IN THE SUPREME COURT OF FLORIDA

DELMER SMITH,	:	
Appellant,	:	
vs.	:	Case No. SC18-42
STATE OF FLORIDA,	:	
Appellee.	:	
_____	:	

APPEAL FROM THE CIRCUIT
COURT IN AND FOR MANATEE
COUNTY STATE OF FLORIDA

SUPPLEMENTAL REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT REGARDING REFERENCES

References to the record of the direct appeal of the trial, judgment and sentence in this case are in the form (ROA. 123). References to the postconviction record on appeal are in the form (PC-ROA. 123). References to the June 5, 2019 hearing pursuant to the remand are in the form (R. 123). References to the June 13, 2019 hearing pursuant to the remand are in the form (R2. 123). References to the June 24, 2019 Amended Order Denying Defendant's Motion For Postconviction Relief are in the form (Order. 123). Arguments will be numbered in conformity with the Amended Order.[1] References to the Supplemental Answer Brief Of Appellee Addressing The Relinquishment Proceedings are in the form (SAB. 123). Generally, Delmer Smith is referred to as Mr. Smith.

[1] The claim involving the duffel bag was referenced as "Claim 1" in the Amended Order and will be labeled as such in this Supplemental Reply Brief. This claim corresponds with Claim II in Appellant's Initial Brief. The claim involving the bag that came from Mr. Smith's car was referenced as "Amended Claim 1" in the Amended Order as well as Appellant's Amended Motion for Postconviction Relief which the circuit court allowed Appellant to file. It will be labeled as such in this Supplemental Reply Brief. The claim involving the forensic search of the cell phone was referenced as "Claim 2" in the Amended Order and will be labeled as such in this Supplemental Reply Brief. This claim corresponds with Claim III in Appellant's Initial Brief.

SUMMARY OF ARGUMENT

None of the arguments in the State's Supplemental Answer Brief defeat Mr. Smith's ineffective assistance of counsel claims. The initial seizures of Mr. Smith's duffel bag and his plastic bag were illegal. The initial seizures and searches remain illegal because they do not fall into any exceptions to the warrant requirement. Subsequent warrants aimed at further exploring items within the bags, including the locked strong box and the medical encyclopedia, did not cure the taint of the initial illegality.

The warrant the State relied on to forensically examine Mr. Smith's cell phone was obtained for the purpose of investigating another case entirely which was concluded at the time of the subsequent search of the cell phone data in this case.

Had trial counsel filed motions to suppress the fruits of these constitutional violations, Mr. Smith would not have been prejudiced by any of the evidence at trial. Mr. Smith has sufficiently established both deficient performance and prejudice and is entitled to a new trial as to his guilt or innocence.

ARGUMENT
ISSUE I

MR. SMITH'S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE A MOTION TO SUPPRESS EVIDENCE THE POLICE FOUND AS THE RESULT OF AN ILLEGAL SEARCH AND SEIZURE OF ITEMS IN A DUFFEL BAG THAT BELONGED TO DELMER SMITH THUS VIOLATING MR. SMITH'S RIGHTS UNDER THE FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The State is petitioning this Court to ignore the simplicity of inventory search analysis. This Court should decline that invitation. This issue is not complex. The initial intrusion must be a justifiable one; an impermissible seizure will taint a subsequent search. *Coolidge v. New Hampshire*, 403 U.S. 443, 473 (1971). To extend the scope of the inventory exception to the seizure of objects—not in the arrestee's possession or immediate control at the time of arrest—which the police discover after the arrestee is in custody would fly in the face of the basic rule that no amount of probable cause can justify a warrantless seizure. *Id*. at 471. Inventory searches are intimately connected with arrests and are suspect when motivated by criminal investigations. Criminal investigations do precede most arrests, however, the property being "inventoried" is typically not the subject of the investigation itself but merely a byproduct of police having contact with the arrestee.

