United States v. Song Ja Cha: The Ninth Circuit Finds Evidence Obtained Pursuant to Unreasonably Long Seizures Excludable Where Police Officers Demonstrate a Mistake of Law

I. Overview

Police officials in Tamuning, Guam did not obtain a search warrant until 26.5 hours after they seized the Cha's home, excluding Mr. In Han Cha from his property for all but a few minutes of the 26.5 hours.[1] Subsequently, the State charged both Mr. Cha and his wife, Ms. Song Ja Cha, "with the federal crimes of conspiracy, sex trafficking and coercion, and enticement to travel for the purpose of prostitution . . ."[2] In a pretrial hearing, the magistrate judge held the warrantless seizure of the Cha's property unconstitutionally long.[3] The district court agreed, finding the time the police department took to obtain a search warrant so unreasonable as to violate the Cha's Fourth Amendment rights.[4] The district court did not address the government's alternative argument that, even if the seizure was unreasonable, the evidence seized pursuant to the search warrant was not excludable as 'fruit' of an unreasonable seizure.[5]

---

[1] United States v. Song Ja Cha, No. 09-10147, slip op. 3783, 3786 (9th Cir. Mar. 9, 2010).

[2] Id. at 3783.

[3] Id.

[4] Id.

[5] See Id. at 3793 & n.7.

On appeal, the Ninth Circuit examined both the reasonableness of the seizure and the State's alternative argument against exclusion of the evidence.[6] The government argued that the seizure was reasonable because at least half of the time between the seizure and the acquisition of the warrant was at night, and at the same time, title 8, section 35.20(c) of the Guam Code afforded a presumption against searches conducted between the hours of 10 p.m. and 6 a.m.[7] The court found, however, that because the seizure began in daylight hours and that section 35.20(c) of the Guam Code provided an exception for that presumption, the seizure was nevertheless unreasonable.[8] Next, the Ninth Circuit agreed with the government's argument that the probable cause established an 'independent source' for the evidence such that it was not excludable as 'fruit' of the unreasonable seizure.[9] Despite this concession, the court found that the facts of the case justified exclusion of the evidence as a direct result of the unconstitutionally long seizure.[10] In response, the government argued that any police misconduct was unintentional and therefore not sufficiently deliberate to justify exclusion under Herring v. United States.[11] The United States Court of Appeals for the Ninth Circuit held that the Guam police department's

---

[6] Id. at 3787, 3793 & n.7.

[7] Id. at 3790 & n.3, 3791 & n.5 (citing Guam Code Ann. tit. 8, § 35.20(c)).

[8] Id. at 3790 n.3, 3791 n.5 (citing § 35.20(c)).

[9] Id. at 3793-94.

[10] Id. at 3794 (citing United States v. Dass, 849 F.2d 414, 414 (9th Cir. 1988)).

[11] Id. at 3796 (citing Herring v. United States, 129 S. Ct. 695, 700 & n.1, 704) (2009)).

conduct, which demonstrated a mistake of law, was sufficiently deliberate and culpable in relation to the standard of objective reasonableness; the conduct was systemic to the police department such that exclusion of the evidence would promote deterrence; and that exclusion of the evidence was worth the price paid by the justice system. United States v. Cha, No. 09-10147, slip op. 3783, 3796-99 (9th Cir. Mar. 9, 2010).

II. Background

The Supreme Court first addressed the issue of when a court must exclude evidence obtained pursuant to the warrantless seizure of a home in United States v. Segura.[12] Here, the Court delimited application of the exclusionary rule to evidence obtained pursuant to a warrantless seizure by promoting the doctrine of ""fruit of the poisonous tree.""[13] This analogy positions the illegal activity as a 'poisonous tree' and certain evidence derivative of the illegality as 'fruit' of that tree.[14] While evidence obtained as the direct result of illegal activity is clearly excludable as 'fruit of the poisonous tree', evidence obtained ""from an independent source"" of that illegal activity is not.[15] The Court in Segura held that evidence is not considered 'fruit of the poisonous tree' unless the illegal search or seizure is ""at least the 'but for' cause of the

---

[12] Segura v. United States, 468 U.S. 796, 809 (1984) (plurality opinion).

[13] Id. at 804 (quoting Nardone v. United States, 308 U.S. 338, 341 (1939).

[14] Id.

