*State v. Ibarra-Cisneros (Gilberto)*
Concurrence by Alexander, J.

No. 82219-1

ALEXANDER, J. (concurring)—I write separately in order to address the question that prompted this court to grant review: whether the connection between the discovery of cocaine at Gilberto Ibarra-Cisneros's feet and the unlawful seizure of Adrian Ibarra-Raya's cell phone was so attenuated as to dissipate the taint.[1] Having determined that the warrantless search that yielded the cell phone was illegal, it was proper for the Court of Appeals to consider whether that illegality tainted the cocaine evidence that supported Ibarra-Cisneros's conviction for possession of cocaine. The record before us, which contains not only Ibarra-Raya's and Ibarra-Cisneros's joint suppression motion, but also the testimony elicited during Ibarra-Cisneros's two-day trial, is more than adequate to answer that question.

In affirming Ibarra-Cisneros's conviction, the Court of Appeals relied on the attenuation factors developed by the United States Supreme Court in *Brown v. Illinois*, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975): (1) temporal proximity, (2) the

[1]The constitutionality of the attenuation doctrine under article I, section 7 of the Washington Constitution was addressed in both the lead opinion and dissenting opinion in *State v. Eserjose*, 171 Wn.2d 907, 926-29, 259 P.3d 172 (2011).

presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct. *See State v. Ibarra-Raya*, 145 Wn. App. 516, 524, 187 P.3d 301 (2008) (citing *State v. Le*, 103 Wn. App. 354, 360-62, 12 P.3d 653 (2000)), *review granted sub nom. State v. Ibarra-Cisneros*, 165 Wn.2d 1036, 205 P.3d 131 (2009). These factors aid courts in determining ""'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'"" *Brown*, 422 U.S. at 599 (quoting *Wong Sun v. United States*, 371 U.S. 471, 487-88, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963) (quoting John MacArthur Maguire, Evidence of Guilt 221 (1959))).[2] The court concluded 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." *Ibarra-Raya*, 145 Wn. App. at 524.

The Court of Appeals' conclusion is belied by record, which shows that the tainted cell phone was instrumental in the discovery of the cocaine. As the prosecutor said at the hearing on Ibarra-Cisneros's *Knapstad*[3] motion, "The fact is, the phone call

[2]Contrary to the statement of the concurring justice in *Eserjose*, *Wong Sun* did not distinguish "evidence ""'attenuated'"'" from the government's lawless conduct from evidence that has not ""'been come at by exploitation of that illegality'"'" in the first place." *Eserjose*, 171 Wn.2d at 932 (Madsen, C.J., concurring) (quoting *Nardone v. United States*, 308 U.S. 338, 341, 60 S. Ct. 266, 84 L. Ed. 307 (1939) (quoting Maguire, *supra,* at 221)). It *defined* "attenuated evidence" as evidence that has not been "'come at by exploitation of . . . illegality,'" but "'instead by means sufficiently distinguishable [note: not *totally* distinguishable] to be purged of the . . . taint.'" *Wong Sun*, 371 U.S. at 488 (quoting Maguire, *supra*, at 221). In fact, the language in question comes from a passage that begins: "A brief study of *attenuation* follows." Maguire, *supra*, *at* 220 (emphasis added).

[3]*State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

led the police to him." Verbatim Report of Proceedings at 75. A review of the sequence of events that led to the seizure of the cocaine reveals that officers exploited the tainted phone at almost every step. Indeed, Ibarra-Cisneros only came to the attention of police officers when his brother's cell phone started "chirping" at the police station. *Id*. at 137. Thereafter, officers used the tainted phone in order to arrange a meeting with Ibarra-Cisneros in a parking lot, to identify him when he arrived at the agreed location, and to verify that the phones in the truck Ibarra-Cisneros was riding in had been used to contact the phone at the police station.

Thus, the record shows that the cocaine that supported Ibarra-Cisneros's conviction was not "'come at . . . by means sufficiently distinguishable to be purged of the . . . taint.'" *Wong Sun*, 371 U.S. at 488 (quoting Maguire, *supra,* at 221). The tainted cell phone was in fact the primary means of locating Ibarra-Cisneros, and the police obtained the cocaine as a direct result of this contact. Thus, the connection between the discovery of the cocaine at Ibarra-Cisneros's feet and the unlawful seizure of Ibarra-Raya's phone is not "'so attenuated as to dissipate the taint.'" *Id*. at 487 (quoting *Nardone v. United States*, 308 U.S. 338, 341, 60 S. Ct. 266, 84 L. Ed. 307 (1939)). Therefore, I concur in the judgment to reverse Ibarra-Cisneros's conviction on the ground that the officers exploited the tainted cell phone in obtaining the cocaine.

AUTHOR:
Justice Gerry L. Alexander

WE CONCUR: