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Evidence—DEFENDANT'S CONFESSION FOLLOWING CONFRONTATION WITH ILLEGALLY SEIZED EVIDENCE NOT EXCLUDED WHERE INDEPENDENT MOTIVE INDUCED THE CONFESSION—*Warlick v. Commonwealth*, 215 Va. 263, 208 S.E.2d 746 (1974).

The "fruit of the poisonous tree"[1] doctrine is a refinement of the exclusionary rule of evidence.[2] This rule prevents the admission of secondary evidence (the fruit) discovered or derived from evidence obtained in an unlawful search (the poisonous tree).[3] In this area of search and seizure,[4] courts have excluded confessions made after the accused has been confronted with illegally seized evidence, once it was shown that the confession was caused or induced by the confrontation.[5]

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1. The phrase was first used by Justice Frankfurter in Nardone v. United States, 308 U.S. 338, 341 (1939).

2. Comment, *Krauss v. Superior Ct: A Case Study on the Failure of the Fourth Amendment Exclusionary Rule*, 13 SANTA CLARA LAW. 256, 260 (1972). The exclusionary rule of evidence was enunciated in Weeks v. United States, 232 U.S. 383 (1914). In *Weeks*, the Supreme Court rejected the common-law rule that admissibility of evidence was unaffected by the manner in which it was secured and held that evidence obtained during an unconstitutional search and seizure was not admissible in the federal courts. The exclusionary rule was later held applicable to the states in Mapp v. Ohio, 367 U.S. 643 (1961).

3. The rationale of the doctrine was first articulated in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). Mr. Justice Holmes, writing for the majority, reasoned that the heart of a provision that forbids the government to secure evidence in certain ways was not merely that the evidence so acquired should not be used in court, "but that it shall not be used at all." *Id.* at 392. *See generally* Annot., 43 A.L.R.3d 385, 394 (1972).

4. The "fruit of the poisonous tree" doctrine is not limited to the exclusion of secondary evidence where such evidence is derived from an illegal search and seizure. However, due to the scope of this note, the remaining discussion will focus on those cases in which the government's action amounted to an unlawful search and seizure and the derivative evidence is a confession or admission by the accused. For a discussion of the doctrine prohibiting the use of secondary evidence derived from *any* unlawful act of government agents see Annot., 43 A.L.R.3d 385, 389 (1972).

5. The United States Supreme Court in Fahy v. Connecticut, 375 U.S. 85 (1963), held that where the accused knew about an illegal search and seizure prior to his confession, he should have had an opportunity to demonstrate that his admissions "were induced by being confronted with the illegally seized evidence." *Id.* at 91.

One commentator states that the test is "whether the defendant was motivated to make the statement when confronted by the evidence . . . ." Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 CAL. L. REV. 579, 607-08 (1968). *See* People v. Johnson, 70 Cal. 2d 541, 450 P.2d 865, 75 Cal. Rptr. 401, *cert. denied*, 395 U.S. 969 (1969); State v. Kitashiro, 48 Hawaii 204, 397 P.2d 558 (1964) (holding confession inadmissible when the defendant confessed after being told by the police that they had taken from his home stolen automobile parts and that he might as well confess). *Accord*, McCloud v. Bounds, 474 F.2d 968 (4th Cir. 1973); Amadov-Gonzalez v. United States, 391 F.2d 308 (5th Cir. 1968); Jacobs v. Warden, Maryland Penitentiary, 367 F.2d 321 (4th Cir. 1966); Wickline v. Slayton, 356 F. Supp. 140, 143 (E.D. Va. 1973); People v. Stoner, 65 Cal. 2d 595, 422 P.2d 585, 55 Cal. Rptr.

There are, however, recognized limitations to the rule. First, derivative evidence is admissible where the government learns of it from a source independent of and distinct from the illegal activity.[6] Second, even when derivative evidence is not attributed to an independent source, it is admissable when its connection to the illegality had "become so attenuated as to dissipate the taint."[7] The test for the scope of this limitation is whether the government obtained the derivative evidence by exploiting the initial illegality or by means so "distinguishable as to be purged of the primary taint."[8]

In *Warlick v. Commonwealth*[9] the Supreme Court of Virginia had to determine if a defendant's confession subsequent to a confrontation with

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897 (1967); People v. Bilderbach, 62 Cal. 2d 757, 401 P.2d 921, 44 Cal. Rptr. 313 (1965); French v. State, 198 So. 2d 668 (Fla. App. 1967); People v. Rodriquez, 11 N.Y.2d 279, 183 N.E.2d 651, 229 N.Y.S.2d 353 (1962); Commonwealth v. Spofford, 343 Mass. 793, 180 N.E.2d 673 (1962).

