[J-34-2013]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 67 MAP 2012
	:	
Appellant	:	Appeal from the order of Superior Court
	:	entered November 29, 2011 at No. 381
	:	MDA 2011 which affirmed/vacated in part
v.	:	and remanded the order of the Luzerne
	:	County Court of Common Pleas, Criminal
	:	Division, dated January 24, 2011 at No.
RICHARD ALLEN JOHNSON,	:	CP-40-CR-0000947-2010
	:	
Appellee	:	SUBMITTED: April 25, 2013

DISSENTING OPINION

MR. JUSTICE McCAFFERY **DECIDED: February 18, 2014**

The question before the Court is whether evidence found during a search incident to arrest is admissible at trial under Article I, Section 8 of the Pennsylvania Constitution even though the warrant for the arrest was subsequently found to have already been served and thus was no longer valid. In Herring v. United States, 555 U.S. 135 (2009), the United States Supreme Court held that when police mistakes in the execution of an expired arrest warrant are the result of negligence, rather than systemic error or reckless disregard of constitutional requirements, the exclusionary rule should not apply. I would hold that Article I, Section 8 does not require greater privacy protection than the high Court afforded in Herring. Accordingly, I dissent.

Fourth Amendment Jurisprudence

One hundred years ago, in Weeks v. United States, 232 U.S. 383 (1914), the United States Supreme Court held for the first time that, in a federal prosecution, the Fourth Amendment barred the use of evidence that had been obtained via a warrantless search. Several decades later, in Wolf v. Colorado, 338 US 25, 33 (1949), the high Court expressly limited Weeks's holding to federal prosecutions, stating that "in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure." However, only twelve years after Wolf was decided, it was overruled in Mapp v. Ohio, 367 U.S. 643, 644-45 (1961) (holding that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court"). Twenty-three years after Mapp was decided, the United States Supreme Court limited the scope of the exclusionary rule, holding that evidence obtained by police officers acting in reasonable reliance on a search warrant subsequently found to be unsupported by probable cause was not barred from use at trial. U.S. v. Leon, 468 U.S. 897, 900 (1984). In promulgating this "good faith exception" to the exclusionary rule, the high Court held as follows:

> In the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause.

Id. at 926.

The Leon Court explained that it had re-examined the purposes of the exclusionary rule and concluded that its primary purpose is to deter police misconduct, i.e., "willful, or at the very least negligent, [police] conduct which has deprived the

defendant of some right." Id. at 916, 919, 926 (citations omitted). When the police have not engaged in any misconduct, but rather have acted with objectively reasonable reliance on a search warrant that is subsequently determined to be invalid, then the benefits of applying the exclusionary rule are "marginal or nonexistent." Id. at 922. Under such circumstances, the Leon Court held, the costs of applying the exclusionary rule outweigh the benefits, and, pursuant to the good faith exception, determined that the rule is inapplicable. Id. at 926.

The U.S. Supreme Court employed a similar balancing approach to decide a recent case with facts and circumstances closely resembling the case currently before us. See Herring, supra. The defendant-petitioner was arrested on a warrant, and a search incident to arrest revealed drugs on his person and an illegally possessed firearm in his motor vehicle. Very shortly after the arrest, the warrant was found to have been recalled months earlier, and thus it was invalid. Id. at 137-38. After the defendant-petitioner was indicted for illegal possession of the drugs and the firearm, he moved to suppress the evidence, contending that his arrest was illegal under the Fourth Amendment because the warrant had been rescinded. The district court, adopting the magistrate judge's recommendation, denied the suppression motion, concluding that the arresting officers had acted in a good faith belief that the warrant was still outstanding. The Court of Appeals for the Eleventh Circuit affirmed, holding that the evidence was admissible under the good faith rule of Leon, supra. The Eleventh Circuit concluded that the arresting officers had not engaged in any wrongdoing or carelessness, and that the sheriff's office had acted only negligently, not deliberately or tactically, in failing to update the records regarding the warrant's rescission. Herring, supra at 138-39.

The high Court affirmed, reiterating that the exclusionary rule is a judicially created rule, not an individual right; is not a necessary consequence of a Fourth

Amendment violation; and applies only where it has the potential to result in the deterrence of future Fourth Amendment violations. Id. at 141. The high Court retained its focus on the deterrence of police misconduct: "evidence should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." Id. at 143 (citations and internal quotation marks omitted). Recognizing that the cases that had given rise to the exclusionary rule involved intentional, flagrant, patently unconstitutional conduct, the high Court made clear that the "exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." Id. at 144.

