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Opinion No. 09-88

Constitutionality of "Exclusionary Rule Reform Act"

QUESTION

The "Exclusionary Rule Reform Act" (SB 518) adopts a good-faith exception to the exclusionary rule, providing that evidence seized in violation of the Fourth Amendment to the United States Constitution will not be suppressed in state criminal proceedings so long as the search that produced the evidence was "carried out in circumstances justifying an objectively reasonable belief that it was in conformity with the fourth amendment." Is this legislation constitutional?

OPINION

The legislation, as drafted, references only the federal constitution and tracks the current state of Fourth Amendment jurisprudence. Therefore, SB 518 is constitutional under the Fourth Amendment. But, because evidence in a criminal trial in Tennessee must also be admissible under Article I, § 7, of the Tennessee Constitution and its separate exclusionary rule, and because Tennessee courts to date have not recognized a good-faith exception under Article I, § 7, any attempt to legislate a good-faith exception under the state constitution could be vulnerable to attack.

ANALYSIS

Tennessee citizens are protected against unreasonable searches and seizures by government officials under both the state and federal constitutions—U.S. Const. amend. IV; Tenn. Const., art. I, § 7. Neither provision is self-executing in the sense that neither furnishes a remedy for government violations of their protections. Rather, as will be detailed below, both the United States Supreme Court and the Tennessee Supreme Court have developed similar, but not necessarily identical, exclusionary rules to safeguard the respective constitutional protections.

The United States Supreme Court was the first to develop the exclusionary rule and has since modified its rule by adoption of a good-faith exception. In *Weeks v. United States*, 232 U.S. 383, 398 (1914), the United States Supreme Court for the first time held that, in federal prosecutions, the government was prohibited from introducing evidence that had been obtained

in violation of a citizen's Fourth Amendment rights; use of such evidence, the Court concluded, would itself involve the denial of the accused's constitutional rights. The Court applied this exclusionary rule to state prosecutions in *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (Fourth Amendment's right of privacy enforceable against the states through the Due Process Clause of the Fourteenth Amendment).

After more than twenty years of applying the exclusionary rule in state and federal prosecutions, courts began to question whether the federal constitution truly required the exclusionary sanction for every Fourth Amendment violation in light of the rule's substantial societal costs. Thus, in *United States v. Leon*, 468 U.S. 897 (1984), the government asked the Court to carve out a good-faith exception to the exclusionary rule. In *Leon*, officers had obtained facially valid search warrants from a neutral and detached magistrate and executed several searches. In district court litigation, the trial court concluded that the magistrate had improperly found probable cause. *Leon*, 468 U.S. at 903. Since the officers had acted in good faith, the government asked the Court to modify the exclusionary rule so as not to exclude evidence obtained under these circumstances. *Id.* at 905.

The *Leon* Court concluded that modification was appropriate by first finding that the exclusionary remedy was not itself required by the Fourth Amendment; the remedy, the Court explained, was simply a judicially created safeguard for the constitutional protections rather than a personal constitutional right of the party aggrieved by the search. *Leon*, 468 U.S. at 906. Since the exclusionary remedy was designed to deter police misconduct, not magistrate or other judicial error, applying it in circumstances where law enforcement officers acted in objectively reasonable good faith would not further the ends of the rule. *Id.* at 916, 920. The United States Supreme Court thus established by decision what this bill proposes to establish by legislation—that evidence will not be suppressed if officers execute a search or seizure in circumstances justifying an objectively reasonable belief that the search or seizure was in conformity with the Fourth Amendment. Therefore, as drafted, SB 518 does not offend the Fourth Amendment under the decisions of the United States Supreme Court.

Senate Bill 518 does not purport to address Article I, § 7, and the exclusionary rule adopted by the Tennessee Supreme Court to enforce that constitutional provision, however. Where, as here, there are similar federal and state constitutional provisions, state courts are bound by the interpretation given to the federal constitution by the Supreme Court of the United States. *Miller v. State*, 584 S.W.2d 758, 760 (Tenn. 1979). But, as to state constitutional provisions, the Tennessee Supreme Court sits as the final arbiter and may choose to interpret a Tennessee constitutional provision as providing greater protection than does its federal counterpart. *Id.* The Tennessee Supreme Court has held that Article I, § 7, "is identical in intent and purpose with the Fourth Amendment," and that federal cases applying the Fourth Amendment should be regarded as "particularly persuasive." *Sneed v. State*, 221 Tenn. 6, 423 S.W.2d 857, 860 (1968). But, in several areas the Court has departed from these principles. *See State v. Lakin*, 588 S.W.2d 544 (Tenn. 1979) (refusing to follow "open fields" doctrine of *Hester v. United States*, 265 U.S. 57 (1924)); *State v. Jacumin*, 778 S.W.2d 430 (Tenn. 1989) (refusing to follow "totality of the circumstances" test of *Illinois v. Gates*, 462 U.S. 213 (1983), for sufficiency of affidavits used to obtain search warrants); *State v. Randolph*, 74 S.W.3d 330 (Tenn. 2002) (refusing to follow holding in *California v. Hodari D.*, 499 U.S. 621 (1991), that a

defendant is not seized when he does not stop or yield to officer's show of authority). Thus, an analysis of the development of Tennessee's exclusionary rule is also necessary to a resolution of this issue.