[15] Id. (quoting Wong Sun v. United States, 371 U.S. 471, 487 (1963)).

discovery of the evidence.""[16] Furthermore, Segura admonished courts to use good sense when determining if that but-for cause is so attenuated to endanger society's interest in the preservation of incriminating evidence.[17] Ultimately, the Court in Segura found that the legality of the seizure was irrelevant, as police officers had information sufficient to secure a warrant prior to the seizure; or rather, an 'independent source' for the warrant.[18]

Before the Court concluded that the independent source rendered the legality of the seizure irrelevant, however, it entertained the petitioner's argument that police officers obtained the evidence as a direct result of an illegal seizure by analyzing the legality of the seizure.[19] First, the Court in Segura distinguished the personal interests affected by a seizure from those affected by a search.[20] While a warrantless search threatens an individual's privacy interests, a warrantless seizure can only threaten an individual's possessory interests.[21] The Court then

---

[16] Id. at 815 (quoting United States v. Crews, 445 U.S. 463, 471 (1980)).

[17] Id. at 816 (citing Nardone v. United States, 308 U.S. 338, 341 (1939)); See United States v. Place, 462 U.S. 696, 696 (1983).

[18] Id. at 814 (citing Wong Sun v. United States, 371 U.S. 471, 488 (1963)).

[19] Id. at 805-06.

[20] Id. at 806 (citing inter alia United States v. Jacobson, 466 U.S. 109, 113 (1984)).

[21] Id. at 809 (noting that a seizure may be reasonable even where "[t]here was no indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant." (quoting Mincey v. Arizona, 437 U.S 385, 387 (1978))).

pointed to several factors indicative of the reasonableness of a warrantless seizure: those being the existence of probable cause, the need to preserve evidence, and whether or not the police officers purposefully delay obtaining a warrant in bad faith.[22] Nevertheless, the Court recognized that a reasonable warrantless seizure "may become unreasonable as a result of its duration . . ."[23] The Court in Segura found the delay reasonable because police officers were busy processing arrests related to the seizure, more than half of the delay was between 10 p.m. and 10 a.m. ("when it is reasonable to assume that judicial officers are not as readily available for consideration of warrant requests"), and the property owners were unable to exercise their possessory interests as they were in police custody.[24]

In Illinois v. McArthur, the Supreme Court ignored the initial question of whether or not there was an independent source for the warrant, but instead challenged the lower court's conclusion that the seizure was unreasonable.[25] Because the Court in McArthur predicated the admissibility of evidence obtained pursuant to the seizure on the legality of that seizure, it developed a four-factor test to assess the reasonableness of the seizure: those factors being the existence of probable cause at the time of the seizure, whether or not there was good reason to fear the homeowner would destroy the evidence, if police officers "made reasonable efforts to

---

[22] Id. at 810-13.

[23] Id. at 812 (citing United States v. Place, 462 U.S. 696 (1983)).

[24] Id. at 812-813 (citing United States v. Van Leeuwen, 397 U.S. 249 (1970)).

[25] Illinois v. McArthur, 531 U.S. 326, 331-33 (2001).

reconcile their law enforcement needs with the demands of personal privacy," and if the police officers' seizure of the dwelling was limited in time and scope.[26]

While the Court in McArthur assumed that police officers had both probable cause and good reason to fear the defendant would destroy evidence if left unrestrained, the Court left the question of whether or not the officers made a reasonable effort to reconcile their law enforcement needs somewhat more open-ended.[27] The Court found that the officers sufficiently reconciled their needs when they allowed McArthur to re-enter his home "for his own convenience" under police supervision.[28] On the other hand, the Court in McArthur implied that the police officers did not *have* to allow McArthur to re-enter his home, but could have been justified by simply excluding McArthur from his home while waiting for a search warrant.[29] Likewise, the question of whether or not the seizure was limited in time and scope is one that the Court only briefly explored, finding that, within the context of "the nature of the intrusion and the law enforcement interest at stake," the two-hour seizure "was no longer than reasonably necessary for the police, acting with diligence, to obtain the warrant."[30] This reasoning suggests that a determination of whether or not a seizure is limited in time and scope is largely based on

---

[26] Illinois v. McArthur, 531 U.S. 326, 331-33 (2001).

[27] Id. at 332.

[28] Id. at 335.

[29] Id. at 332 & 335; But see Cha, No. 09-10147, slip op. at 3789 (9th Cir. Mar. 9, 2010).