In applying these principles to the facts and circumstances of Herring, the high Court determined that the conduct of the law enforcement officers "was not so objectively culpable as to require exclusion [of the evidence]." Id. at 146. There was no evidence that record-keeping errors in the sheriff's office were routine or widespread; rather, the testimony suggested that such errors were rare. Id. at 147. Accordingly, the high Court held as follows: "[W]hen police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not 'pay its way'," and thus the exclusionary rule should not apply. Id. at 147-48 (citation omitted).

Pennsylvania Jurisprudence

Pre-Mapp

Pennsylvania was not quick to conclude that the exclusionary rule constituted an available remedy under -- much less an integral part of -- Article I, Section 8 of the Pennsylvania Constitution. Although the U.S. Supreme Court adopted the Fourth Amendment exclusionary rule in 1914, for more than four decades, we declined to

adopt the exclusionary rule as a matter of state law.[1] For example, in Commonwealth v. Dabbierio, 138 A. 679, 681 (Pa. 1927), we recognized but explicitly rejected Weeks in upholding, under state constitutional law, the admission of evidence that had been obtained pursuant to a defective search warrant.[2] Rather than follow Weeks, the Dabbierio Court "[found itself] in more complete accord with … McGuire v. United States, 273 U.S. 95, 99, 47 S.Ct. 259, 260 [1927]." Dabbierio, supra at 681. In McGuire, supra at 260, six federal revenue agents, acting pursuant to a search warrant, seized several gallons of liquor from the defendant-appellant's premises, destroyed most of the liquor without legal authority, but retained two quarts as evidence. The defendant-appellant challenged the admissibility of that evidence, contending that, by destroying the seized liquor, the agents "lost the protection and authority conferred upon them by the search warrant," and thus rendered the seizure illegal under the Fourth Amendment. In denying this challenge, the high Court conceded that the destruction of the liquor was an illegal act, but declined to conclude that the seizure of the liquor or its use as evidence violated any constitutional immunities of the defendant. Id. at 260-61. The high Court reasoned as follows, reasoning with which our Dabbierio Court explicitly agreed:

> Even if the officers were liable as trespassers ab initio, which we do not decide, we are concerned here not with their liability but with the interest of the government in securing

[1] See Commonwealth v. Russo, 934 A.2d 1199, 1209 (Pa. 2007).

[2] The defect in the Dabbierio warrant was substantial and intentional: there was no description of the place to be searched, either in the supporting affidavit or in the warrant itself. Dabbierio, 138 A. at 680. The affiant and the issuing judicial officer had agreed that the place to be searched should not be specified until after the exact location had been ascertained by service of the warrant. Id. This Court determined that "[s]uch a warrant ought not to have been issued, and, if issued, ought not to have been served." Id.

> the benefit of the evidence seized, so far as may be possible without sacrifice of the immunities guaranteed by the Fourth and Fifth Amendments. A criminal prosecution is more than a game in which the government may be checkmated and the game lost merely because its officers have not played according to rule. The use by prosecuting officers of evidence illegally acquired by others does not necessarily violate the Constitution nor affect its admissibility.

McGuire, 273 U.S. at 260 (quoted in Dabbierio, 138 A. at 681).

Thus, even though the facts of Dabbierio much more closely resembled those of Weeks than those of McGuire, the Dabbierio Court found more persuasive the high Court's ruling in McGuire, which emphasized the interest of the government in securing evidence for and using evidence in criminal prosecutions. Privacy interests protected by the Pennsylvania Constitution did not prevail even though Dabbierio was decided under state constitutional law.

The Dabbierio decision was consistent with the common law rule, i.e., "the admissibility of evidence is not affected by the illegality of the means by which it was obtained." Commonwealth v. Chaitt, 112 A.2d 379, 381 (Pa. 1955); see also Commonwealth v. Connolly, 138 A. 682 (Pa. 1927) (in dicta, applying Dabbierio's holding); Commonwealth v. Hunsinger, 138 A. 683 (Pa. 1927) (applying Dabbierio's holding in a case with similar facts); Commonwealth v. Agoston, 72 A.2d 575, 585 (Pa. 1950) (in upholding the admissibility of evidence obtained without a search warrant, applying the common law rule that "the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence"). This common law rule remained "firmly entrenched in the decisions of the appellate courts of our [ ] Commonwealth," Chaitt, supra, until the U.S. Supreme Court in Mapp imposed the exclusionary rule on the states for Fourth Amendment purposes. See Russo, 934 A.2d at 1199; Commonwealth v. Bosurgi, 190 A.2d 304, 306-09 (Pa.

1963) (in the first case challenging the admissibility of evidence obtained through an allegedly illegal search and seizure to reach this Court after Mapp, recognizing that Mapp prohibited the use in state courts of evidence that had been obtained by unreasonable search and seizure).

