STATE OF MICHIGAN

IN THE MACOMB COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

Lower Court No. 17-3420-FC

-vs-

Honorable Joseph Toia

GEORGE RIDER

Defendant-Appellant

_____/

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DEFENDANT GEORGE RIDER'S SUPPLEMENTAL BRIEF POST-*GINTHER* HEARING

George Rider was convicted of first-degree murder for the shooting death of Julii Johnson after a jury trial before this Court. On appeal, Mr. Rider argued that his trial counsel had been constitutionally ineffective for confusing a warrant to obtain subscriber and location data from information the cell phone provider with one to search and seize the phone itself. The Court of Appeals agreed that this error met the first of the two prongs of the familiar *Strickland v Washington,* 466 US 668, 694

(1984) test for ineffective assistance of counsel, and remanded this case to this Court to conduct an evidentiary hearing to determine whether defense counsel's deficient performance had a reasonable probability of affecting the outcome of Mr. Rider's trial. As part of that determination, the Court of Appeals ordered this Court to determine (1) whether the warrantless seizure was nonetheless reasonable, i.e., did a recognized exception to the warrant requirement apply, (2) if no exception applies, whether the exclusionary rule bars the use of any evidence seized at the car wash, and (3) to the extent that evidence was admitted at trial that should not have been admitted, whether there is a reasonable probability that the outcome of Mr. Rider's trial would have been different had the evidence not been admitted.

The prosecution has conceded this third issue, prejudice, but contends that the seizure was pursuant to valid exceptions to the warrant requirement, or that if the seizures did violate the Fourth Amendment they were not flagrant and so the evidence should not be suppressed. The prosecution is wrong.

Statement of Facts

Since the prosecution has the burden of proving that the warrantless seizures at the car wash were constitutional, it presented the testimony of two witnesses, Sergeant Brandon Roy and Lieutenant Charles Rushton.[1] In this case, Lt. Rushton was assisting the officer in charge and Sgt. Roy was the intelligence officer. 11/4/22 T 8. 60.

[1] For ease of reference, the officers are referred to by their current rank in the Warren Police Department.

Sgt. Roy testified that he was the intelligence officer on this case. 11/4/22 T 8. The phone with number 4616 was the last one to text co-defendant Marcie Griffin the night before the murder and the first one to text her after the murder. 11/4/22 T 14. This fact led to the police seeking a records and ping warrant from Metro PCS on January 27, 2017. Exh. 1.

Paragraphs 15 to 17 of Exhibit 3 include the information the police obtained from the records for 4616. The police learned that the subscriber was a business, Midtown Entertainment Group. 11/4/22 T 16. The evening before the murder, the phone was near the crime scene, which is also close to Meijer and the GM Tech Center. 11/4/22 T 17, 44. At 7:42 a.m., 12 minutes after the "suspect vehicle left," the phone was interacting with cell towers along I696 in Oak Park, which Officer Roy opined was a 12 minute drive away. 11/4/22 T 27.

The GPS, or ping, emails did not begin until January 30, 2017. 11/4/22 T 31. The morning of February 4, 2017 was the first time the "pings" included an actual location for the phone. 11/4/22 T 17. Sgt. Roy called Detective Bozek to advise him of the ping and then went to the police station to continue to monitor the ping. 11/4/22 T 20. The ping location information would arrive every 15 minutes by email; it was not a constant visual track. 11/4/22 T 15, 30. Sgt. Roy knew it was a Samsung phone and likely told the officers in the field that. 11/4/22 T 33.

Lt. Charles Rushton testified that he was notified of the active ping that morning and went to the location. 11/4/22 T 60-61. Detective Livingston was already there. 11/4/22 T 60-61. At about 10:20 a.m., they saw Mr. Rider drive away in a Ford

Explorer. 11/4/22 T 24, 63. The decision was made that Lt. Rushton should follow the Explorer. 11/4/22 T 63.