[30] Id. at 332-33.

the specific facts of the case. For these reasons, the Court in McArthur remanded the case to the lower court to assess the legality of the seizure.[31]

In Herring v. United States, the Supreme Court recounted that in effect, the exclusionary rule "forbids the use of improperly obtained evidence at trial."[32] Acknowledging the substantial consequences of this effect, the Court in Herring articulated both the purpose and appropriate application of the rule: to protect against Fourth Amendment violations only where exclusion will effectively deter future violations.[33] As such, the Court effectively developed another set of criteria by which to assess the admissibility of evidence obtained pursuant to a Fourth Amendment violation.[34] Central to the Court's analysis was the idea that the exclusionary rule does not apply, even to evidence obtained as a direct result of a Fourth Amendment violation, where the police officers' conduct was not deliberate, reckless, grossly negligent, "or in *some* circumstances" systemically negligent.[35] Therefore, "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."[36] Finally, the Court

---

[31] Id. at 337.

[32] Herring v. United States, 129 S. Ct. 695, 699 (2009) (citing Weeks v. United States, 232 U.S. 383, 398 (1914)).

[33] Id. at 699-700 (citing United States v. Calandra, 414 U.S. 338, 347-355 (1974)).

[34] Id. at 699.

[35] Id. at 702 (citing inter alia United States v. Leon, 468 U.S. 897 923, n.24 (1984)).

[36] Id.

in Herring measured the deliberateness and culpability of the conduct by the objective standard of a reasonably well-trained officer, in light of all of the circumstances.[37]

The Ninth Circuit has a similarly inconsistent body of case law concerning the application of the exclusionary rule to evidence obtained pursuant to an unreasonable seizure. In United States v. Holzman, the Ninth Circuit found the time it took a police officer to obtain a search warrant reasonable where that officer prepared a thorough warrant application and didn't purposefully delay in bad faith.[38] Then, in United States v. Dass, the Ninth Circuit affirmed the lower court's order to suppress evidence as a direct result of an unreasonably long seizure, where police seized a number of packages for a period of seven to twenty-three days.[39] Similarly, in United States v. Lopez-Soto, the Ninth Circuit held that there is no good-faith exception to the exclusionary rule where a police officer makes a mistake of law that violates a citizen's Fourth Amendment rights.[40] In both United States v. Ankeny and Lopez-Soto, however, the Ninth

---

[37] Id. at 703 (quoting Leon, 468 U.S, at 922, n.23).

[38] United States v. Holzman, 871 F.2d 1496, 1507-08 (9th Cir. 1989) (citing Segura v. United States, 468 U.S. 796, 813 (1984)); But see Cha, No. 09-10147, slip op. at 3789 (9th Cir. Mar. 9, 2010) (preparing a thorough warrant application not necessary and unreasonable).

[39] United States v. Dass, 849 F.2d 414, 414-16 (9th Cir. 1988).

[40] United States v. Lopez-Soto, 205 F.3d 1101, 1106 (9th Cir. 2000) (citing United States v. Gantt, 194 F.3d 987, 1006 (9th Cir. 1999)).

Circuit applied the 'inevitable discovery' doctrine to determine if the police officers would have discovered the evidence independent of the constitutional violation.[41]

III. The Court's Decision

In the noted case, the Ninth Circuit found the police officers' conduct unreasonable in relation to the factors advanced in Segura and McArthur.[42] Additionally, in keeping with Herring, the court found the police conduct sufficiently deliberate and culpable to justify exclusion of the evidence obtained pursuant to that seizure, despite that evidence not being 'fruit of the poisonous tree'.[43]

Because the police officers had probable cause to search the Cha's home prior to the seizure, the court conceded that the first factor of the McArthur test favored the government.[44] Next, the court affirmed the lower court's determination that the police officers had no good reason to fear Mr. Cha would destroy evidence, reasoning that the second factor was a purely

---

[41] See Lopez-Soto, 205 F.3d at 1106-07; United States v. Ankeny, 502 F.3d 829, 834, n. 2 (9th Cir. 2007) (quoting United States v. Ramirez-Sandoval, 872 F.2d 1392, 1399 (9th Cir. 1989)).

[42] United States v. Song Ja Cha, No. 09-10147, slip op. 3783, 3788-91 (9th Cir. Mar. 9, 2010).

[43] Id. at 3794-98.