Post-Mapp, Pre-Edmunds

In the three decades immediately following Mapp and Bosurgi, this Court decided numerous search and seizure cases. In many, this Court's rulings were aligned with federal jurisprudence. See, e.g., Commonwealth v. Platou, 312 A.2d 29, 31 n.2, 34 (Pa. 1973) (holding, under the Fourth Amendment and Article I, Section 8, that a warrant to search an apartment does not extend to a visitor's suitcase found in that apartment), overruled, Commonwealth v. Reese, 549 A.2d 909, 910-12 (Pa. 1988) (citing United States v. Ross, 456 U.S. 798, 820-21 (1982), in overruling Platou, and holding that the search of a visitor's jacket was within the scope of a warrant to search an apartment for drugs); Commonwealth v. Holzer, 389 A.2d 101, 105-07 (Pa. 1978) (following a coterminous approach with respect to the Fourth Amendment and Article I, Section 8, and holding that it was reasonable for constitutional purposes for the police to seize and hold a vehicle until a search warrant could be obtained, where the seizure occurred after the owner had been placed into custody); Commonwealth v. Musi, 404 A.2d 378, 385 (Pa. 1979) (accepting "the wisdom of [the federal] approach" in holding that a violation of a procedural rule for the execution and return of warrants should not render an otherwise valid search illegal unless the defendant can show prejudice); In Re Search Warrant B-21778, 521 A.2d 422, 426-27 (Pa. 1987) (citing federal Fourth Amendment law in rejecting the appellant's claim that he could assert vicariously the privacy rights of another individual under the Fourth Amendment and Article I, Section 8); Commonwealth v. Blystone, 549 A.2d 81, 86-88 (Pa. 1988) (in holding that Section

5704(2) of the Wiretapping and Electronic Surveillance Control Act, 18 Pa.C.S. § 5701-82, did not violate Article I, Section 8, finding persuasive the U.S. Supreme Court's rationale in several electronic surveillance cases).

It is therefore apparent that this Court, from its earliest days up through most of the 20th century, discerned no additional or strengthened protections in the Pennsylvania Constitution as compared to the Fourth Amendment with regard to search and seizure cases. See also Kerr v. Pennsylvania State Board of Dentistry, 960 A.2d 427, 438-39 (Pa. 2008) (Castille, C.J., concurring) (briefly discussing the history of the exclusionary rule in Pennsylvania).

In the late 1970's, however, a line of cases began to emerge from this Court that departed from federal search and seizure jurisprudence, based on our discernment of greater protection for individual privacy rights in Article I, Section 8 of the Pennsylvania Constitution than in the Fourth Amendment to the U.S. Constitution. In Commonwealth v. DeJohn, 403 A.2d 1283 (Pa. 1979), this Court declined to follow the U.S. Supreme Court's decision in United States v. Miller, 425 U.S. 435 (1976), in which the high Court held that a depositor had no reasonable expectation of privacy in his or her bank records. This Court found the analysis of the California Supreme Court in Burrows v. Superior Court of San Bernardino County, 529 P.2d 590 (Cal. 1974), "in recognizing modern electronic realities, [to be] more persuasive than the simplistic propriety analysis … used by the [U.S. Supreme Court] in Miller." DeJohn, supra at 1290. Relying on implicit privacy protections discerned under Article I, Section 8 of the Pennsylvania Constitution, this Court held that "bank customers have a legitimate expectation of

privacy in records pertaining to their affairs kept at the bank," and, therefore, a warrant supported by probable cause was required to access them. DeJohn, supra at 1291.[3]

In Commonwealth v. Sell, 470 A.2d 457, 459 (Pa. 1983), the issue was the doctrine of automatic standing to contest a search and seizure when a defendant has been charged with a possessory offense. Three years before Sell, the U.S. Supreme Court had abandoned the doctrine of automatic standing, see Salvucci v. United States, 448 U.S. 83, 85 (1980), requiring instead that a defendant seeking to challenge the admissibility of evidence under the Fourth Amendment show a legitimate expectation of privacy in the searched area as a predicate to establishing standing. Relying on Article I, Section 8 of the Pennsylvania Constitution, this Court in Sell retained the doctrine of automatic standing, thus declining to follow the Salvucci holding. Sell, supra at 465-66. The Sell Court concluded that "Article I, Section 8 of the Pennsylvania Constitution, as consistently interpreted by this Court, mandates greater recognition of the need for protection from illegal governmental conduct offensive to the right of privacy." Sell, supra at 468-69.

