State of Tennessee v. Jerome Antonio McElrath

569 S.W.3d 565 (Tenn. 2019)

No. M2015-01794-SC-R11-CD and No. M2015-01958-SC-R11-CD

Attorney Contributor: Roger E. Nell

Criminal Law Journal Member: Cooper Byers

Rather than keeping just one document listing all those currently barred from housing authority property, the Union City Police Department kept two.[1] One document, the "barred" list, listed people currently barred from housing authority property.[2] Another document, the "reinstated" list, listed people who were no longer barred from such property.[3] In April of 2015, both the barred list and the reinstated list included Jerome McElrath's name.[4]

When Union City Police Officer Chris Cummings called dispatch on April 8, 2015 asking if Mr. McElrath was barred, dispatch looked at the barred list, and upon finding McElrath's name, told the officer McElrath was in fact barred from housing authority property.[5] However, dispatch failed to also check the reinstated list which would have revealed that Mr. McElrath was no longer barred.[6] In fact, McElrath had been reinstated and his name placed on the reinstated list, however his name was not removed from the barred list for nearly five years.[7]

Because dispatch told Officer Cummings that McElrath was still barred, Officer Cummings arrested McElrath, twice, for criminal trespassing.[8] Incident to arrest, both times, the officer searched him.[9] Both times the officer found contraband on him.[10] McElrath was twice charged with possession of marijuana.[11] McElrath moved to suppress the evidence.[12] The trial court granted McElrath's motion to suppress and the Court of Criminal Appeals affirmed because, as the trial judge put it, Tennessee had no good faith exception "to get around the exclusionary rule."[13]

The Tennessee Supreme Court extended the good faith exception of *Herring v. United States*[14] to Tennessee.[15] "[W]hen police mistakes are the result of negligence . . . rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence [by suppressing the evidence] does not 'pay its' way."[16] Nonetheless, the Court upheld the suppression of evidence in this case because the five-year long error was the result of a systemic or reckless disregard for constitutional requirements.[17]

The Tennessee Supreme Court holding in this case further signaled to trial courts that courts are not bound to apply a good-faith exception exclusively to those circumstances under which the Court itself has specifically applied it.[18] The Tennessee Supreme Court was clear in earlier applications and extensions of a good-faith exception that such was limited to the situation at hand.[19] Trial courts were not free to find a good-faith exception under other circumstances.

Now, trial courts "have discretion to consider *variations* of the good-faith exception described herein."[20] In other words, trial courts are at liberty to look for and find good-faith exceptions under circumstances other than what the Tennessee Supreme Court has specifically considered. In that regard, the dam appears to have been broken. Yet, the Tennessee Supreme Court noted a doctrine that may be helpful in diverting the deluge: collective knowledge.[21]

To those on the law enforcement side of things, this case is a boon. Indeed, it was set up as such.[22] On its face, this case further erodes State constitutional protections[23] and continues the trend of reducing State constitutional protections to the floor level of the Federal Constitution.[24] In the end, the Tennessee Supreme Court's broad adoption of the good-faith exception ostensibly excuses police negligence with regard to constitutional protections.[25]

The majority's position is that the exclusionary rule will do little to nothing to prevent or correct law enforcement's "mere negligence." Justice Lee fairly counters that position. She notes that the majority conclusion "goes against the long-standing tort principle that individuals and entities have an incentive to act with due care when there is liability for negligence."[26] If holding a person financially liable for injuries is sufficient to correct or prevent negligent behavior by the average citizen, why would the loss of admissible evidence be insufficient to correct or prevent constitutionally negligent behavior by law enforcement?

Interestingly, the majority relied in part on the "collective knowledge" doctrine in upholding the suppression of the evidence.[27] In sum and with some overstatement, that doctrine holds that what one cop knows, they all know.[28] Courts have used the "collective knowledge" doctrine to uphold warrantless searches and seizures when the arresting or searching officer did not personally have sufficient knowledge to support probable cause but other law enforcement, at least those marginally involved in the situation, did.[29] The majority in *McElrath*, relying in part on *Ramirez*[30] – a California case, held that probable-cause-defeating information, too, must be imputed to the officer on the ground.[31] Sauce for the goose is sauce for the gander.

Justice Kirby took umbrage with this notion. She argued that *Ramirez* may not have survived *Herring* and should be disregarded.[32] However, Justice Kirby's argument fails for two reasons.

First, the majority did not exclusively rely on *Ramirez*. The majority also relied on *Leon*,[33] which established the exclusionary rule at the federal level in the first instance. The *Herring* court also relied upon *Leon*. Specifically, as the majority quoted *Herring*, "*Leon* admonished that we must consider the actions of *all* the police officers involved."[34]

Second, *Ramirez* was decided by the California Supreme Court. When *Ramirez* is read closely, this case appears to have been resolved as a matter of State constitutional law and is thus free to

provide more protection to people than the federal constitution.[35] Similarly, *McElrath* is a Tennessee case decided under Tennessee's Constitution. The Tennessee Supreme Court is free to create its own remedies and rules for State constitutional issues and they should.