[44] Id. at 3788.

factual determination and that lower court's finding was "not clearly erroneous."[45] The court found that the third factor also favored the Chas, focusing on the fact that police officers in McArthur allowed the property-owner to reenter his home at his convenience, while police officers only allowed Mr. Cha to reenter his home once in order to retrieve his diabetes medication.[46] Finally, the court held that the fourth factor of the McArthur test favored the Chas as well, because by preparing an overly detailed warrant application, police officers took more time than reasonably "*necessary*" to obtain the warrant.[47] Here, the court interpreted the requirement that the seizure be "no longer than reasonably necessary for the police, acting with diligence, to obtain the warrant" as according special relevance to the word 'necessary'.[48]

Looking to the Segura factors, the court conceded that, much like the seizure in Segura, there was no evidence that the police officers purposefully delayed obtaining the warrant in bad

---

[45] Id. at 3787, 3789 (citing United States v. Jones, 286 F.3d 1146, 1150 (9th Cir. 2002) (establishing the court's standard of review); But see McArthur, 531 U.S. at 332 (finding police officers' assumption that defendant would destroy evidence if given the opportunity reasonable, not erroneous).

[46] Id. at 3789; But see McArthur, 531 U.S. at 332, 335 (suggesting police officers met this requirement by simply waiting to search the home with a warrant).

[47] Cha, No. 09-10147, slip op. at 3789 (9th Cir. Mar. 9, 2010); But see Holzman, 871 F.2d 1496, 1507-08 (9th Cir. 1989).

[48] McArthur, 531 U.S. at 332 (2000); But see McArthur at 332, 334 (repeating the word 'diligence' rather than 'necessary').

faith.[49] Second, while the Court in Segura found that the police officers reasonably assumed judicial officers were unavailable to approve warrant applications between the hours of 10 p.m. and 10 a.m., the court held that Guam police officers could make no such assumption.[50] Citing the magistrate judge's report that "'[p]olice officers on Guam know that . . . a detached magistrate may be located at any hour to approve a warrant,'" as well as an exception to title 8, section 35.20(c) of the Guam Code, the court found that the police officers had every reason to believe they could obtain a search warrant during the night hours.[51] Unlike the Court in Segura, however, the court did not accord any relevance to the fact that some of the delay was a result of police officers processing arrests related to the investigation.[52] Finally, and most importantly, the court found that although Mrs. Cha could not exercise her possessory interests while in police custody, the fact that Mr. Cha was fully capable of exercising his possessory interests was a sufficient indication that the seizure was unreasonable.[53]

---

[49] Cha, No. 09-10147, slip op. at 3790 (9th Cir. Mar. 9, 2010) (citing Segura v. United States, 468 U.S. 797, 812-13 (1984)); .

[50] Id. at 3789-91 & n.5.

[51] Id. at 3789, 3791 & n.5 (citing Guam Code Ann. tit. 8, § 35.20(c) (authorizing judges to execute warrants between 10 p.m. and 6 a.m. if police officers demonstrate a reasonable cause)).

[52] Segura, 468 U.S. at 812; See Cha, No. 09-10147, slip op. at 3785.

[53] Id. at 3791 & n.4.

Next, the court conceded that the evidence was not excludable under the doctrine of 'fruit of the poisonous tree', as police officers established independent source for obtaining the evidence.[54] Even so, the court held that it could exclude the evidence "as a direct result of the constitutional violation," reasoning that United States v. Dass permitted per se exclusion of evidence obtained pursuant to an unconstitutionally long seizures, despite the fact that police officers in Dass seized packages (not a dwelling) for a period of at least seven days.[55]

Nevertheless, the court found the evidence was also excludable with regard to Herring v. United States, as the police conduct was not only systemic, but also sufficiently deliberate and culpable to justify exclusion.[56] First, the court looked to the requirement that the ""police conduct must be sufficiently deliberate that exclusion can meaningfully deter it . . .""[57] the court reasoned that the word 'deliberate' referred to any police conduct rising above the level of attenuated negligence; conduct that was either ""deliberate, reckless . . . grossly negligent, or . . .

---

[54] Id. at 3793-95 (citing Segura v. United States, 468 U.S. 797, 815 (1984); United States v. Ankeny, 502 F.3d 829, 836-38 (9th Cir. 2007) ; United States v. Salas, 879 F.2d 530, 536-39 (9th Cir. 1989)).

[55] Id. at 3794-95 (citing United States v. Dass, 849 F.2d 414, 414-16 (9th Cir. 1988)); But see Herring, 129 S. Ct. at 700 (citing Illinois v. Gates, 462 U.S. 213, 223 (1983)); Segura v. United States, 468 U.S. 797, 813-14 (1984).

[56] Id. at 3795-98 (citing Herring v. United States, 129 S. Ct. 695, 698-700 & n.1, 702, 704 (2009)).