Say hypothetically that in mid-September of 2009, Mr. Smith was not yet in police custody and, instead of directing Ms. Tejeda to, he had just unpacked his own storage unit and loaded everything in his car. If police had executed the active arrest warrant on Mr. Smith when he was driving his car filled with all of the same contents that are the subject of these proceedings, then police would have been entitled to catalog the items within his car. The reason for that is because if Mr. Smith was arrested, police would have been saddled with his vehicle. The police would have had no choice but to impound the car and inventory its contents. That is a situation where the cataloging of items would have been done purely to record the contents of the property and for no other reason because the car's contents would have had the required nexus to Mr. Smith's arrest. Instead what happened here is the police took property originating from Mr. Smith's storage unit because they believed, based on recorded telephone conversations from the county jail, that they would discover evidence pertaining to a series of unsolved crimes.

The State contends that suppression would not have been warranted, even if the police took this property without Mr. Smith's consent, based on the inevitable discovery exception to the exclusionary rule. (SAB. 8) However, this argument is foreclosed by *Rodriguez v. State*, 187 So. 3d 841, 849-50 (Fla. 2015), which held that the exception does not apply where "the prosecution has made no showing that a search warrant was being ***actively pursued prior to the occurrence of the illegal***

conduct." (Emphasis added.) This seizure took place on September 15, 2009. Police did not seek a warrant to examine this property until forty-three days later on October 28, 2009. The failure to seek a timely search warrant precludes the application of the inevitable discovery doctrine in this case.

The inevitable discovery rule cannot function to apply simply when police could have obtained a search warrant if they had taken the opportunity to pursue one, but can only apply if they actually were in pursuit of one. *Id.* at 849. Within the inevitable discovery exception to the exclusionary rule there is no room for probable cause to obviate the requirement to pursue a search warrant, for this would eliminate the role of the magistrate and replace judicial reasoning with the current sense impression of police officers. *Id*. If the prosecution were allowed to benefit in this way, police misconduct would be encouraged instead of deterred, and the rationale behind the exclusionary rule would be eviscerated. *Id*.

The trial court was not moved by this forty-three day delay and justified it by noting that multiple police agencies were investigating this and other seemingly related crimes. (Order. 15) The mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment. The investigation of crime would always be simplified if warrants were unnecessary but the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's property may not be totally sacrificed in the name of

maximum simplicity in enforcement of the criminal law. *See Mincey v. Arizona*, 437 U.S. 385, 393 (1978).

The trial court's flawed Fourth Amendment analysis caused the denial of Mr. Smith's ineffective assistance of counsel claim on this issue. Had trial counsel filed a motion to suppress items found in the duffel bag, well-settled state and federal law would have required it to be granted. The fact that there was a subsequent warrant to open the locked strong box found within the duffel bag does not absolve police of their misconduct and would not have, as the State maintains, entitled the prosecution to any such evidence at trial. It does, however, provide additional evidence that the police were in a mode of seeking evidence, not merely "inventorying".

The exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search and seizure, but also evidence later discovered and found to be derivative of an illegality or "fruit of the poisonous tree." *Segura v. United States*, 468 U.S. 796, 804 (1984). The question to be resolved when it is claimed that evidence subsequently obtained is 'tainted' or is 'fruit' of a prior illegality is whether the challenged evidence was "come at by exploitation of [the initial] illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States*, 371 U.S. 471, 488 (1964).

Had trial counsel filed a successful motion to suppress the fruits of the search of the duffel bag, the prosecution would not have been able to introduce at trial

evidence of possession of the victim's stolen property which severely prejudiced Mr. Smith. None of the above arguments are unpreserved as the State posits. (SAB. 6) The trial court's amended order made new findings as to this particular issue. (Order. 13-16) Logic dictates that new findings beget supplemental briefing.

AMENDED ISSUE I

> MR. SMITH'S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE A MOTION TO SUPPRESS EVIDENCE THAT THE POLICE FOUND ON SEPTEMBER 15, 2009 AS A RESULT OF AN ILLEGAL SEARCH AND SEIZURE OF A BAG BELONGING TO MR. SMITH THUS VIOLATING MR. SMITH'S RIGHTS UNDER THE FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

This issue is not untimely. (SAB. 9-10) Post-conviction counsel relied on an erroneous stipulation introduced at Mr. Smith's trial as to the origin of the medical encyclopedia. The State endorsed this same stipulation both at the trial level and throughout the resultant appellate process. The fundamental reason for the amendment was that both parties relied on a stipulation that the medical encyclopedia had been found in the duffel bag. Of note is the fact that the stipulating witness was a crime scene technician called by the prosecutor at the original trial. Evidence established at the remand proceedings materially changed the corresponding claims and arguments. Florida law provides the opportunity to amend claims. *Spera v. State*, 971 So. 2d 754 (Fla. 2007); *Bryant v. State*, 901 So. 2d 810

(Fla. 2005). The trial court acted rationally and equitably when it allowed the amendment filed in this case. The Court should not disturb that judgment.

