IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 66816-1-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
ROBERT H. CHAPMAN,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: July 16, 2012
_____	)	

Becker, J. — Robert Chapman appeals his felony conviction for driving under the influence. He contends the trial court erred in denying his motion to suppress evidence. We agree. There was no valid basis to search his vehicle incident to his arrest without a warrant. All of the evidence supporting his conviction stemmed from the initial unlawful search and was subject to the exclusionary rule. We reverse.

FACTS

At 7:30 a.m. on April 13, 2009, police officer Di Alexander ran a routine license check on a vehicle passing by and learned that the registered owner had a suspended driver's license and two outstanding misdemeanor warrants. Department of Licensing records indicated that the driver was also required to

have an ignition interlock device. Officer Alexander pulled the vehicle over and contacted the driver, Robert Chapman. Her partner, Officer James Martin, arrived as backup. Chapman presented his Washington identification card, confirming that he was the registered owner. Officer Alexander placed Chapman in handcuffs and arrested him for driving with a suspended license and for the two warrants. The officer escorted Chapman to her patrol car and advised him of his rights under Miranda.[1]

With Chapman secured in her vehicle, Officer Alexander returned to Chapman's car and searched it, partly to determine whether the car had an ignition interlock device as required and also because, according to her training and understanding at the time, arrest of the driver provided a lawful basis to search the vehicle. The search of Chapman's car took place eight days before the United States Supreme Court issued its decision in Arizona v. Gant, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). Alexander discovered several open and mostly empty cans of Sparks, an alcoholic energy drink, on the driver's side floorboard. Before she saw the open containers, Officer Alexander had not observed any signs of intoxication and had detected only an "overwhelming" smell of cigarette smoke.

After finding this evidence, Officer Alexander briefly consulted her partner

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

who told her he had noticed an odor of alcohol.[2] The officer then asked Chapman if he had been drinking. Chapman said he drank the night before and had consumed two cans of Sparks that morning. The officer conducted a field sobriety test and detected several indicators of intoxication. She then took Chapman to a nearby police station and administered breath alcohol tests which registered Chapman's alcohol level as at least .186.

The State charged Chapman with driving while under the influence (DUI) as a felony offense and driving with a suspended license.

Chapman filed a motion to suppress, challenging the warrantless search of his car under Arizona v. Gant, 556 U.S. 332, State v. Patton, 167 Wn.2d 379, 219 P.3d 651 (2009), and State v. Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009), all decided after his arrest. Chapman argued that the cans of alcohol discovered in the search were inadmissible and all evidence gathered following the search should be excluded as the "fruit of the unlawful search." The trial court denied the motion, concluding that the search of the vehicle was lawful because it was a search for evidence related to the crime of ignition interlock violation. A jury convicted Chapman as charged and he appeals.

EXCLUSIONARY RULE

[2] Officer Martin did not testify at the 3.6 hearing. At trial, he described the odor as "faint."

The State agrees that the search of Chapman's car incident to his arrest violated his right to privacy under article I, section 7 of the Washington Constitution. Under an independent state constitutional analysis, a warrantless vehicle search incident to arrest is authorized only under circumstances when the person arrested would be able to obtain a weapon from the vehicle or reach evidence of the crime of arrest to conceal or destroy it. State v. Snapp, __ Wn.2d __, 275 P.3d 289, 295 (2012). Therefore, as the State properly concedes, the evidence directly resulting from the unlawful search—the Sparks cans—should not have been admitted as evidence.

But the State and Chapman disagree on the scope of the exclusionary rule as it applies to this case. According to Chapman, the exclusionary rule bars admission of all of the evidence supporting his conviction, including his incriminating statements and test results, because all the evidence was directly derived from the initial illegal search. The State, on the other hand, argues that only the cans were subject to suppression. In the State's view, all evidence of Chapman's intoxication subsequently gathered was admissible because it was obtained by lawful means and the officer had sufficient independent reasons to question Chapman about drinking. The State therefore contends that Chapman's DUI conviction is supported by ample admissible evidence and the admission of the Sparks cans was harmless error.

Under the exclusionary rule, the State may not present evidence obtained

during an illegal search in its case-in-chief. State v. Gaines, 154 Wn.2d 711, 716-17, 116 P.3d 993 (2005). Additionally, evidence derived from an illegal search may also be subject to suppression as "fruit of the poisonous tree" where it has been obtained by exploitation of an officer's illegal conduct. Wong Sun v. United States, 371 U.S. 471, 487-88, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963); Gaines, 154 Wn.2d 711, 716; State v. Allen, 138 Wn. App. 463, 469, 157 P.3d 893 (2007). Unlike its federal counterpart, Washington's exclusionary rule is "nearly categorical." State v. Afana, 169 Wn.2d 169, 180, 233 P.3d 879 (2010); State v. Winterstein, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009).