Lt. Rushton testified that the team collectively decided: "we need to seize those items." 11/4/22 T 65. Lt. Rushton had asked to have marked patrol units sent to his area as he drove. 11/4/22 T 73. He did not observe Mr. Rider commit any traffic violations before he pulled into the car wash. 11/4/22 T 68-69. At some point either just before or just after Mr. Rider pulled into the car wash, Lt. Rushton learned that the updated "ping" information placed the phone near the car wash. 11/4/22 T 75.

Lt. Rushton directed the officers in the patrol car to "pin in" Mr. Rider's vehicle. 11/4/22 T 75. Lt. Rushton said he and the officers in the car approached Mr. Rider's vehicle and he had his gun pointed at Mr. Rider, and the other officers may have done the same. 11/4/22 T 76. Mr. Rider was ordered out of the car, patted down and two phones were taken from his person. 11/4/22 T 77. Lt. Rushton testified that both phones in Mr. Rider's pockets were smartphones, although on cross-examination he admitted the possibility that one may have been a flip phone. 11/4/22 T 89. In fact, one of the phones was a flip phone. 6/4/19 T 9. The other was the 4616 phone. Inside of the car was a third phone, which turned out to be an iphone. The vehicle was seized and towed to the impound lot, and warrants sought.

As the intelligence officer, Sgt. Roy was writing the warrant requests in the case and supporting affidavits, admitted as Exhibits 1, 2 and 3 at the hearing. The affidavits seeking to search the phones is not identical to the one for the search of the car. Exhibit 2, the affidavit seeking to search the car, Sgt. Roy references information

about the 4616 phone, but fails to mention that the police already have that phone. This fact is contained, however, in Exhibit 3, paragraph 23. Exhibit 3 says that there is a third phone in the car, and that the car had been impounded pending a search warrant to retrieve the phone. Exh 3, paragraphs 24-25. Exhibit 2 is silent as to how the police got the car. Exhibit 2 falsely states that officers "intercepted the vehicle at 12 Mile and Gratiot where they initiated a traffic stop." Exh 2, paragraph 22.

Argument

The prosecution has stated that the only issue is whether the warrantless *search* of Mr. Rider's car was invalid. The prosecution is skipping a step. Mr. Rider contended in the Court of Appeals, and here that the seizure (and resulting search) were unconstitutional. And the Court of Appeals remanded for a determination of whether "the warrantless seizure" was constitutional. There is no dispute that Mr. Rider was seized when he was prevented from leaving the car wash and ordered out of his car as it was being dried off, and that there was no traffic violation to support this stop. It was a stop purely to effectuate at a minimum the warrantless seizure of the 4616 phone. And the police *had* that phone in hand when they seized his car and sought a warrant to search it. The police also *knew* they had the 4616 phone when they sought the warrant to search the car, but omitted that fact from affidavit supporting the search warrant request for the car. Compare Exh 2 with Exh 3 paragraph 23. That affidavit seeking a warrant to search the phones falsely states that the vehicle was "intercepted . . . at 12 Mile and Gratiot where they initiated a traffic stop." Exh 3, paragraph 22. None of the identified exceptions to the warrant

requirement support the seizure of Mr. Rider and his car, and the phones. This stop was weeks after the murder; any "exigency" was created by the violation of Mr. Rider's constitutional rights. Suppression is the appropriate remedy here, given the affirmative falsehoods and falsehood by omission in the affidavits supporting the warrant requests, and the pattern in this case of seizing phones without warrants from Ms. Griffin, Mr. Rider and Ms. Bellamy (at a minimum).