In Commonwealth v. Melilli, 555 A.2d 1254 (Pa. 1989), this Court again relied on Article I, Section 8 in declining to follow a U.S. Supreme Court ruling -- this time concerning whether a pen register constituted a search and therefore must be supported by probable cause. The U.S. Supreme Court in Smith v. Maryland, 442 U.S. 735, 745-46 (1979), had held that the use of a pen register was not a search under the Fourth and Fourteenth Amendments, and, therefore, no warrant supported by probable cause was required for its installation. However, this Court expressly rejected Smith,

[3] DeJohn was the product of a divided Court. However, four justices were in agreement as to the expectation of privacy in bank records. DeJohn, supra at 1292; id. at 1307 (Manderino, J., dissenting); see Commonwealth v. Duncan, 817 A.2d 455, 460 n.4 (Pa. 2003) (discussing the Court's divided decision in DeJohn).

and relied instead on the privacy interests protected under Article I, Section 8 of the Pennsylvania Constitution to hold that police must obtain a court order based on probable cause before utilizing a pen register. Melilli, supra at 1257-59.

Commonwealth v. Edmunds

Citing DeJohn, Sell, and Melilli, this Court in Commonwealth v. Edmunds, 586 A.2d 887, 888, 894, 895 n.7 (Pa. 1991), again departed from U.S. Supreme Court precedent, and declined to adopt the "good faith" exception to the exclusionary rule as inconsistent with the guarantees embodied in Article I, Section 8 of the Pennsylvania Constitution. In Edmunds, a state trooper served a search warrant on the defendant-appellant at his residence, found marijuana, and arrested him for drug-related offenses. The defendant-appellant moved to suppress the evidence, asserting that probable cause for the search was lacking and thus the warrant was constitutionally defective. Id. at 889-90. Following a hearing, the trial court found that the warrant did indeed lack probable cause under Pennsylvania law; however, the trial court further found that, in executing the warrant, the trooper had acted in good faith reliance thereon, reasonably believing that the warrant was valid because it had been issued by a neutral magistrate. Id. at 890. Accordingly, the trial court applied the good faith exception to the exclusionary rule, as had been set forth several years earlier by the U.S. Supreme Court in Leon, see discussion in text, supra, and denied the defendant-appellant's suppression motion. Edmunds, supra. The Superior Court affirmed the order of the trial court.

This Court reversed, holding that "the good faith exception to the exclusionary rule is [not] properly part of the jurisprudence of this Commonwealth, by virtue of Article I, Section 8 of the Pennsylvania Constitution" because it would "frustrate the guarantees embodied" therein, particularly with regard to personal privacy interests. Id. at 894, 895.

In reaching this holding, Edmunds set forth a methodology to be used in analyzing issues that arise under the Pennsylvania Constitution. Id. at 894. Specifically, the Court determined that it was "important" for the litigants in any future case implicating a provision of the Pennsylvania Constitution, to brief and analyze at least the following four factors:

> 1) text of the Pennsylvania constitutional provision;
> 2) history of the provision including Pennsylvania case-law;
> 3) related case-law from other states;
> 4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence.

Id. at 895.

This Court in Edmunds then proceeded to consider each of these factors in light of the circumstances of that case. With regard to the constitutional text, Edmunds acknowledged that the Fourth Amendment and Article I, Section 8 were "similar in language." Id. at 895. As this Court has expressly acknowledged, "it is not the text itself [of Article I, Section 8] which imbues Pennsylvania jurisprudence with its unique character but, rather, the history of our case law as it has developed in the area of search and seizure." Commonwealth v. Glass, 754 A.2d 655, 662 n.11 (Pa. 2000) (citation omitted).

Turning to the history of Article I, Section 8, Edmunds noted that Pennsylvania's constitutional protection against unreasonable search and seizure predated the Fourth Amendment by fifteen years, and, as a part of the Declaration of Rights, was "an organic part of [Pennsylvania's] original constitution of 1776." Edmunds, supra at 896; see also Sell, supra at 466. The "modern" version of the search and seizure provision, i.e., Article I, Section 8, dates from 1790. Edmunds, supra at 897. Edmunds also noted the primary purpose of the warrant requirement guaranteed by Article I, Section 8:

> The primary purpose of the warrant requirement was to abolish 'general warrants,' which had been used by the British to conduct sweeping searches of residences and businesses, based upon generalized suspicions. Therefore, at the time the Pennsylvania Constitution was drafted in 1776, the issue of searches and seizures unsupported by probable cause was of utmost concern to the constitutional draftsmen.

Id. at 897 (internal citations omitted).

