a suspected drug house.

Strieff conditionally pleaded guilty to reduced charges of attempted possession of a controlled substance and possession of drug paraphernalia, but reserved his right to appeal the trial court's denial of the suppression motion. The Utah Court of Appeals affirmed.

The Utah Supreme Court reversed. It held that the evidence was inadmissible because only "a voluntary act of a defendant's free will (as in a confession or consent to search)" sufficiently breaks the connection between an illegal search and the discovery of evidence. Because Officer Fackrell's discovery of a valid arrest warrant did not fit this description, the court ordered the evidence suppressed.

The United States Supreme Court agreed to decide whether the discovery of a valid arrest warrant during an invalid stop was enough to save the evidence discovered as the result of the search incident to arrest.

In its review the Court noted that in deciding on the application of the exclusionary rule courts must weigh the degree to which excluding the evidence will deter future law enforcement misconduct versus the social costs of allowing defendants to avoid the consequences of the evidence.

The Court noted that they have recognized several exceptions to the exclusionary rule including:

Independent Source Doctrine-allows evidence to be admitted if it was obtained in an unlawful search but officers had a separate and independent source to properly seize the evidence at the time.

Inevitable Discovery- allows evidence unlawfully seized to be admitted at trial if the officers would have discovered the evidence by some proper means even without the unconstitutional conduct.

Attenuation Doctrine- “evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that ‘the interest protected by the constitutional guarantee that has been violated would not have been served by suppression of the evidence obtained.’”

In turning to whether the attenuation doctrine applied to the stop in this case, the Court outlined the 3-factor test a court must consider in “attenuation” cases.

1. Temporal Proximity (How Much Time?) between the officer’s unconstitutional act and the discovery of the evidence to determine how closely the discovery of the evidence followed the unconstitutional search.
2. The presence of intervening circumstances.
3. The purpose and flagrancy of the officer’s misconduct

The Court noted that in this case, the search followed on the heels of the improper stop, thus in analyzing the first factor, temporal proximity, it would go in favor of suppressing the evidence since “substantial time” had not passed.

The Court said the second factor, “intervening circumstance,” which in this case was the arrest warrant, weighed strongly in favor of allowing the evidence to come in.

The Court noted that the warrant was in effect before Officer Fackrell ever made the stop and it was entirely independent of the stop of Strieff. The Court quoting: *United States v. Leon* “asserted: “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.”

In applying this second factor and the quoted “duty to carry out the provisions of a warrant language cited above to Officer Fackrell’s actions the Court wrote: “Officer Fackrell’s arrest of Strieff thus was a ministerial act that was independently compelled by the pre-existing warrant. And once Officer Fackrell was authorized to arrest Strieff, it was undisputedly lawful to search Strieff as an incident of his arrest to protect Officer Fackrell’s safety.”

The Court then determined that the third factor, the purpose and flagrancy of the official misconduct went in favor of Officer Fackrell. The Court said that Fackrell was, at most, negligent. The Court indicated that Fackrell made two “good faith” mistakes.

First, he had not observed what time Strieff entered the suspected drug house, so he did not know how long Strieff had been there. Officer Fackrell thus lacked a sufficient basis to conclude that Strieff was a short-term visitor who may have been consummating a drug transaction. Second, because he lacked confirmation that Strieff was a short-term visitor, Officer Fackrell should have asked Strieff whether he would speak with him, instead of demanding that Strieff do so. Officer Fackrell’s stated purpose was to “find out what was going on [in] the house.” Nothing prevented him from approaching Strieff simply to ask. See *Florida v. Bostick*, 501 U. S. 429, 434, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991) “[A] seizure

does not occur simply because a police officer approaches an individual and asks a few questions”). But these errors in judgment hardly rise to a purposeful or flagrant violation of Strieff’s Fourth Amendment rights.

While Officer Fackrell’s decision to initiate the stop was mistaken, his conduct thereafter was lawful. The officer’s decision to run the warrant check was a “negligibly burdensome precautio[n]” for officer safety. Rodriguez v. United States, 575 U. S., 135 S. Ct. 1609, 191 L. Ed. 2d 492, 500 (2015). And Officer Fackrell’s actual search of Strieff was a lawful search incident to arrest. See Gant, supra, at 339, 129 S. Ct. 1710, 173 L. Ed. 2d 485.

Moreover, there is no indication that this unlawful stop was part of any systemic or recurrent police misconduct. To the contrary, all the evidence suggests that the stop was an isolated instance of negligence that occurred in connection with a bona fide investigation of a suspected drug house. Officer Fackrell saw Strieff leave a suspected drug house. And his suspicion about the house was based on an anonymous tip and his personal observations.

After reviewing the three factors, the Court held that the evidence was admissible indicating that the pre-existing arrest warrant was a critical intervening circumstance that was wholly independent of the illegal stop.

NOTE: Flagrant Misconduct that leads to the discovery of the arrest warrant may not turn out the same.

ⁱ *Utah v. Strieff*, 136 S.Ct. 2056 (2016).

ⁱⁱ *U.S. v. Leon*, 468 U.S. 897, 920, n.21 (1984).