The Fourth Amendment of the United States Constitution and Article 1, § 11 of the 1963 Michigan Constitution protects against unreasonable searches and seizures. *People v Mahdi,* 317 Mich App 446, 457 (2016). As reflected in the text of the Fourth Amendment, the touchstone of any Fourth Amendment analysis is reasonableness. *People v Hughes,* 506 Mich 512, 524 (2020). The general rule is that the police must secure a warrant in order for a search or seizure to be reasonable under the Fourth Amendment. *Id.* at 524-525

The prosecution first tries to justify the seizure of Mr. Rider and his vehicle, and the subsequent search of him, under the "automobile exception.[2]" "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." *Coolidge v New Hampshire,* 403 US 443, 461 (1971). The prosecution cites to *People v Kazmierczak,* 461 Mich 411, 418-419 (2000) to support its assertion

[2] *Carroll v. United States,* 267 US 132 (1925) is the origin of the "automobile exception." In that case, the Court said, "On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. *Id.* at 149. The 4616 phone in this case was not contraband.

that the search and seizure in this case was valid. In *Kazmierczak,* the Michigan Supreme Court began by noting that there is a two prong analysis *if* the stop of the vehicle was permissible. *Id.* at 420. In *Kazmierczak* the stop was permissible because the officer had observed a traffic violation. *Id.* For that reason, the "automobile exception" applied.[3] The exception was not used to justify the stop itself. *See also, eg, Byrd v. United States,* ___ US ___, 138 S. Ct. 1518, 1524 (2018)(stop for possible traffic violation). But Lt. Rushton has made it clear that there was no traffic violation, despite his earlier use of the term "traffic stop" in his testimony. As testimony at the pre-trial hearing made clear, Mr. Rider's vehicle was pinned in at the car wash as it was being dried off, and he was ordered out of the SUV at gunpoint and then searched. The prosecution is using the automobile exception then to do the lifting to justify the stop itself, but has cited no cases to support this assertion. But even *People v Alwaily*, the unpublished opinion attached as Exhibit A to the prosecution's brief, involved "a valid traffic stop" for illegally tinted windows. *See* Prosecution Supp Br at 16, quoting *Alwaily*.

The prosecution is also relying on the automobile exception to, perhaps, support the search and seizure of Mr. Rider's person. After all, the 4616 phone and a flip phone were in his pocket when they were seized. The prosecution has correctly

[3] Mr. Rider does not concede that there was probable cause to obtain the warrants later, but rather that fact is irrelevant because the initial seizures were violations of the Fourth Amendment. But even assuming there was probable cause to support seizure of the 4616 phone, there was not probable cause to seize the other phones – other than that they were also in Mr. Rider's possession weeks after the murder. The police did not have probable cause that it had been in his hands on the date of the murder, and their warrant has almost no information about him in it at all.

not tried to justify this as a *Terry* stop. *Terry v Ohio,* 392 US 1 (1968). Under *Terry,* "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Terry,* 392 US at 22. An investigatory stop "must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity. *United States v Cortez,* 449 US 411, 417 (1981). Based upon the "totality of the circumstances" the officers must have "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Id.* An officer who makes a valid investigatory stop "may perform a limited patdown search for weapons." *People v Champion,* 452 Mich 92, 98 (1996). If, while doing this search, the "plain feel" exception "allows the seizure [of an object] without a warrant . . . when the identify of the object is immediately apparent and the officer has probable cause to believe that the object is contraband." *Id.* at 101.

The "plain feel" exception could not justify the seizure of the phones on Mr. Rider's person. Phones are not contraband, and there was nothing illegal about Mr. Rider possessing the phones. Even assuming that the search warrant for data somehow transformed the 4616 phone into contraband, the identity of the object was not immediately apparent. Sgt. Rushton testified, repeatedly, that he did not know whether any of the phones Mr. Rider had on his person were the 4616 phone. The prosecution has even argued that the police could not call the phones without violating the Fourth Amendment, asserting rather absurdly that a defendant could

claim a privacy right in the fact that the police called them from the station house.[4] The fact that Sgt. Rushton would have to do additional investigation to establish a connection between the seized phone and suspected criminal activity means that the incriminating nature of the phone was not "immediately apparent." See *People v Mahdi,* 317 Mich App 446, 462-463 (2016).