Despite the early constitutional guarantees of the right to be free from unreasonable search and seizure, Edmunds recognized that the remedy provided by the exclusionary rule had been unavailable in Pennsylvania until it was mandated by the 1961 ruling of the U.S. Supreme Court in Mapp, supra. See text, supra. However, as discerned in Edmunds, beginning in the 1970's, "this Court began to forge its own path under Article I, Section 8 of the Pennsylvania Constitution, declaring … that Article I, Section 8 [ ] embodied a strong notion of privacy, notwithstanding federal cases to the contrary." Edmunds, supra at 898 ("From DeJohn forward, a steady line of caselaw has evolved under the Pennsylvania Constitution, making clear that Article I, Section 8 is unshakably linked to a right of privacy in this Commonwealth.") (citing Platou, supra (1973); DeJohn, supra (1979); Sell, supra (1983); Blystone, supra (1988); and Melilli, supra (1989)); and Glass, supra at 662 n.11 (stating that Edmunds found a "clear divergence from [the] philosophical underpinnings of [the] federal exclusionary rule [beginning] in 1973") (internal quotation marks omitted).

Based on this emphasis on personal privacy, Edmunds concluded that the exclusionary rule in Pennsylvania "served to bolster the twin aims of Article I, Section 8; to wit, the safeguarding of privacy and the fundamental requirement that warrants shall only be issued upon probable cause." Id. at 899. Edmunds explicitly rejected the U.S.

Supreme Court's view in Leon that the sole purpose of the exclusionary rule was to deter police misconduct:

> [W]e disagree with [the U.S. Supreme] Court's suggestion in Leon that we in Pennsylvania have been employing the exclusionary rule all these years to deter police corruption. We flatly reject this notion. We have no reason to believe that police officers or district justices in the Commonwealth of Pennsylvania do not engage in "good faith" in carrying out their duties.

Edmunds, supra at 899.

Thus, relying on decisional law from the late 1970's and 1980's, Edmunds concluded that adoption of the good faith exception to the exclusionary rule would emasculate the strong right of privacy and the equally strong adherence to the requirement of probable cause that had developed under Article I, Section 8. Id. at 899. Edmunds also drew support from rulings in other states that had declined to adopt a good faith exception. More specifically, Edmunds briefly summarized rulings from the highest courts of New Jersey, Connecticut, and North Carolina, each of which had concluded that the exclusionary rule serves broader purposes than merely the deterrence of police misconduct, and therefore had rejected the good faith exception. Id. at 900-901.

Finally, Edmunds addressed the fourth factor, to wit, policy considerations. Edmunds concluded that adoption of a good faith exception would "effectively nullify" Pa.R.Crim.P. 2003, which requires that an inquiry into probable cause for a search warrant be confined to the written affidavit and warrant, "in order to avoid any doubt as to the basis for probable cause." Edmunds, supra at 903. Edmunds stressed the requirement that an independent magistrate make a determination of probable cause prior to the issuance of any search warrant. Id. at 904-905. Edmunds also questioned the magnitude of the costs of applying the exclusionary rule in practice and the

concerns attached to the alternative remedy, i.e., allowing victims of improper searches to sue police officers directly. Id. at 904. Finally, Edmunds noted that Pennsylvania's adoption of the flexible, totality of the circumstances standard for determining probable cause, eliminated concerns that the exclusionary rule might be applied in an overly rigid manner. Id. Based on the above-summarized analysis, Edmunds held that the protections embodied in Article I, Section 8 of the Pennsylvania Constitution precluded adoption of the good faith exception to the exclusionary rule when a search warrant was subsequently determined to have been issued without probable cause.

Post-Edmunds Cases

In the years since Edmunds, this Court has decided numerous Article I, Section 8 and Fourth Amendment cases. In many, this Court has followed the prevailing Fourth Amendment standard, concluding that Article I, Section 8 and the Fourth Amendment provide comparable protections. See, e.g., Commonwealth v. Melendez, 676 A.2d 226, 228 (Pa. 1996) (reiterating that, under Article I, Section 8, police may "stop and frisk" based upon reasonable suspicion, following the U.S. Supreme Court's holding in Terry v. Ohio, 392 U.S. 1 (1968)); In re D.M., 781 A.2d 1161, 1163 (Pa. 2001) (stating that Pennsylvania courts have consistently followed Terry, supra, in stop and frisk cases; declining to depart from this longstanding practice; and seeing "no reason at this juncture to embrace a standard other than that adhered to by the United States Supreme Court" for stop and frisk cases); Commonwealth v. Williams, 692 A.2d 1031, 1039 (Pa. 1997) (in the context of a challenge to a warrantless search of a parolee's bedroom, concluding that the same standard for the legality of the search applies under Article I, Section 8 and the Fourth Amendment); Hawkins, 718 A.2d at 268-69 (maintaining, under Article I, Section 8, consistent with federal Fourth Amendment jurisprudence, a bar on derivative standing, a doctrine that would have allowed the

