IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. gilberto ibarra-cisneros, Petitioner.	NO. 82219-1 EN BANC Filed October 20, 2011

STEPHENS, J.—Petitioner Gilberto Ibarra-Cisneros and his brother, Adrian Ibarra-Raya, were separately prosecuted on drug charges in November 2006. Both moved unsuccessfully to suppress evidence discovered as a result of the warrantless search of Ibarra-Raya's home. In particular, Ibarra-Cisneros argued to suppress the evidence against him as the fruit of the unlawful use of Ibarra-Raya's cell phone, which was seized during the search. The Court of Appeals determined that the search of Ibarra-Raya's home was unlawful, but that "any connection between Mr. Ibarra-Raya's cell phone and the bindle found at Mr. Ibarra-Cisneros's feet is too attenuated to affect his cocaine possession conviction." *State v. Ibarra-Raya,* 145 Wn. App. 516, 524, 187 P.3d 301 (2008) (citing *State v. Tan Le,* 103 Wn. App.

354, 360-62, 12 P.3d 653 (2000)). We granted review and now reverse.

FACTS

In the early morning hours of July 14, 2006, Adrian Ibarra-Raya's home was searched by officers of the Walla Walla Police Department. Officers found drugs in the house, arrested Ibarra-Raya, and took him to the police station for questioning. While Ibarra-Raya was at the police station, his brother, Gilberto Ibarra-Cisneros, attempted to reach him on his cell phone. The phone had been seized and was answered in Spanish by a drug enforcement administration (DEA) agent who was working with the police. The agent did not identify himself, but told Ibarra-Cisneros that his brother was in the bathroom. During the course of the conversation, Ibarra-Cisneros became insistent on speaking with his brother and exchanged angry words with the agent, who ultimately arranged to meet Ibarra-Cisneros in the parking lot of a nearby supermarket.

At the parking lot, officers followed a pickup in which Ibarra-Cisneros was a passenger. Ibarra-Cisneros got out of the vehicle and stood beside it. Officers testified they found a freshly dropped bindle of cocaine on the ground where Ibarra-Cisneros was standing. The State charged Ibarra-Cisneros with cocaine possession. Ibarra-Raya was charged with possession of marijuana with intent to deliver and possession of cocaine. At a pretrial CrR 3.6 hearing, the defendants jointly sought to suppress evidence seized during the warrantless search of Ibarra-Raya's home. The State did not argue that Ibarra-Cisneros lacked standing to move to suppress

any evidence or that the evidence used against him was too attenuated from the search of the home to be subject to the exclusionary rule. There was no hearing on questions such as whether law enforcement conducted a valid *Terry*[1] stop of Ibarra-Cisneros, whether the cocaine bindle found at his feet was in open view, or whether any evidence obtained following the home search was attenuated from the circumstances of the search. Rather, the record confirms that the suppression hearing for Ibarra-Cisneros and his brother was consolidated and the State treated both men's claims as rising or falling together. *See* Clerk's Papers at 53-62, 101-05, 216-21; Verbatim Report of Proceedings at 6-40. Given this focus of the CrR 3.6 hearing, we have a limited factual record.

The trial court refused to suppress the evidence, and Ibarra-Raya and Ibarra-Cisneros appealed. The brothers filed a joint brief in the Court of Appeals challenging the State's assertion of various exceptions to the warrant requirement for the search of the home. As an alternative basis to reverse his conviction, Ibarra-Cisneros argued that the State lacked sufficient evidence of constructive possession of cocaine to sustain his conviction. Appellants' Br. at 4-5, 60-62. The defense maintained, "Throughout the proceedings below, there has been no question that if the evidence gathered from the Ibarra-Raya home was suppressed, that the evidence against Mr. Ibarra-Cisneros must also be suppressed." *Id.* at 58-59. The State did not dispute this assertion, but rather relied on all of the evidence gathered after the

[1] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

home search to support Ibarra-Cisneros's conviction, and maintained that all of the evidence was properly admitted. Br. of Resp't at 33-36.

The Court of Appeals held that the search of Ibarra-Raya's home was unlawful and reversed his conviction. The court affirmed Ibarra-Cisneros's conviction, however, concluding:

> [A]ny connection between Mr. Ibarra-Raya's cell phone and the bindle found at Mr. Ibarra-Cisneros's feet is too attenuated to affect his cocaine possession conviction, when considering the intervening circumstances, temporal factors, and lack of flagrant police conduct.

Ibarra-Raya, 145 Wn. App. at 524 (citing *Tan Le*, 103 Wn. App. at 360-62). This conclusion is the sum total of the Court of Appeals attenuation analysis. The court then rejected Ibarra-Cisneros's alternative challenge to the sufficiency of the evidence used to convict him. *Id*.

The Court of Appeals cursory application of the attenuation doctrine prompted a petition for review by Ibarra-Cisneros that focused on law enforcement's use of the illegally seized cell phone. The American Civil Liberties Union of Washington filed an amicus brief in support of Ibarra-Cisneros's position. The State did not answer the petition for review or file a supplemental brief, so we have no briefing from the State addressing the attenuation doctrine. We granted Ibarra-Cisneros's petition for review. *State v. Ibarra-Cisneros*, 165 Wn.2d 1036, 205 P.3d 131 (2009).

ANALYSIS

Our resolution of this case is dictated by the limited record and briefing before us. While several important issues are suggested by the underlying facts, we will not consider arguments that were waived below. Nor will we engage in a gratuitous examination of the exclusionary rule under federal and state law, including the question of whether the attenuation doctrine is consistent with article I, section 7 of the Washington State Constitution.

Where it applies, the attenuation doctrine is recognized as an exception to the exclusionary rule. It is well established that "[t]he burden is upon the State to demonstrate sufficient attenuation from the illegal search to dissipate its taint." *State v. Childress*, 35 Wn. App. 314, 316, 666 P.2d 941 (1983); *see also Nardone v. United States*, 308 U.S. 338, 341, 60 S. Ct. 266, 84 L. Ed 307 (1939). 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.

Here, the Court of Appeals affirmed Ibarra-Cisneros's conviction by sua sponte applying the attenuation doctrine as an exception to the exclusionary rule. It did not consider the joint treatment of Ibarra-Raya's and Ibarra-Cisneros's suppression motions below or the lack of a record at the CrR 3.6 hearing on the factors it articulated as supporting an attenuation analysis.[2] Accordingly, the Court of Appeals erred in relying on the attenuation doctrine as the basis to allow the

[2] The parties have not addressed whether the attenuation doctrine is a recognized exception to the exclusionary rule under article I, section 7 of the Washington State Constitution, and we do not reach that issue.

cocaine evidence against Ibarra-Cisneros.

This case does not require us to consider whether Ibarra-Cisneros has a protectable privacy interest at stake, as the State did not raise this issue below, and there is some indication that the State affirmatively waived this issue when it agreed that the brothers' suppression motions should be treated similarly. For the same reason, there is no question here that Ibarra-Cisneros has standing to challenge the search of his brother's home. In a different case, similar facts may raise issues of standing or the extent of the petitioner's protectable privacy interest, but these issues were not raised below by the State, and we will not consider them for the first time on appeal, particularly in the absence of adequate briefing.

In light of the way this case has developed, the only fair resolution of Ibarra-Cisneros's appeal is to treat it as the Court of Appeals treated Ibarra-Raya's appeal. The State has not met its burden of purging the taint resulting from the unlawful home search. Rather than reaching for issues not raised below, we return this case to where it started with the acknowledgement that, because the warrantless home search was unlawful, all evidence seized as a result must be suppressed. We reverse the Court of Appeals.[3]

[3] This resolution makes it unnecessary to consider Ibarra-Cisneros's alternative argument that, even if the challenged evidence is allowed, the evidence is insufficient to support his conviction.

AUTHOR:
Justice Debra L. Stephens

WE CONCUR:

	Justice Mary E. Fairhurst
Justice Charles W. Johnson	Richard B. Sanders, Justice Pro Tem.
Justice Tom Chambers	
Justice Susan Owens	