6. In *Silverthorne*, Mr. Justice Holmes, after stating that illegally seized evidence should not be used, continued: "Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed." 251 U.S. at 392. For a short discussion of this independent source limitation see Pitler, *supra* note 5, at 624. For a discussion of the limitation and a collection of illustrative cases see Annot., 43 A.L.R.3d 385, 399 (1972).

Another limitation to the "fruit of the poisonous tree" doctrine, the "inevitable discovery" exception, has been invoked to allow admission of secondary evidence where the court is convinced that the evidence would eventually have been obtained by lawful means regardless of the prior police misconduct. For a discussion of the applicability of this limitation see Note, *The Inevitable Discovery Exception to the Constitutional Exclusionary Rules*, 74 COLUM. L. REV. 88 (1974).

7. Nardone v. United States, 308 U.S. 338, 341 (1939). The Court held that, having once established that the government acted illegally, the defendant must be given an opportunity to prove that evidence derived from the illegal conduct constitutes a substantial portion of the government's case. *Id.* at 341. However, the Court acknowledged that while "[s]ophisticated argument may prove a causal connection between . . . illicit wiretapping and the Government's proof," the trial judge, in his discretion, could admit the evidence if the connection had become too attenuated. *Id.* at 341. *See also* Note, *Fruit of the Poison Tree—A Plea for Relevant Criteria*, 115 U. PA. L. REV. 1136, 1139 (1967).

8. Wong Sun v. United States, 371 U.S. 471, 487-88 (1963). The Court in further clarifying the *Nardone* "attenuation limitation" rejected the idea that all derivative evidence should be inadmissible if it would not have been exposed "but for" illegal police action. *Id.* at 488. Rather, the confession would be excluded where the police obtained it through exploitation of the illegality, but would not be excluded where the connection was less direct. *See* Broeder, *Wong Sun v. United States: A Study in Faith and Hope*, 42 NEB. L. REV. 483, 519-32 (1963).

For a discussion of the application of this standard to various factual situations see Pitler, *supra* note 5, at 636. For a collection of cases utilizing the attenuation limitation see Annot., 43 A.L.R.3d 385, 402 (1972).

9. 215 Va. 263, 208 S.E.2d 746 (1974).

illegally seized evidence was "fruit of the poisonous tree." The defendant Warlick was arrested for breaking and entering in the nightime the Metro Drug Store and with the theft of a quantity of controlled drugs. The arrest was precipitated by an illegal search of defendant's home which revealed two vials of drugs.[10]

After the *Miranda* warnings were given the officers advised him that the vials had Metro Drug Store labels, but Warlick denied knowledge of the drugs and of the break-in, and continued his denial during questioning en route to police headquarters. After again advising the defendant of his rights, the police continued to question him in the "booking" room where the drug vials had been placed on a desk, and Warlick continued to deny any involvement.[11] He was then taken to another room and again the vials were placed in his presence. After further denials of knowledge of the location of the remaining drugs, the officers asked him how he would feel if some children "got hold" of them. The defendant subsequently revealed to the police the location of the drugs.

At trial, the defendant testified that he had led the police to the drugs of his own free will in order to prevent children from getting possession of them.[12] When asked whether he had decided to sacrifice himself to prevent any possibility of children finding the drugs, he stated that he had.[13] The trial court denied the motion to exclude his confession, and on appeal the defendant argued that his statements were inadmissible since they were obtained through an illegal seizure.

Although the police had continually confronted Warlick with illegally seized drugs prior to his confession in an apparent attempt to gain incriminating statements,[14] the court held the confession admissible and not "fruit of the poisonous tree."[15] The court reached this decision based on the defendant's testimony,[16] finding that the motivating factor behind his con-

10. At trial, the Commonwealth conceded that the seizure of the vials at defendant's home was unlawful and the trial court suppressed that evidence. *Id.* at 265, 208 S.E.2d at 747.

11. *Id.*

12. *Id.*

13. *Id.*

14. No other logical reason was apparent for the placing of the drugs in each room where the defendant was questioned.

15. 215 Va. at 267, 208 S.E.2d at 749. Warlick's confession was not given after a period of time away from the police station as in *Wong Sun* where Wong Sun's confession was held to be purged of the illegal taint. *See* note 8 *supra* and accompanying text.

16. 215 Va. at 267, 208 S.E.2d at 749. At first glance, this holding may appear to be a deviation from the general "fruit of the poisonous tree" doctrine developed in *Silverthorne* and *Wong Sun*. *See* notes 3 & 8 *supra* and accompanying text. The police were using the

fession was his concern for the children, not the fact that he had been confronted with illegally seized evidence.[17] The fact that he admitted knowing the location of the drugs only after the police brought up the possibility of harm to children supports this finding.

In order to have his confession suppressed the defendant must show that it was induced by his confrontation with the illegally seized evidence, and therefore secured through the government's exploitation of the initial illegality.[18] However, the testimony and factual situation in this case indicate the confrontation with the evidence did not induce the confession. Even if the defendant were to prove some causal connection between the illegal seizure and the confession, the court held it would be admissible since "it was so attenuated and distant from the illegal search as to dissipate the taint."[19]

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illegally seized evidence contrary to the essence of the "fruit of the poisonous tree" doctrine stated in *Silverthorne*. Once police illegality is shown, the *Wong Sun* test requires the court to determine if the secondary evidence is secured through the exploitation of that illegality. However, although the police apparently attempted to exploit the illegally seized drugs, the factual situation and the defendant's testimony reveal that their attempt was not successful.

17. 215 Va. at 167, 208 S.E.2d at 749. It could be argued that the impetus to confess remained in Warlick's mind after the confrontations with the drugs and therefore, the confession was at least partially induced by the illegality. However, nothing exists in the factual situtation to support that position.

18. *See* notes 5 & 8 *supra* and accompanying text. In *Fahy*, the Supreme Court did not hold that all confessions following an illegal search were inadmissible; rather, it held the defendant should have had an opportunity to show his admissions "were induced by being confronted with the illegally seized evidence." 375 U.S. at 91. In *Wong Sun*, the Court required lower courts to inquire whether the confession had "been come at by exploitation of that illegality . . . ." 371 U.S. at 488.

The confrontation with the drugs did not induce the confession; the confession was not motivated by or obtained through the exploitation of the drugs. The defendant, based on his testimony, confessed due to other motives. In People v. Johnson, 70 Cal. 2d 541, 450 P.2d 865, 75 Cal. Rptr. 401 (1969), the California Supreme Court indicates it will determine if the exploitation of the illegality "in fact" induced the confession. 70 Cal.2d at ___, 450 P.2d at 869-70, 75 Cal. Rptr. at 405-06. After having held the confession inadmissible in *Johnson*, the court distinguished the case from other situations in which the confession could be admissible: "This is not a case where a defendant having learned of the seized evidence and of another's confession implicating him delayed several days before deciding to return to the police and voluntarily confess. Nor is it a case where there is any evidence of an independent motive to confess." 70 Cal. 2d at ___, 450 P.2d at 870, 75 Cal. Rptr. at 406.

In Wickline v. Slayton, 356 F. Supp. 140, 143-44 (E.D. Va. 1973) a confession was deemed admissible where the defendant was not motivated by confrontation with illegally seized evidence, but confessed to exculpate his brother-in-law. *See generally* Maquire, *How to Unpoison the Fruit, The Fourth Amendment and the Exclusionary Rule*, 55 J. CRIM. L.C. & P.S. 307, 319-20 (1964).

19. 215 Va. at 267, 208 S.E.2d at 749. This conclusion correctly follows the directions of *Nardone* and *Wong Sun* in which the Court rejected a simple "but for" test to determine

Although the defendant had been given two *Miranda* warnings before confessing, the court did not determine whether the warnings dissipated the taint of the illegal search. Without deciding, the court recognized that opinion is divided on whether the giving of *Miranda* warnings after an illegal search constitutes a sufficient causal break between the search and a subsequent confession.[20] The court was not required to decide this issue since it was not shown that the "police exploited the illegally seized evidence in obtaining an admission from the defendant . . . ."[21] Thus, the decision leaves this critical question open in the typical case where the defendant does not have or admit an independent motive to confess. This issue, although unanswered in *Warlick,* is most significant since a future

admissibility. Since the defendant cannot suppress the confession as being directly induced by the government's use of the drugs, he must argue that it be excluded due to a less direct causal connection between the confession and the illegality. The defendant could argue "but for" the illegal search the police would not have asked him the questions which pointed out the danger to children. However, in *Nardone,* the Supreme Court permitted trial judges to reject "sophisticated arguments" proving a causal connection between the government illegality and the fruit where the connection was too attenuated. 308 U.S. at 341. *See* notes 7 & 8 *supra* and accompanying text.