defendant to assert vicariously the privacy interests of another in a suppression motion); Commonwealth v. Cleckley, 738 A.2d 427 (Pa. 1999) (applying the federal standard of voluntariness to the question of whether a search had been consensual and concluding that an independent state constitutional analysis under Article I, Section did not suggest a distinct standard); Commonwealth v. Glass, 754 A.2d 655 (Pa. 2000) (in agreement with federal law and the law of most states, holding that anticipatory warrants are not categorically prohibited in Pennsylvania by by Article I, Section 8); Commonwealth v. Duncan, 817 A.2d 455, 459, 469 (Pa. 2003) (distinguishing DeJohn, supra, in holding that the defendant-appellant had no reasonable expectation of privacy under Article I, Section 8 in the name and address information provided by his bank to the police); Commonwealth v. Russo, 934 A.2d 1199, 1200, 1205-13 (Pa. 2007) (after conducting a detailed Edmunds analysis, concluding that the Fourth Amendment "open fields" doctrine enunciated in Oliver v. United States, 466 U.S. 170 (1984), applies equally under Article I, Section 8, and thus federal and state law in this regard are coextensive); see also Commonwealth v. Basking, 970 A.2d 1181 (Pa.Super. 2009) (adopting the apparent authority exception to the warrant requirement as a matter of state constitutional law and concluding that the rights conferred under Article I, Section 8 and the Fourth Amendment are co-extensive in this regard).

In contrast to the above-cited cases, in the following examples, our scrutiny of the specific privacy interest asserted under Article I, Section 8 led us to conclude that heightened protections, as compared to the federal standard, were warranted. See, e.g., Commonwealth v. Mason, 637 A.2d 251 (Pa. 1993) (under Article I, Section 8, suppressing evidence discovered when, in the absence of exigent circumstances, police forcibly entered a residence while awaiting the issuance of a search warrant, even though under U.S. Supreme Court Fourth Amendment precedent the evidence would

have been admissible pursuant to the independent source doctrine); Commonwealth v. White, 669 A.2d 896, 901-02 (Pa. 1995) (declining to follow New York v. Bolton, 453 U.S. 454 (1981), based on the enhanced privacy interests inherent in Article I, Section 8, and holding that when an occupant of an automobile is placed under arrest, the search incident to arrest does not encompass a search of the arrestee's automobile); Commonwealth v. Matos, 672 A.2d 769 (Pa. 1996) (rejecting the U.S. Supreme Court's Fourth Amendment-based reasoning in California v. Hodari D., 499 U.S. 621 (1991), and holding that, pursuant to the privacy rights guaranteed under Article I, Section 8, pursuit by a police officer, without probable cause or reasonable suspicion, constitutes a seizure, and accordingly requires suppression of contraband discarded by a defendant during a chase); Commonwealth v. Hawkins, 692 A.2d 1068, 1069-71 & n.2, (Pa. 1997) (rejecting the decisions of several federal circuit courts in holding that, under Article I, Section 8, an anonymous tip that a man with a particular description at a particular location was carrying a gun did not constitute sufficient justification for police to conduct a stop and frisk pursuant to Terry v. Ohio, 392 U.S. 1 (1968) (see also Hawkins, supra at 1071 (Newman, J., dissenting)); Theodore v. Delaware Valley School District, 836 A.2d 76, 84, 88 (Pa. 2003) (in the context of a challenge to a school district's policy of suspicionless testing of certain students for drug and alcohol use, rejecting the U.S. Supreme Court's Fourth Amendment jurisprudence in favor of a distinct approach under Article I, Section 8, which recognizes "a strong notion of privacy … greater than that of the Fourth Amendment.") (citation omitted).

Application of Edmunds Factors to this Case

As discussed above, the U.S. Supreme Court in Herring, supra, a case with facts very similar to the instant case, concluded that, under the Fourth Amendment, the exclusionary rule should not apply when police serve an expired arrest warrant due to a

non-systemic error of negligence in administrative record-keeping. The question now before us is whether Article I, Section 8 requires greater privacy protection than the high Court afforded in Herring. This can be determined only after consideration and analysis of the circumstances of this case in light of the relevant factors set forth by this Court in Edmunds.

With respect to the text of Article I, Section 8, this Court has noted many times that it is similar to that of the Fourth Amendment. See Russo, supra at 1205-06; Hawkins, 718 A.2d at 269; Edmunds, supra at 895-96. There are no textual differences between the two provisions that would suggest greater protection under the Pennsylvania Constitution for a defendant who has been arrested under an expired warrant.

