

A Red Herring Or Worse

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The United States Supreme Court recently decided another case in what appears to be an evolving attack on the exclusionary rule under the Fourth Amendment to the United States Constitution. In Herring v. United States, 129 Supreme Court 695, 172 Legal Ed 2nd 496 (2009) the court affirmed, in a 5-4 decision, an 11th Circuit decision upholding a district court's failure to suppress evidence under the exclusionary rule. The question is whether this is a typical good faith exception to the exclusionary rule that has existed for many years (see Illinois v. Gates, 462 US 213, 103 Supreme Court 2317, 76 Legal Ed 2nd 527 (1983)) or something far more reaching. Certainly, the press describes this as another nail in the coffin of the exclusionary rule.

In Herring, a police investigator obtained information that the defendant (a convicted felon) had driven to the sheriff's department to obtain items from his impounded truck. The investigator asked the county warrant clerk to check if there were any outstanding warrants for the arrest of the individual. The clerk found none. The investigator then asked a different clerk in an adjoining county to do the same and that individual indicated there was an active arrest warrant for the defendant's failure to appear on a felony charge. The investigator requested that the warrant be faxed to him. The defendant was arrested and upon searching him they found methamphetamine and a pistol. However, there had been no warrant and the information given to the investigator was erroneous. Nor had the warrant been faxed, because it didn't exist. In fact it had been recalled, which was then communicated to the investigator. Nonetheless, the evidence was admitted and the court upheld the search.

In affirming the decision, the Court noted that it had accepted the petition for cert to resolve a conflict between the 11th Circuit decision and the state court decision in Hoay v. State, 348 Arkansas 80, 71 SW 3rd 573 (2002). It then started with the proposition that the Fourth Amendment, which contains no provision expressly excluding the use of evidence obtained in violation of its commands, nevertheless has been used to forbid the use of improperly obtained evidence at trial. This has been the case since Weeks v. United States, 232 U.S. 383, 34 Supreme Court 341, 58 Legal Ed 652 (1914). As stated in United States v. Calandra, 414 U.S. 338, 94 Supreme Court 613, 38 Legal Ed 2nd 561 (1974), the rule was designed to safeguard Fourth Amendment rights generated through its deterrent effect. The Court then noted that exclusion has always been the last resort and not the first "impulse". Citing Hudson v. Michigan, 547 U.S. 586, 126 Supreme Court 2159, 165 Legal Ed 2nd 56 (2006). As the Court stated, it is only to ap-

ply where it “results in appreciable deterrence.” Moreover, the Court said the benefits of deterrence must outweigh the costs and further stated that the possible benefit must be weighed against its “substantial social costs.”

In its discussion of the exclusionary rule, the Court noted the exclusion of evidence has generally been found when there was intentional conduct that was patently unconstitutional. For instance, it noted that officers breaking into a defendant’s home without a warrant had met this test in Weeks because “not only did they have no such search warrant ... but they could not have gotten one had they tried.” It also noted that in a situation where officers had forced open the door to the defendant’s house and kept her lawyer from entering while brandishing a false warrant while putting the defendant into handcuffs was flagrant conduct justifying the exclusionary rule.

Ultimately the Court found that the pertinent analysis of deterrence is objective and not subjective while at the same time indicating that it did not mean to “suggest that all record keeping errors by the police are immune from the exclusionary rule.” It then suggested that if the police had been shown to be reckless in maintaining a warrant system or had knowingly made false entries to lay the ground work for future false arrest, an exclusion of evidence might be justified. It is, however, apparent that the majority is at a minimum, restricting the exclusionary rule to those cases where there is some type of intentional bad faith behavior on the part of the authorities.

It is noteworthy that the Court did not mention that the investigator acted prior to even receiving the faxed warrant. However, by characterizing this as negligent record keeping, the Court gave the benefit of the doubt to the good faith rule. While it appears that the press has overstated the impact of the case, the Court is set to decide at least two more cases that may in fact lead to the erosion of the exclusionary rule. Thus, it is extremely important when faced with suppression issues to include extensive analysis under the Washington Constitution, otherwise depending on the direction of the United States Supreme Court you could end up losing the issue entirely under federal jurisprudence.