[57] Id. at 3796 (quoting Herring v. United States, 129 S. Ct. 695, 702 (2009)).

recurring or systematic negligence.""[58] Because police officers did not act with adequate diligence, the court concluded that the entire Guam police department demonstrated a failure to know the governing law, and as such their conduct rose to the level of recklessness.[59] Furthermore, by not allowing Mr. Cha to retrieve his diabetes medication for over four hours, the court also found the police conduct sufficiently culpable to justify exclusion of the evidence.[60] Finally, the court appealed to the standard of the reasonably well-trained police officer, asserting that a reasonably well-trained officer is not ignorant of the requirement to pursue a search warrant diligently.[61]

IV. Analysis

The Ninth Circuit inappropriately focused on the reasonableness of the seizure before contending with the principal issue of whether the evidence in question was 'primary' or

---

[58] Id. at 3795-96 (quoting Herring, 129 S. Ct. at 702).

[59] Id. at 3797-98 (citing United States v. Lopez-Soto, 205 F.3d 1101, 1106 (9th Cir. 2000) (holding there is no good-faith exception to the exclusionary rule for police officers who make a mistake of law)).

[60] Id. at 3798 (quoting Herring, 129 S. Ct. at 702).

[61] Id. at 3796-97; See Herring, 129 S. Ct. at 704 (quoting United States v. Leon, 468 U.S. 897, 922 n.23 (1984)).

'derivative'.[62] While the court clearly implied that the evidence was derivative, it did not recognize that the evidence was also the product of an 'independent source', and therefore not subject to the exclusionary rule, until after analyzing the legality of the seizure.[63] And, as the Court in Segura confirmed, the legality of the initial seizure is irrelevant to the admissibility of the evidence if there was an independent source for the evidence.[64] That the court failed to appropriately consider the applicability of the exclusionary rule is not surprising, however, as McArthur provided the court a convenient precedent for this erroneous approach.[65] Perhaps sensing the over-exclusive effect of McArthur, the Court in Herring tailored a far narrower standard for applying the exclusionary rule while refusing to analyze the reasonableness of the police conduct.[66] The divergent approaches to the exclusionary rule manifested in Herring and Cha no doubt stems from two discrete ideologies: one that views the rule as a last resort, and

---

[62] Id. at 3788; See Segura v. United States, 468 U.S. 796, 804-05 (1984) (citing Nardone v. United States, 308 U.S. 338, 341 (1939); Weeks v. United States, 232 U.S. 383 (1914)).

[63] Id. at 3793 (admitting seizure not but-for cause analogous to admitting not directly excludable as primary evidence).

[64] Segura, 468 U.S. at 814.

[65] McArthur, 531 U.S. 326, 331-32 (2001) (analyzing the reasonableness of the seizure without addressing the question of an independent source for the evidence).

[66] Herring, 129 S. Ct. 695, 698 (2009) (finding the exclusionary rule does not apply in instances of isolated, police negligence).

another, "majestic" conception of the rule that champions individual rights over sovereign interests.[67] While neither ideology is without reproach, the majority in Herring incisively noted that the 'majestic' conception of the exclusionary rule "relies almost exclusively on previous dissents . . ." to justify the exclusion of evidence in the face of the substantial social cost of "letting guilty and possibly dangerous defendants go free . . ."[68]

Nevertheless, the accuracy of the Ninth Circuit's conclusion rests on the determinations that the police officers did not act with appropriate diligence in obtaining the warrant, that this lack of diligence represented a mistake of law, and that this mistake of law rose above the level of attenuated negligence.[69] And, because the court nests the latter two determinations on a determination of fact, the conclusion that the seizure was sufficiently deliberate and culpable to justify exclusion of the evidence is not categorically without merit.

---

[67] See Herring, 129 S. Ct. at 700 (quoting Hudson v. Michigan, 547 U.S. 586, 591 (2006); But see Herring, 129 S. Ct. at 707 (quoting Arizona v. Evans, 514 U.S. 1, 18 (1995) (Stevens, J., dissenting) (internal quotation marks omitted)) (Ginsburg, J., dissenting).

[68] Id. at 700 n.1., 7001 (citing Illinois v. Krull, 480 U.S. 340, 352-53 (1987); United States v. Leon, 468 U.S. 897, 908 (1984)).

[69] United States v. Cha, No. 09-10147, slip op. at 3796-98 (9th Cir. Mar. 9, 2010).