FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-5024

MICHAEL PORTER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Gilchrist County.
Phillip A. Pena, Judge.

June 29, 2020

ON MOTION FOR REHEARING, CERTIFICATION, AND WRITTEN OPINION

BILBREY, J.

We deny Appellant, Michael Porter's motion for rehearing, certification, and for written opinion, but on our own motion withdraw our May 26, 2020, opinion and substitute this opinion in its place.

Porter raises three issues in this appeal of his conviction for first degree murder, sexual battery, and burglary of an occupied dwelling with an assault or battery. We affirm the trial court's denial of Porter's motion to suppress physical evidence seized at the time he was arrested given the exigent circumstances established by the record. We also affirm the denial of the motion

to dismiss finding no abuse of discretion. Finally, we affirm the denial of the motion to suppress DNA evidence for the reasons set forth below.

During the early morning hours of July 24, 2013, the locked backdoor of a residence in Gilchrist County was pried open. The occupant, a woman who lived alone, was then sexually battered apparently while tied to her bed. Thereafter, she fled from her home, which was across the street from her nephew and niece. She got as far as the street before she was run down by a motor vehicle. According to the testimony of the medical examiner at Porter's trial, a vehicle made two passes over the victim, crushing every rib and causing other extensive internal injuries. The nephew and niece of the victim testified that they heard noises in the front of their home during those early morning hours, as though someone was "doing doughnuts" in the yard. When they went to investigate, they found the victim in the street, naked and barely breathing. The victim managed to tell her relatives that she had been sexually battered and then run over by her assailant, a man she could not identify. Tragically, the victim died by the time she arrived at the hospital.

A partial sample of DNA not belonging to the victim was found on a sponge left on the victim's bed. That DNA was submitted by the Florida Department of Law Enforcement (FDLE) for comparison with profiles stored on the Combined DNA Index System (CODIS), a DNA database. *See* § 943.325, Fla. Stat. Porter's DNA profile was stored in the database, and the partial DNA sample found at the crime scene matched Porter's profile. He thereafter became the primary suspect in the murder investigation and was eventually charged following the discovery of additional incriminating evidence.

Following his arrest in 2013 for the murder, sexual battery, and burglary, Porter moved to suppress the "CODIS hit" which had matched his DNA profile with CODIS with the DNA sample located at the crime scene. Porter argued in his motion to suppress that his DNA profile should not have been on CODIS at the time the crimes at issue were being investigated. Therefore, Porter argued, the DNA match was the "fruit of the poisonous tree" and should be suppressed.

Porter's DNA profile had been lawfully obtained by FDLE following his convictions in 1988 for multiple felonies including sexual battery. However, those previous convictions were later overturned, and a new trial was ordered. *See Porter v. Moore*, 31 F. App'x 940 (11th Cir. 2002) (unpublished). On retrial in 2002, Porter was acquitted. *See Porter v. White*, 483 F.3d 1294 (11th Cir. 2007) (discussing the history of Porter's 1988 conviction, reversal of the conviction, and subsequent acquittal). Following that acquittal, Porter obtained a "certificate of eligibility to petition for a seal or expunge order" from FDLE. By this certificate, FDLE determined that Porter was "legally eligible, in accordance with subsection 943.0585(2)/943.059(2), Florida Statutes, to petition the court to seal, the arrest record(s) for the charges(s) and dates(s) shown above."

Thereafter, Porter petitioned the circuit court in Pasco County "to seal all criminal history record information in the custody of any criminal justice agency and the official records of the Court concerning [Porter's] arrest on the 26th day of June, 1987, by the Pasco County's Sheriff's Office for Sexual Battery." In 2006, Porter obtained an order from the circuit court of Pasco County granting a petition to "expunge" all "court records pertaining" to his June 26, 1987, arrest in accordance with rule 3.692, Florida Rules of Criminal Procedure."[1] The order further provided that it was to be forwarded to any agency that had Porter's "criminal history record information" relating to the 1987 arrest. A certified copy of the expungement order was received by FDLE in August 2006. The certificate of eligibility to petition for a seal or expunge order, the petition to seal record, and the order granting Porter's petition did not reference the DNA information held by FDLE resulting from Porter's then lawful incarceration.

---

[1] The order granted expungement of the records even though FDLE found Porter eligible only for the records to be sealed and Porter had requested only sealing of the records. *See* §§ 943.0585 & 943.059, Fla. Stat. (2006) (discussing the requirements for and the differences between sealing and expungement of criminal records).

In his motion to suppress, Porter argued that because FDLE had previously received a certified copy of the 2002 judgment of acquittal and a certified copy of the 2006 order to expunge, removal of Porter's DNA information from CODIS was required pursuant to then existing federal law and FDLE policy. Porter further argued that in 2009, when certain statutory provisions were enacted in section 943.325, Florida Statutes (2009), regarding procurement, storage, and removal of DNA from the statewide database, FDLE was again placed on notice that Porter's DNA information contained in his "DNA record" should be removed from CODIS given his prior filings. *See* § 943.325(2)(e), Fla. Stat. (2009).[2]

The trial court conducted an evidentiary hearing on the motion to suppress at which the supervisor of FDLE's DNA database division as well as the former assistant general counsel for FDLE testified. Both these witnesses testified essentially that unless an order is received by FDLE specifically directing the removal of a DNA record, then such information is not removed upon a request to remove records regarding a person's criminal history.

In a detailed order, the trial court denied the motion to suppress. It did not explicitly hold that FDLE was not previously obliged to remove Porter's DNA record given the wording of the documents submitted by Porter and given the existing law. But the trial court did hold that the exclusionary rule did not apply to the facts before it. We agree with this reasoning.