20. 215 Va. at 266, 208 S.E.2d at 748. The courts that hold that the warnings do not dissipate the taint of the illegality point out that the *Miranda* warnings are designed to advise a defendant of his rights to remain silent and his right to counsel but that that he is being confronted with illegally seized evidence that is inadmissible at trial. These cases also recognize that if *Miranda* warnings render admissible confessions obtained after confronting an accused with illegally seized evidence, then the police will be encouraged to make illegal searches hoping to gain admissible confessions. *See* People v. Johnson, 70 Cal. 2d 541, 450 P.2d 865, 75 Cal. Rptr. 401, *cert. denied,* 395 U.S. 969 (1969). *See also* Wickline v. Slayton, 356 F. Supp. 140, 143 (E.D. Va. 1973) (distinguishing inability of *Miranda* rights to purge taint of confrontation with illegally seized evidence from *Miranda* warnings after illegal arrest; but confession held admissible when illegally seized evidence had minimal influence on decision to confess); Commonwealth v. Daniels, 455 Pa. 552, 558, 317 A.2d 237, 240 (1974) (*Miranda* warnings do not purge taint where defendant confronted with illegally seized items). *See generally* Pitler, *supra* note 5, at 608-09.

The cases holding that the giving of *Miranda* rights prior to a confession purges the taint adopt the view that the warnings constitute a break in the causal chain between the illegality and the confession. Justice Mosk dissenting in People v. Johnson, 70 Cal. 2d 541, 450 P.2d 865, 75 Cal. Rptr. 401, *cert. denied,* 395 U.S. 969 (1969) contended that the *Miranda* warnings given purged any taint: "I can conceive of few more 'independent act[s] by the defendant or a third party which break the causal chain linking the illegality and [the] evidence' than advice by the captors to the suspect that he has a right to have counsel then and there, and that he may remain silent. Here we have *Miranda* warnings serving as the attenuation required by *Nardone, Wong Sun* . . . not once but twice. There was not merely a single break in the casual chain but a double fracture." 70 Cal. 2d at ____, 450 P.2d at 878, 75 Cal. Rptr. at 414. *See* State v. Rocheleau, 313 A.2d 33 (Vt. 1973); Jetmore v. State, 275 So. 2d 61 (Fla. Dist. Ct. App. 1973). For a discussion of *Jetmore* and the general question of *Miranda* warnings purging the taint of an illegal search and seizure see Note, 1 FLA. ST. U.L. REV. 533 (1973).

21. 215 Va. at 167, 208 S.E.2d at 749.

holding that *Miranda* warnings purge the taint of a prior police illegality will, in effect, destroy the "fruit of the poisonous tree" doctrine in this context.[22]

The court's decision in *Warlick* does not indicate a retreat from the "fruit of the poisonous tree" doctrine. Although the doctrine is representative of the general principle that the government should not be allowed to utilize the products of its own illegalities, the various exceptions to the doctrine also clearly reflect the principle that all that follows illegal government action is not per se excluded. Where a defendant's confession is not induced or motivated by a confrontation with illegally seized evidence, the nexus between the prior illegal action of the government and the subsequent confession is not sufficient to require that the confession be excluded.

W.J.M.

22. The decision on this question will affect the vitality of the "fruit of the poisonous tree" doctrine in this context. As Mr. Justice Holmes reasoned in *Silverthorne,* the essence of an exclusionary rule to prevent the government from seizing evidence illegally is not merely that it be suppressed at trial but that the evidence not be used at all. 251 U.S. at 392. If the government can conduct an illegal seizure, confront the accused with that evidence and induce a confession, clearly the government is "using" the illegally seized items. If *Miranda* warnings alone will make a confession secured in this manner admissible, the very core of the "fruit of the poisonous tree" doctrine is destroyed. The "attenuation limitation" will have consumed the initial rule.