On the surface *McElrath* seems to wash away any errors in receipt and transmission of information to the law enforcement officer on the street at the scene. The focus of that argument will be that whatever happened was "simple, isolated oversight or inadvertence."[36] That will be the State's position and it is still the State's burden to prove that a search or seizure was constitutional and that a good-faith exception applies.[37]

To counter that effect, *McElrath* provides authority to hold law enforcement accountable for the accurate receipt and transmission of information from beginning to end. We are in an era of "swatting."[38] Nefarious individuals call 911 falsely reporting a serious emergency, such as a bomb threat, murder, or hostage situation. That (mis)information triggers an overwhelming police response sometimes to deadly ends for wholly innocent and unsuspecting people. Ought not law enforcement bear some responsibility for vetting information before acting? Ought the courts not demand such? Otherwise, the courts will enable systemically flawed processes or inadequately maintained records, excusing constitutional violations under the guise of isolated oversight or inadvertence.

Once information is relayed to law enforcement, the law enforcement system is responsible for its accurate receipt and transmission right down the chain.[39] While it looks like *McElrath*'s good-faith exception provides insulation for the searching or seizing officer, such insulation should only be available if the State can establish that all of the information known and provided to the acting officer was accurate, was received accurately, and was transmitted accurately. Only then should the officer – rather, the law enforcement system – be deemed to have acted in good-faith.

[1] *State v. McElrath*, No. W2015-01794-SC-R11-CD and W2015-01958-SC-R11-CD, slip op. at 3-4 (Tenn. Mar. 12, 2019).
[2] *Id.*
[3] *Id.*
[4] *Id.* at 4-5.
[5] *Id.* at 2.
[6] *Id.* at 5.
[7] *Id.* at 4.
[8] *Id.* at 3.
(MISSING FOOTNOTE)
[9] *Id.* at 1.
[10] *Id.* at 2.
[11] *Id.*
[12] *Id.* at 4.
[13] *Id.* at 4-5.
[14] *Herring v. U.S.,* 555 U.S. 135 (2009).
[15] *McElrath*, at 21-22.
[16] *Id.* at 15 (quoting *Herring,* 555 U.S. at 147-48).
[17] *Id.* at 19.
[18] *Id.* at 16 n.3.
[19] See, *State v. Reynolds*, 504 S.W.3d 283, 313 (Tenn. 2016).
[20] *McElrath*, at 16 n.3 (emphasis added).
[21] *Id.* at 19.
[22] *State v. McElrath*, 2017 WL 2361960, *3 (Tenn. Crim. App. No. W2015-01794-CCA-R3-CD, May 31, 2017).
[23] *McElrath*, at 15-16.
[24] *Id.* See *State v. Reynolds*, 504 S.W.3d 283 (Tenn. 2016); *State v. Davidson*, 509 S.W.3d 156 (Tenn. 2016); *State v. Lowe*, 552 S.W.3d 832 (Tenn. 2018); *State v. Tuttle*, 515 S.W.3d 282 (Tenn. 2017). Justice Brennan warned: "State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law – for without it, the full realization of our liberties cannot be guaranteed." Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977).
[25] *McElrath*, at 15; Lee's Separate Opinion at 3.
[26] Lee's Separate Opinion at 3.
[27] *McElrath*, at 19-21.
[28] *Id.* at 19.
[29] *Id.*
[30] *People v. Ramirez*, 668 P.2d 761 (Cal. Sup. Ct. 1983).
[31] *McElrath*, at 21.
[32] Kirby's Separate Opinion at 5-6.
[33] *United States v. Leon*, 468 U.S. 897 (1984).
[34] *McElrath*, at 20 (quoting *Herring*, 555 U.S. at 140 in turn citing *Leon*, 468 U.S. at 925, n.24) (emphasis added).
[35] *Ramirez*, 668 P.2d at 768-69. Chief Justice Bird's one-paragraph concurrence would specifically state that *Ramirez* turned solely on independent State grounds. State courts of last resort should remember Justice O'Connor's suggestion in *Michigan v. Long*, 463 U.S. 1032 (1983). "If a state court chooses to rely on federal precedence as it would on the precedents of all other jurisdictions, then it

need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purposes of guidance, and do not themselves compel the result that the court has reached. . . . If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Id.* at 1041.

[36] *McElrath*, at 17 (quoting *State v. Lowe*, 552 S.W.3d 832, 860 (Tenn. 2018)).

[37] *Id.*

[38] *See*, *Swatting*, *available at* https://en.wikipedia.org/wiki/Swatting (accessed Sept. 26, 2019); *Swatting is a Dangerous Prank with Potentially Deadly Consequences*, *available at* https://www.cnn.com/2019/03/30/us/swatting-what-is-explained/index.html (accessed Oct. 2, 2019).

[39] We used to play a game called "Telephone" in school. The teacher whispered a word or phrase to a student. Then that student whispered it to the next, and to the next, and it was passed through all the students. The last student then said out loud what he had been told. Never did the last student ever say what the teacher whispered to the first student – never. Current technology available to and being used by law enforcement is sufficient to overcome this problem.