Counsel hereby adopts the same arguments made in Issue I (pgs. 1-6) of this Reply Brief as not to be needlessly repetitive. The same facts and arguments apply to both the duffel bag and the plastic bag with respect to inventory search analysis, consent and expectation of privacy, inevitable discovery, and the exclusionary rule.

The State has suggested that the medical encyclopedia was not "searched" until fingerprints were taken, pursuant to another warrant. (SAB. 12) It is the search before this fingerprinting, where the police first discovered the medical encyclopedia that is in dispute. It is both the seizure and the search of the bag itself that counsel contests. The Constitution of the United States of America guarantees that private citizens will not be subject to unreasonable "searches ***and seizures***". U.S. Const. amend. IV. (Emphasis added.) *See also* Fla. Const. art. I, § 12. As stated in Issue I (pgs. 5-6) of this Reply Brief, the exclusionary rule would have reached all aspects of the medical encyclopedia in this case because the initial discovery was illegal. The warrant authorizing police to fingerprint the medical encyclopedia was not so attenuated as to dissipate the taint of the illegal seizure. Any warrant entitling police to the fingerprints present on the medical encyclopedia would not have ever existed but for the illegal search and seizure that led to its discovery in the first place.

Had trial counsel filed the motion to suppress the medical encyclopedia based on the illegal search of the plastic bag, and the trial court granted that motion, then *Wong Sun* would have prohibited the State from introducing the medical encyclopedia as an exhibit at trial but also any testimony regarding it and physical evidence produced from it, including fingerprints. As stated before, this evidence severely prejudiced Mr. Smith.

ISSUE II

MR. SMITH'S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE A MOTION TO SUPPRESS EVIDENCE THAT THE POLICE FOUND AS A RESULT OF AN ILLEGAL SEARCH OF MR. SMITH'S CELLPHONE THUS VIOLATING MR. SMITH'S RIGHTS UNDER THE FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The State claims that even if trial counsel had filed a successful motion to suppress this evidence, the trial prosecutor could have admitted the UFED report obtained by Sarasota Sheriff's Office. It is pure conjecture that the forensic download done by Sarasota County Sheriff's Office extracted identical evidence from Mr. Smith's cell phone as the download done by Manatee County Detective Diamond. There is no proof of their interchangeable qualities in the record.

This issue has not been waived. (SAB. 16) Counsel did not brief this issue in its Supplemental Initial Brief because the facts established at the June 2019

evidentiary hearings did not materially change counsel's legal arguments. The stale warrant that the State argues entitled police to a forensic download of Mr. Smith's phone in fact gave them no such authority and was akin to no warrant at all. Detective Dumer admitted that the warrant Sarasota County applied for on October 20, 2009, would not have authorized Manatee County to search Mr. Smith's phone. The reason for that is Sarasota County's warrant for forensic cell phone data was for a separate case that Mr. Smith was convicted of in 2011. Detective Diamond, who performed the search on behalf of Manatee County, testified that a forensic download was not done on the phone until July of 2012, shortly before Mr. Smith's trial in this case.

CONCLUSION

Appellant respectfully requests this Honorable Court reverse his Conviction and Death Sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 15, 2019 a true copy in PDF format of the foregoing SUPPLEMENTAL INITIAL BRIEF has been transmitted to the Clerk of the Supreme Court of Florida, through the Florida Courts E-Filing Portal, which will serve a Notice of Electronic Filing to: Christina Z. Pacheco, Assistant Attorney General, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607-7013 (Christina.pacheco@myfloridalegal.com and capapp@myfloridalegal.com). A hard copy will be sent by first class U.S. Mail to Delmer Smith III, DOC #135769, Florida

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing SUPPLEMENTAL INITIAL BRIEF OF APPELLANT was generated by computer using Microsoft Word with Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.210 (a)(2).

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