With regard to the history of Article I, Section 8, I have extensively reviewed, see text supra, this Commonwealth's jurisprudence with respect to search and seizure and the exclusionary rule. No case stands on all fours with the instant case. Our discernment, over the past few decades, of heightened protection of privacy interests under Article I, Section 8 for certain circumstances, does not automatically support the extension of heightened protection to the instant circumstances. As we have repeatedly emphasized, we do not reflexively find "in favor of any new right or interpretation asserted" under Article I, Section 8. Russo, supra at 1210 (citation omitted); Commonwealth v. Smith, 836 A.2d 5, 15 (Pa. 2003); Commonwealth v. Duncan, 817 A.2d 455, 459 (Pa. 2003). Indeed, we have stated that there should be "compelling reasons" to interpret our state Constitution to afford defendants greater protections than those granted by the U.S. Constitution. Commonwealth v. Gray, 503 A.2d 921, 926 (Pa. 1985). Under the circumstances of the instant case, I have not discerned "compelling reasons" to grant greater protections than those afforded by the Fourth

Amendment. Rather, my analysis of the utility of and policy behind application of the exclusionary rule has persuaded me that, under the circumstances presented here, there are compelling reasons to conclude that the Fourth Amendment and Article I, Section 8 confer co-extensive protections.

In the cases where this Court has discerned enhanced protection for individual privacy interests under Article I, Section 8, we have articulated a broad view of the purpose of the exclusionary rule. Specifically, we have emphasized that the exclusionary rule in Pennsylvania has "served to bolster the twin aims of Article I, Section 8: to wit, the safeguarding of privacy and the fundamental requirement that warrants shall only be issued upon probable cause." Edmunds, supra at 899; see also Commonwealth v. Matos, 672 A.2d 769, 773 (1996) ("The [Edmunds] Court [ ] concluded that the purpose of the exclusionary rule as developed in Pennsylvania was not solely to deter police conduct, as the United States Supreme Court had interpreted it, but rather was unshakably linked to a right of privacy in this Commonwealth.") (internal quotation marks and emphasis omitted).

Our articulation of these broad goals of the exclusionary rule in Pennsylvania does not and cannot alter the rule's prospective nature, an inherent characteristic that circumscribes the rule's remedial function. Once an unreasonable, illegal search or seizure has taken place, the constitutional violation is accomplished; exclusion of evidence pursuant to the exclusionary rule does nothing to repair or redress the unconstitutional invasion of privacy that has already occurred. See, e.g., Pennsylvania Board of Probation and Parole v. Scott, 524 U.S. 357, 362 (1998); Stone v. Powell, 428 U.S. 465, 486 (1976). Rather, the exclusionary rule serves to make future constitutional violations less likely by rendering unusable the fruits of the violation that has already occurred. See, e.g., Commonwealth v. Miller, 518 A.2d 1187, 1195 (Pa. 1986)

(recognizing that "the exclusionary rule is a judicially created device designed to deter improper governmental action in the course of criminal investigations and prosecutions. It is not a personal right of the accused").

Even when focusing on the right to privacy or the mandate of probable cause, goals emphasized by this Court in Edmunds, we must be mindful that the exclusionary rule looks ahead to the next case, seeking to prevent future violations of the right to privacy and future issuance of warrants unsupported by probable cause. Accordingly, the exclusionary rule is of marginal value under circumstances where its application is unlikely to yield future benefits with regard to the right to privacy and/or the mandate of probable cause. Furthermore, we must consider not only the marginal value of the rule under such circumstances, but also the costs of the rule with respect to prosecution of the accused and protection of society.

This Court raised similar points concerning the goals of the exclusionary rule and the need to weigh all the interests relevant to its application only a few years after Edmunds was decided:

> Upon reflection, it is apparent that in the context of the Fourth Amendment, when a court deters police misconduct, it necessarily also safeguards privacy and the probable cause requirement. Why would a court deter police misconduct at all if not to deter police from improperly invading the right of persons to be secure, i.e., private, in their persons, houses, papers and effects? Deterring police misconduct is not an end in itself. The ultimate distinction, then, between the federal and the Pennsylvania analysis is not that the federal courts seek only to deter police misconduct and the Pennsylvania courts seek to protect certain rights, but that the federal courts place less importance than do we on the right of privacy. Therefore, they balance the interests differently and reach a different conclusion as to the relative importance of privacy as against securing criminal convictions.

Mason, 637 A.2d at 257 n.3.