The prosecution also asserts that "exigent circumstances" justified the seizure of Mr. Rider, his vehicle, and all three phones. The exigent circumstances exception is subject to a reasonableness inquiry, and applies only where "the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment." *Kentucky v King,* 563 US 452, 462 (2011). The police here were only in a position to seize the phones after they illegally seized Mr. Rider and his vehicle, not during a traffic stop, but simply in Lt. Rushton's words, to "get those items." In contrast, in the *Alwaily* case upon which the prosecution so heavily relies the police were in a position to seize the phone not because they engaged in conduct that violated the Fourth Amendment, but because of a traffic stop. Pros brief at 16.

Furthermore, the same exigency concerns were not present here to justify the seizure of the car and every possible phone. Weeks had passed since the murder, not hours as in *Alwaily*. While the police expressed concern that they might "lose" Mr. Rider in traffic, they still had an active ping warrant on the phone, and they had Mr.

[4] If, however, the prosecution is right that under the Fourth Amendment no steps whatsoever could be taken to determine which of the seized phones was the 4616 phone could be taken without a warrant, then Exhibit 3 shows that a Fourth Amendment violation occurred. Paragraph 23 states that the 4616 phone was seized from Mr. Rider.

Rider's plate number and an address where the phone had been that would have allowed them to conduct further investigation if necessary. The prosecution's argument that exigent circumstances justified this stop would lead to the exception swallowing the rule.

Finally, the evidence obtained as a result of the illegal seizure should be suppressed. The purpose of the exclusionary rule is to deter "deliberate, reckless, or grossly negligent conduct." *Herring v United States*, 555 US 135, 142 (2009). As shown above, the Fourth Amendment violation is clear, and the misleading wording of the affidavit for the search of the phones shows that the police knew the seizure of the phones and vehicle was unconstitutional. Lt. Rushton testified misleadingly at the preliminary examination that he had made a traffic stop when in fact there was no traffic violation. PE II 164; PE II 198. Officer Roy swore in the affidavit that "Officers Lewis and Koerner intercepted the vehicle at 12 Mile and Gratiot where they initiated a traffic stop." Exh 3. But there was no traffic stop, and Lt. Rushton testified that the information that there had been a traffic stop came from him. Lt. Suppression also "remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth." *United States v Leon*, 468 US 897, 922 (1984).

The search warrant for Mr. Rider's vehicle, Exh 2, further shows that these officers seem to have a habit of seizing phones without making arrests or having warrants authorizing the seizure. "Bellamy refused to provide officers with the call

or text message records from her phone while speaking with officers and Bellamy's phone was seized as evidence." Paragraph 16 of Roy aff. Ms. Bellamy described this as "stealing" her phone. 5/24/19 T 157. Lt. Rushton testified that he was the one who seized her phone. 11/4/22 T 85. Finally, when Griffin invoked her right to counsel, her phones were "seized as evidence." Paragraph 18 of Roy aff. Notably absent is any mention of the seizure being pursuant to a warrant. Repeated warrantless seizure of cellphones, entitled to heightened protection under recent United Supreme Court precedent[5], is precisely the type of "deliberate, reckless, or grossly negligent conduct" that should be suppressed under *Herring*.

The seizure of Mr. Rider, his vehicle and all three phones in his possession were a violation of his rights under the Fourth Amendment and the Michigan Constitution. The police were at a minimum grossly negligent when they decided to seize him to get the 4616 phone. Suppression is an appropriate measure here, and a new trial should be granted without the illegally seized evidence.

[5] *See Riley v California,* 573 U.S. 373 (2014) and *Carpenter v United States,* 138 S.Ct. 2206 (2018).

Conclusion

For the foregoing reasons, this Court should find (1) that the warrantless seizure was not reasonable (2) that the exclusionary rule bars the use of any evidence seized at the car wash, and (3) as the prosecution concedes, that as a result of the improper admission of evidence at trial there is a reasonable probability that the outcome of Mr. Rider's trial would have been different had the evidence not been admitted.

Respectfully submitted,

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