REL: February 11, 2022

Alabama Court of Criminal Appeals

OCTOBER TERM, 2021-2022

CR-20-0688

Hayden Andrew Picogna

v.

State of Alabama

Appeal from Shelby Circuit Court
(CC-17-214)

KELLUM, Judge.

Hayden Andrew Picogna was indicted for two counts of assault in the second degree, see § 13A-6-21(a)(4), Ala. Code 1975, and one count of

resisting arrest, see § 13A-10-41, Ala. Code 1975, resulting from his interactions with police officers in his motel room. Pursuant to a plea agreement with the State, Picogna pleaded guilty to harassment, see § 13A-11-8, Ala. Code 1975, as a lesser-included offense of the assault charge in the first count of the indictment.[1] In accordance with the agreement, the Shelby Circuit Court sentenced him to 90 days in jail, suspended the sentence, and placed him on unsupervised probation for 24 months. As part of his plea agreement, Picogna expressly reserved the right to appeal the trial court's denial of his motion to suppress all evidence of what occurred in his motel room on August 28, 2016, on the ground that police officers entered the room in violation of his rights under the Fourth Amendment to the United States Constitution.

The facts are straightforward. Police received information from Picogna's former girlfriend, who was staying with her mother in Hoover, that Picogna, who was in Colorado, had threatened to kill her, her family, "and anyone that got in his way with a knife or a vehicle and then

[1]The record does not reflect the disposition of the other assault charge or the resisting-arrest charge.

himself." (R. 9.) After making the threat on Friday, August 26, 2016, Picogna drove to Alabama, arriving on Sunday, August 28, 2016, and rented a room at a motel in Birmingham. Officers with the Hoover Police Department went to the motel to investigate the threat Picogna had made. They knocked on the door to Picogna's room and, when he answered, asked Picogna to come outside to talk about the threat. When Picogna saw one of the officers holding a non-lethal "beanbag gun," he told the officers that he wanted to speak with an attorney and attempted to end the encounter by closing the door and retreating into the room. (R. 16.) One of the officers reached across the threshold of the door to grab Picogna's arm and placed his boot in the doorframe to prevent Picogna from closing the door.[2] Picogna attempted to pull away and, in doing so,

[2]"It was not necessary for the officer's entire body to cross the threshold in order to constitute an entry under the Fourth Amendment." State v. Maland, 103 P.3d 430, 435 (Idaho 2004). The United States Supreme Court has "made clear that any physical invasion of the structure of the home, 'even by a fraction of an inch,' [i]s too much." Kyllo v. United States, 533 U.S. 27, 37 (2001) (quoting Silverman v. United States, 365 U.S. 505, 512 (1961)). See Siedentop v. State, 337 P.3d 1, 2 (Alaska 2014) ("[M]any federal and state courts have held that an officer's act of placing a foot across the threshold constitutes an entry for Fourth Amendment purposes."); Cupello v. State, 27 N.E.3d 1122, 1132 (Ind. Ct.

pulled the officer fully into room, at which point he dislodged the officer's grip, dove onto the bed, and tried to put his hands under the pillow. Worried that Picogna was trying to grab a weapon, the officers "reengage[d] him." (R. 13.) The record indicates that when the two officers reengaged Picogna inside the motel room, a struggle ensued and both officers suffered injuries (scratches and/or bruises) before subduing and arresting Picogna.

Picogna argues on appeal, as he did in the trial court, that the officers violated his Fourth Amendment right to be free from unreasonable searches and seizures when the officers entered his motel room without his consent, without a warrant, and without probable cause plus exigent

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App. 2015) ("The placement of Constable Webb's foot inside the threshold of the apartment door was an unlawful entry by a public servant into Cupello's dwelling. ..."); State v. Hudson, 209 P.3d 196, 198 (Idaho Ct. App. 2009) ("[T]he magistrate correctly found that the first officer unlawfully entered Hudson's motel room when he stopped the door from closing with his foot and then pushed it open so he could continue to observe Hudson."); State v. Johnson, 177 Wis.2d 224, 232, 501 N.W.2d 876, 879 (Wis. Ct. App. 1993) ("Without question, Officer Klug's step into the threshold, preventing Johnson from closing the door, was an entry."); People v. Klimek, 101 Ill. App.3d 1, 5, 427 N.W.2d 598, 602, 56 Ill. Dec. 403, 407 (Ill. Ct. App. 1981) ("Officer Krupka's placement of his foot inside the threshold of defendant's door constitutes and entry.").

circumstances,[3] and that, therefore, all evidence of what occurred inside the motel room, i.e., all evidence of the crimes with which he was charged,[4] is due to be suppressed under the exclusionary rule of the Fourth Amendment. He also argues that the trial court made an erroneous factual finding in reaching its conclusion that the officers' entry did not violate the Fourth Amendment. It is not necessary for us to address these arguments because, even if the officers violated the Fourth Amendment when they entered Picogna's motel room and the trial court erred in finding otherwise, the Fourth Amendment's exclusionary rule does not bar admission of evidence relating to crimes Picogna committed after the violation occurred. See Herring v. United States, 555 U.S. 135, 140 (2009) ("The fact that a Fourth Amendment violation occurred ... does not necessarily mean that the exclusionary rule applies."); and Illinois v. Gates, 462 U.S. 213, 223 (1983) ("The question whether the exclusionary

[3]It is undisputed that Picogna had a right of privacy in his motel room just as he would have in his own home. See Ex parte Morgan, 641 So. 2d 840, 842 (Ala. 1994) ("The protection against warrantless searches and seizures in regard to a dwelling has been extended to motel rooms.").

[4]Picogna was not charged with any crime relating to the threat he had made toward his former girlfriend.

rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.").

> "The exclusionary rule was adopted to effectuate the Fourth Amendment right of all citizens 'to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. ...' Under this rule, evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure. Weeks v. United States, 232 U.S. 383 (1914); Mapp v. Ohio, 367 U.S. 643 (1961). This prohibition applies as well to the fruits of the illegally seized evidence. Wong Sun v. United States, 371 U.S. 471 (1963); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).
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> "The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim:
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> > " '(T)he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late.' Linkletter v. Walker, 381 U.S. 618, 637 (1965).
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> "Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures:
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> > " 'The rule is calculated to prevent, not to repair. Its purpose is to deter -- to compel respect for the

> constitutional guaranty in the only effectively available way -- by removing the incentive to disregard it.' Elkins v. United States, 364 U.S. 206, 217 (1960).

"Accord, Mapp v. Ohio, supra, 367 U.S., at 656; Tehan v. United States ex rel. Shott, 382 U.S. 406, 416 (1966); Terry v. Ohio, 392 U.S. 1, 29 (1968). In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."

United States v. Calandra, 414 U.S. 338, 347-48 (1974) (footnote omitted).

> "Suppression of evidence, however, has always been our last resort, not our first impulse. The exclusionary rule generates 'substantial social costs,' United States v. Leon, 468 U.S. 897, 907 (1984), which sometimes include setting the guilty free and the dangerous at large. We have therefore been 'cautio[us] against expanding' it, Colorado v. Connelly, 479 U.S. 157, 166 (1986), and 'have repeatedly emphasized that the rule's "costly toll" upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application,' Pennsylvania Bd. of Probation and Parole v. Scott, 524 U.S. 357, 364–365 (1998). We have rejected '[i]ndiscriminate application' of the rule, Leon, supra, at 908, and have held it to be applicable only 'where its remedial objectives are thought most efficaciously served,' United States v. Calandra, 414 U.S. 338, 348 (1974) -- that is, 'where its deterrence benefits outweigh its "substantial social costs," ' Scott, supra, at 363 (quoting Leon, supra, at 907)."

Hudson v. Michigan, 547 U.S. 586, 591 (2006).

Indeed, the United States Supreme Court has recognized several exceptions to the Fourth Amendment exclusionary rule, including the attenuation-of-taint exception, see Utah v. Strieff, 579 U.S. 232, 237-43 (2016), the independent-source exception, see Murray v. United States, 487 U.S. 533, 536-41 (1988), the inevitable-discovery exception, see Nix v. Williams, 467 U.S. 431, 441-48 (1984), and the good-faith exception, see United States v. Leon, 468 U.S. 897, 905-25 (1984). In addition, although not yet recognized by the United States Supreme Court, this Court and courts in numerous other jurisdictions have recognized a new-crime exception to the exclusionary rule. See Hornsby v. State, 517 So. 2d 631, 637-39 (Ala. Crim. App. 1987). See also State v. Brocuglio, 264 Conn. 778, 826 A.2d 145 (2003) (recognizing the new-crime exception to the exclusionary rule and citing cases doing the same from the United States Courts of Appeal for the 1st, 4th, 5th, 7th, 8th, 9th, 10th, and 11th Circuits and from California, Florida, Illinois, Massachusetts, Minnesota, New York, North Carolina, North Dakota, Oregon, South Dakota, Washington, and Washington D.C.); C.P. v. State, 39 N.E.3d 1174, 1181 n.4 (Ind. Ct. App. 2015) (recognizing the new-crime exception to the

exclusionary rule and citing cases doing the same from Alaska, Idaho, Kentucky, Maine, Montana, New Mexico, Texas, and Virginia); and State v. Lee, 149 Hawaii 45, 49-52, 481 P.3d 52, 56-59 (2021); State v. Pranschke, 902 N.W.2d 591 (Iowa Ct. App. 2017) (decision without published opinion); State v. Herrerra, 211 N.J. 308, 329-34, 48 A.3d 1009, 1022-25 (2012); State v. Holt, 206 Md. App. 539, 561-65, 51 A.3d 1, 13-16 (2012), aff'd on other grounds, 435 Md. 443, 78 A.3d 415 (2013); State v. Panarello, 157 N.H. 204, 207-09, 949 A.2d 732, 735-37 (2008); People v. Doke, 171 P.3d 237, 239-41 (Colo. 2007); and State v. Windus, 207 Ariz. 328, 330-31, 86 P.3d 384, 386-87 (Ariz. Ct. App. 2004) (all recognizing the new-crime exception to the exclusionary rule).

Stated succinctly, the new-crime exception to the exclusionary rule provides that, when a defendant commits a new and distinct crime in response to a Fourth Amendment violation, the exclusionary rule does not bar evidence of the new crime.[5] Courts have advanced different rationales

[5]This exception "is inapplicable when the defendant's response to the police illegality is not itself criminal but merely exposes an ongoing crime." 6 Wayne R. LaFave, Search and Seizure § 11.4(j) (6th ed. 2020). See also 1 Kenneth S. Broun et al., McCormick on Evidence §180 (8th ed.

for the exception. Some have held that a defendant does not have a reasonable expectation of privacy in his or her actions in the presence of police after a Fourth Amendment violation. See United States v. Waupekenay, 973 F.2d 1533, 1537 (10th Cir. 1992). Some view the new-crime exception as an extension of the attenuation-from-taint exception, finding that the commission of the new crime is a "free and independent action" that dissipates the taint. People v. Townes, 41 N.Y.2d 97, 102, 359 N.E.2d 402, 406, 390 N.Y.S.2d 893, 897 (1976). And others focus on the purpose of the exclusionary rule, finding that "the limited objective of the exclusionary rule is to deter unlawful police conduct -- not to provide citizens with a shield so as to afford an unfettered right to threaten or harm police officers in response to the illegality." Brocuglio, 264 Conn. at 788, 826 A.2d at 152. Finally, some courts apply a combination of rationales, as this Court did in Hornsby, supra, in finding that the defendant's actions over the course of a month in plotting with a jail inmate to dispose of the marijuana evidence against him dissipated the

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2020) ("An unwise response to official illegality that simply reveals a past digression by the defendant will not invoke [the new-crime exception].").

taint even if the initial search and seizure of the marijuana was illegal, but also noting that "[s]ound public policy dictates that the law should discourage and deter the incentive on the part of accused persons to commit other new and separate crimes." 517 So. 2d at 639. See also Doke, 171 P.3d at 240-41 (applying the "[t]he attenuation rational for admitting evidence of a new crime committed in response to police misconduct" but also pointing out that '[a] rule that would allow a person whose right to be free from unreasonable searches and seizures was allegedly violated to respond with acts of violence would be contrary to the public interest").

The third rationale is particularly persuasive as a basis for applying the new-crime exception in this case. As the Connecticut Supreme Court explained:

> "We agree with the United States Court of Appeals for the Seventh Circuit that 'the gains from extending the [exclusionary] rule to exclude evidence of fresh crimes are small, and the costs high. If the rule were applied rigorously, suspects could shoot the arresting officers without risk of prosecution. An exclusionary rule that does little to reduce the number of unlawful seizures, and much to increase the volume of crime, cannot be justified.' United States v. Pryor, supra, 32 F.3d [1192,] 1196 [(7th Cir. 1994)]; see also State v. Miller,

> supra, 282 N.C. [633,] 641, 194 S.E.2d 353 [(1973)] ('[a]lthough wrongfully on the premises, officers do not thereby become unprotected legal targets'); State v. Burger, supra, 55 Or. App. [712,] 716, 639 P.2d 706 [(1982)] ('a person who correctly believed that his home had been unlawfully entered by the police could respond with unlimited force and, under the exclusionary rule, could be effectively immunized from criminal responsibility for any action taken after that entry'); State v. Miskimins, supra, 435 N.W.2d [217,] 222 [(S.D. 1989)] ('[w]hile this court recognizes the sanctity of the home, the right to live in peace therein and to be free from illegal governmental interference, these rights do not extend to turn a home into a free-fire zone against the police on whim'). Indeed, there is a greater risk of escalating violence when citizens are permitted to use, or threaten to use, force to respond to unlawful police conduct. This concern is especially true considering that law enforcement officers typically are equipped with firearms, and that a violent response to an illegal search may well result in a tragic outcome."

Brocuglio, 264 Conn. at 788-89, 826 A.2d at 152-53. See also Commonwealth v. Saia, 372 Mass. 53, 58, 360 N.E.2d 329, 332 (1977) ("What is present here is simply an attempt to suppress evidence which is a result of allegedly wilful acts of misconduct by [the defendants], whose provocation and perhaps ultimate defense may be found in the fact of the entry itself. The exclusionary rule does not reach this far. ... Suppose a police officer or other person had been killed in the affray that allegedly occurred here. That hypothesis illustrates the inappropriateness of any

ruling that the observations of the police were inadmissible under the exclusionary rule in the circumstances of these cases.").

The United States Court of Appeals for the Eleventh Circuit has similarly stated:

> "[W]here the defendant's response [to a Fourth Amendment violation] is itself a new, distinct crime, there are strong policy reasons for permitting the police to arrest him for that crime. A contrary rule would virtually immunize a defendant from prosecution for all crimes he might commit that have a sufficient causal connection to the police misconduct. Where the police misconduct is particularly egregious, many serious crimes might plausibly be the product of that misconduct. For example, if the police illegally fired warning shots at a person, would that person be shielded from arrest and prosecution if he fired back and killed someone? Cf. Bad Elk v. United States, 177 U.S. 529, 20 S.Ct. 729, 44 L.Ed. 874 (1900) (suggesting that a defendant who in resisting an unlawful arrest used an unreasonable amount of force and killed the arresting officer might be guilty of manslaughter but not murder). Or would a person be justified if he seized an innocent hostage as a human shield to protect himself from wrongful police fire? Unlike the situation where in response to the unlawful police action the defendant merely reveals a crime that already has been or is being committed, extending the fruits doctrine to immunize a defendant from arrest for new crimes gives a defendant an intolerable carte blanche to commit further criminal acts so long as they are sufficiently connected to the chain of causation started by the police misconduct. This result is too far reaching and too high a price for society to pay in order to deter police misconduct."

United States v. Bailey, 691 F.2d 1009, 1017 (11th Cir. 1982).

Therefore, even if there was a Fourth Amendment violation in this case, the Fourth Amendment's exclusionary rule does not require suppression of evidence of the crimes Picogna committed after that violation occurred. "[A] holding contrary to the one we reach today would effectively give the victim of police misconduct carte blanche to respond with any means, however, violent." Doke, 171 P. 3d at 241. Accordingly, the trial court properly denied Picogna's motion to suppress.[6]

Based on the foregoing, the judgment of the trial court is affirmed.

AFFIRMED.

Windom, P.J., and McCool and Cole, JJ., concur. Minor, J., concurs in the result.

[6]Although this was not the reason the trial court denied Picogna's motion, "[a] trial court will not be placed in error for assigning the wrong reason for a proper ruling, if that ruling is correct for any reason." Nicks v. State, 521 So. 2d 1018, 1030-31 (Ala. Crim. App. 1987).