We review a trial court's ruling on a motion to suppress under a mixed standard of review. *Flowers v. Scott*, 290 So. 3d 642, 644 (Fla. 1st DCA 2020). A trial court's factual findings are reviewed for competent, substantial evidence, while conclusions of law are reviewed de novo. *Id.*

---

[2] Since 2009, section 943.325(2)(e), Florida Statutes, has defined "DNA record" to mean "all information associated with the collection and analysis of a person's DNA sample, including the distinguishing characteristics collectively referred to as a DNA profile."

We disagree with Porter's argument that the "illegal retention" of his DNA record "constitutes fruit of the poisonous tree." Regardless of whether FDLE was obliged to remove his DNA record upon receipt of the judgment of acquittal, the order to expunge, or the enactment of certain laws, any error by FDLE's CODIS unit did not result in a search or seizure violative of the Fourth Amendment to the U.S. Constitution.[3] Indeed, neither the procurement of the DNA sample from the crime scene nor the collection of Porter's DNA during his prior incarceration was a search or seizure at all.

We are not ruling on the question of whether Porter's DNA record should have been removed from CODIS prior to the commission of the instant offenses. In any event, a violation of a statute does not automatically compel the exclusion of evidence. *See United States v. Caceres,* 440 U.S. 741, 755 (1979) (holding that in criminal prosecution "precedents enforcing the exclusionary rule to deter constitutional violations provide no support for the rule's application" with respect to the violation of an IRS regulation concerning recording conversations between agents and taxpayers). Of course, a statute itself could require exclusion of evidence apart from the Fourth Amendment's exclusionary rule. *See United States v. Giordano*, 416 U.S. 505 (1974) (explaining that the issue of whether evidence obtained in violation of a federal wiretapping statute must be suppressed when no constitutional violation has occurred does not turn on the exclusionary rule, which is aimed at deterring violations of Fourth Amendment rights, but upon the provisions of the specific statute). However, Porter has not cited specific statutory authority, state or federal,

---

[3] In his motion to suppress, Porter claimed a violation of Article I, sections 9 and 12, of the Florida Constitution as well as a violation of the federal Fourth Amendment. On appeal, Porter has renewed his argument that the Florida constitution's protections against illegal search and seizures were violated. Since the rights in Article I, section 12 "shall be construed in conformity with the 4th Amendment of the United States Constitution, as interpreted by the United States Supreme Court," we do not separately address that claim.

for the suppression of the DNA evidence collected at the crime scene or obtained from him during his prior incarceration. Instead, he relies only on the exclusionary rule.

That rule has no applicability here. Neither the DNA discovered at the scene nor the DNA record stored by FDLE on CODIS was obtained by a warrantless search or seizure. The DNA at the crime scene was left by Porter in an area where he had no expectation of privacy. The DNA record stored on CODIS was lawfully obtained pursuant section 943.325, Florida Statutes, which authorizes the collection of DNA from persons convicted of certain offenses. Absent evidence of an illegal search or seizure, there is no authority on which to suppress the evidence at issue pursuant to the exclusionary rule. *See United States v. Calandra*, 414 U.S. 338, 347 (1974) ("The exclusionary rule was adopted to effectuate the Fourth Amendment right of all citizens 'to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . .' Under this rule, evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure."). The retention of a lawfully obtained DNA record on CODIS for future use does not constitute a separate search or implicate the Fourth Amendment. *See Boroian v. Mueller*, 616 F.3d 60, 68 (1st Cir. 2010).

Importantly, there has been no suggestion that the officers involved in the investigation in this case acted in bad faith. That is, there was no evidence offered below that any of the law enforcement authorities involved in Appellant's instant charges believed the CODIS database wrongly contained Appellant's DNA record but accessed it nonetheless. The exclusionary rule is intended to deter police misconduct, not to remedy prior wrongs. *Illinois v. Krull,* 480 U.S. 340, 347 (1987) (explaining that the exclusionary rule was historically designed as a means of deterring future police misconduct); *Arizona v. Evans*, 514 U.S. 1, 14 (1995) (same). The asserted error committed by law enforcement in this case, as noted, was the retention of Appellant's DNA record. None of the actual law enforcement agents and officers involved in the investigation of the murder, sexual battery, and burglary for which Appellant was charged and convicted had any involvement whatsoever in the retention or storage of Appellant's DNA record

on CODIS. So far as the instant record discloses, law enforcement in the instant case acted in good faith. Accordingly, the exclusionary rule should not apply. *See United States v. Leon*, 468 U.S. 897, 906 (1984) (explaining that application of the exclusionary rule "is neither intended nor able to 'cure the invasion of the defendant's rights which he has already suffered'") (*quoting Stone v. Powell*, 428 U.S. 465, 540 (1976) (White, J., dissenting)); *California v. Greenwood,* 486 U.S. 35, 45 (1988) (reaffirming that the exclusionary rule is not indiscriminately applied when law enforcement has acted in objective good faith).

Therefore, because Porter has not identified a search or seizure regarding his DNA which violated the Fourth Amendment, we affirm the denial of motion to suppress the DNA evidence sought on the authority of the exclusionary rule.

AFFIRMED.

WOLF and M.K. THOMAS, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Andy Thomas, Public Defender, and Victor Holder, Assistant Public Defender, Tallahassee, for Appellant.

Ashley Moody, Attorney General, and Damaris E. Reynolds, Assistant Attorney General, Tallahassee, for Appellee.