The State argues that one of the few exceptions to our exclusionary rule, the independent source doctrine, applies here.[3] Under this rule, evidence tainted by unlawful government action may be exempt from the exclusionary rule if police officers ultimately obtain the evidence using "a valid warrant or other lawful means independent of the unlawful action." Gaines, 154 Wn.2d at 718; State v. Hilton, 164 Wn. App. 81, 90, 261 P.3d 683 (2011), review denied, 173 Wn.2d 1037 (2012). Courts have applied this doctrine in limited circumstances

[3] Chapman cites State v. Ibarra–Cisneros, 172 Wn.2d 880, 884-85, 263 P.3d 591 (2011), as additional authority. There, the Supreme Court stated, "Courts should not consider grounds to limit application of the exclusionary rule when the State at a CrR 3.6 hearing offers no supporting facts or argument." In this case, however, although the State did not expressly cite the independent source rule at the suppression hearing, it sufficiently articulated its position that the DUI investigation was not triggered solely by the evidence found in the car. Therefore, the State did not waive its argument regarding application of the exclusionary rule.

and typically, in the following fact pattern: law enforcement officers discovered evidence pursuant to an unlawful search, recognized the error, then obtained a search warrant based on independent, untainted information, and subsequently seized the evidence pursuant to that warrant. See Murray v. United States, 487 U.S. 533, 535-36, 537, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988); Gaines, 154 Wn.2d at 712-15; State v. Miles, 159 Wn. App. 282, 284, 244 P.3d 1030, review denied, 171 Wn.2d 1022 (2011). For example, in Gaines, police officers searched a suspect's car without a warrant and discovered an assault rifle. They did not seize the gun at the time, but then obtained a warrant, conducted a search, and seized it. The court held that the search pursuant to the warrant was valid because even after striking all references to the illegal search of the trunk, independent and legally-obtained information supported the warrant. Gaines, 154 Wn.2d at 718-20. Also, the trial court's findings adequately supported the conclusion that the officers were not motivated by what they saw during the unlawful search to seek a warrant, but would have sought a warrant for the car based on facts gathered independently from the illegal search. Gaines, 154 Wn.2d at 721.

Here, the State is asking this court to speculate that the police officer would have asked Chapman about alcohol consumption even if she had not illegally searched his car. In so doing, the State is actually relying on the inevitable discovery doctrine, not the independent source doctrine. Inevitable

discovery is not a valid exception to the exclusionary rule in Washington. Winterstein, 167 Wn.2d at 636. The factual inquiry to determine whether the independent source doctrine applies does not require the court to entertain speculative questions about what police officers might have done if they had not engaged in illegal conduct. Rather, we consider the context of the police investigation and what motivated the police to take the steps they took.

> When dealing with derivative evidence, the factual question that must be answered under the independent source doctrine appears similar to the issue presented by the inevitable discovery doctrine. However, it is not the same. Inevitable discovery involves evidence that was wrongly obtained. Washington courts will not entertain the speculative question about whether the police ultimately would have obtained the same information by other, lawful means. In contrast, inevitable discovery *in the context of derivative evidence*, necessarily deals with evidence that itself was not unlawfully obtained. Instead, the question is whether the process of obtaining the derivative evidence was tainted by an earlier illegality. This factual problem necessarily looks to what the police were doing and what motivated them to take the action they did. But it does not involve the speculative question of whether they later would have actually found the evidence by some legal means. Whether lawfully obtained (i.e., there is no question of additional illegality beyond the original error) evidence was tainted by earlier unlawful actions does not present a speculative question of what the officers might have done next.

Hilton, 164 Wn. App. at 91-92.

The inquiry, then, is not whether Officer Alexander would have asked Chapman about his drinking even if she had not searched his car. It is whether

his confession was obtained independent of the unlawful search. A part of this inquiry is whether the officer was motivated by discoveries made in the initial unlawful search. Murray, 487 U.S. at 542; Gaines, 154 Wn.2d at 718-21; Miles, 159 Wn. App. at 291-94.

Unsupported by any evidence presented at the CrR 3.6 hearing, the State asserts that Officer Alexander would have asked Chapman about alcohol consumption for "independent reasons" even if she had not found evidence of alcohol in the car. This bare assertion fails to establish that the discovery of additional evidence was independent from the initial unlawful search of the car. Officer Alexander was not specifically asked why she broadened the investigation after arresting Chapman for driving with a suspended license and outstanding warrants. But the clear inference from her testimony about the sequence of events was that her discovery of the Sparks cans prompted her to interrogate Chapman about his drinking. The trial court did not find that the evidence during the subsequent investigation was genuinely independent of the warrantless search incident to arrest, nor are there any facts in the record that would support such a finding.

Chapman's right to privacy under article I, section 7 of the Washington State Constitution was violated when the officer searched his car without a warrant. All of the evidence of Chapman's intoxication derived from the unlawful warrantless search. The trial court erred in denying the motion to suppress.

Reversed.

Becker, J.

WE CONCUR:

Appelwick, J.

Dwyer, J.