In any given case, balancing the individual right of privacy and/or the mandate of probable cause against the public interest in truth-determination at trial and conviction of the guilty, requires a fact-specific inquiry operating between wide parameters. While "the right of privacy is a well-settled part of the jurisprudential tradition in this Commonwealth, … the right is not an unqualified one; it must be balanced against weighty competing private and state interests." Commonwealth v. Cass, 709 A.2d 350, 364 (Pa. 1998) (citation omitted); see also Commonwealth v. Williams, 692 A.2d 1031, 1035-39 (Pa. 1997) (after balancing the interests of the Commonwealth and the parolee-appellee, concluding that, under the Fourth Amendment or Article I, Section 8, a parolee has a diminished right to privacy as compared to a free individual). Although we have often applied the exclusionary rule, see text, supra, (setting forth examples), we have never held that its application is mandatory or appropriate for every violation of Article I, Section 8. As Mason, supra, implies, and has often been explicitly recognized, see, e.g., Davis v. United States, ___ U.S. ___, 131 S.Ct. 2419, 2427 (2011), application of the exclusionary rule exacts a significant cost to the judicial system in the loss of relevant and trustworthy evidence, and to society in the vindication and release of the guilty. In a recent case, we expressly recognized the need to balance the competing interests involved: "[t]he greatest difficulty in the enforcement of a prophylactic rule intended to guard individual liberties is on account of the competing value in society's interest in identifying and punishing wrongdoers." Commonwealth. v. Henderson, 47 A.3d 797, 804 (Pa. 2012) (in a case decided under Article I, Section 8, holding that the standard for application of the independent source doctrine set forth by the U.S. Supreme Court in Murray v. United States, 487 U.S. 533 (1988), "strikes the appropriate balance between privacy and law enforcement").

Furthermore, it is notable, and of no small moment, that the exclusionary rule provides no relief whatsoever for an individual who is the subject of an unreasonable search or seizure that has not led to the discovery of any incriminating evidence. See, e.g., Elkins v. United States, 364 U.S. 206, 217 (1960). An innocent victim of an illegal search and seizure has suffered as grievous an invasion of privacy as an accused, but only the accused has any possibility of direct and individual benefit from the exclusionary rule.

Here, there is no question that Appellee's arrest on the inactive warrant was illegal. See Smith, supra at 1152. However, neither the Fourth Amendment nor Article I, Section 8 mandates the exclusion of evidence obtained subsequent to an illegal arrest. See id.; Herring, supra. The relevant privacy interest at stake -- not being taken into custody a second time on an arrest warrant supported by probable cause that has already been served -- must be balanced against weighty competing state and public interests in law enforcement that can protect the public effectively, and in criminal prosecutions that can utilize reliable evidence at trial. The weighing of these competing interests is necessarily informed by a consideration of whether application of the exclusionary rule in this case will actually advance the privacy interest at stake. More specifically, we must consider whether exclusion of the evidence in this case is likely to improve record-keeping with regard to expired warrants in the future, thus ensuring that police will receive more accurate information as to the viability of a warrant.

Conclusion

I conclude that when police make an illegal arrest on an expired warrant as a result of an error in record-keeping reflecting nothing more than a non-systemic instance of administrative negligence, the exclusionary rule should not apply to suppress evidence discovered incident to the arrest. This conclusion logically follows

from the marginal impact that application of the exclusionary rule would have on deterring a rare instance of negligent record-keeping. When the slim likelihood of benefit under such circumstances is balanced against the high price of loss of evidence, I conclude that the exclusionary rule should not apply. However, if the error in record-keeping reflects a systemic or institutional administrative problem leading to repeated errors in the recording and transmission of information as to the status of warrants, then application of the exclusionary rule would be appropriate because of its deterrent effect and consequent promotion of individual privacy. Likewise, and for the same reasons, if law enforcement agents exhibit intentional or reckless disregard of constitutional rights by arresting an individual on a warrant the agents knew or reasonably should have known was expired, application of the exclusionary rule is appropriate. This approach is consistent with the U.S. Supreme Court's Fourth Amendment decision in Herring, and I conclude that, under the circumstances presented, the Fourth Amendment and Article I Section 8 provide co-extensive protections.

Here, the trial court specifically determined that there was no misconduct on the part of the arresting officer, who acted on what he, the State Police and the Wilkes-Barre City Police all believed to be an active warrant. Trial Court Opinion, dated 1/24/11, at 5. However, the trial court made no findings as to the nature of the error that led to the misidentification of the warrant as active, and thus, on the record before us, it is impossible to determine if the exclusionary rule should have been applied.

I would, therefore, vacate the order of the Superior Court and remand to the trial court to conduct further proceedings to determine the nature of the error that led to the incorrect characterization of the warrant as active. I would suggest that the trial court consider the relevant administrative procedures in place for tracking arrest warrants and informing police as to the viability of a particular warrant, and the time that elapsed

between when the arrest warrant should have been withdrawn and when the accused was arrested.

Mr. Justice Stevens joins this opinion.