After the United States Supreme Court had developed and applied the exclusionary rule to federal prosecutions but before it required application of the federal exclusionary rule to the states, the Tennessee Supreme Court, in dicta, announced a state exclusionary rule based on the provisions of Article I, § 7 of the Tennessee Constitution. *Hughes v. State*, 145 Tenn. 544, 238 S.W. 588, 594 (1922). The *Hughes* Court concluded that the arrest and subsequent search at issue there had been lawful but announced that, in situations where evidence was obtained in violation of Article I, § 7, such evidence must be barred from the criminal prosecution. *Hughes*, 238 S.W. at 596. The Court explained that the state could not be permitted to exploit its own wrongdoing in a trial attempting to punish a citizen's wrongdoing. *Hughes*, 238 S.W. at 594. The Court first applied Tennessee's exclusionary remedy in *Hampton v. State*, 148 Tenn. 155, 252 S.W. 1007, 1008 (1923). In *Hampton*, officers had searched Hampton's home after procuring a search warrant, but the warrant turned out to be defective in many regards and failed to meet the constitutional standards for issuance of the warrant under Article I, § 7. *Hampton*, 252 S.W. at 1008. Thus, even though the officers had relied on the warrant in good faith, the Court held that the evidence should have been excluded because it was obtained in violation of Hampton's constitutional rights. *Id.* The Court was not specifically asked to carve out a good-faith exception to the exclusionary rule of *Hughes*.

Since *Hampton*, although the Tennessee Supreme Court has been invited to adopt *Leon*'s good-faith exception to the exclusionary rule, the Court has not done so, nor has it addressed whether there is such an exception under the state's constitution. *State v. Carter*, 16 S.W.3d 762, 768 n.8 (Tenn. 2000). The Court of Criminal Appeals of Tennessee has refused to adopt the good-faith exception on a few occasions. *See, e.g., State v. Huskey*, 177 S.W.3d 868 (Tenn. Crim. App. 2005); *State v. Taylor*, No. 86-144-III, 1987 WL 25417 (Tenn. Crim. App. Dec. 4, 1987). The intermediate appellate court applied a good-faith exception in one case, but the court made clear that it was applying the federal good-faith exception because the search at issue had been conducted in another state by federal officers. *State v. Dillon*, No. 03C01-9304-CR-00124, 1994 WL 51044 at *1-2 (Tenn. Crim. App. Sept. 19, 1994) (app. denied April 10, 1995).

Other state supreme courts that have addressed the propriety of a good-faith exception under their state constitutional provisions have split into two different camps. Some courts have found that, even with the good-faith exception, the federal exclusionary rule is still sufficient to protect state constitutional interests. *See, e.g., Crayton v. Commonwealth*, 846 S.W.2d 684, 688-89 (Ky. 1992) (concluding that deterrence of police misconduct is primary objective of the exclusionary rule; holding that application of good-faith exception to warrant requirement does not violate Section 10 of the Constitution of Kentucky); *State v. Brown*, 708 S.W.2d 140, 146 (Mo. 1986) (en banc) (rejecting argument that Article I, § 15, of the Missouri Constitution forbids any exception to the exclusionary rule; adopting good-faith exception). On the other hand, some state supreme courts have found that adoption of the good-faith exception fails to provide sufficient protection under their state constitutional provisions. *See, e.g., State v. Canelo*, 139 N.H 376, 653 A.2d 1097, 1105 (1995) (finding good-faith exception incompatible with and detrimental to the strong right of privacy inherent in New Hampshire's Constitution);

Commonwealth v. Edmunds, 526 Pa. 374, 586 A.2d 887, 901 (1991) (concluding that strong right of privacy under Pennsylvania Constitution is not served by adopting good-faith exception to the exclusionary rule; invasion of privacy is nevertheless intrusive when done in good faith).

Whether, in the absence of action by the Tennessee Supreme Court, the General Assembly could adopt a good-faith exception to the state exclusionary rule legislatively is an open question. As a general rule, Tennessee's legislature has primary authority to prescribe rules of evidence and to declare what shall be admissible evidence. *Rust v. Griggs*, 172 Tenn. (8 Beeler) 565, 113 S.W.2d 733, 736 (1938). But, if the Tennessee Supreme Court, as the final arbiter of the state's constitution, determines that a rule of evidence, practice, or procedure is constitutionally required, the General Assembly has no constitutional power to abolish or modify it. *See State v. Mallard*, 40 S.W.3d 473, 483 (Tenn. 2001) ("[T]he legislature can have no constitutional authority to enact rules, either of evidence or otherwise, that strike at the very heart of a court's exercise of judicial power. . ."). Stated another way, the legislature cannot place a construction on the constitution that will be binding on the courts. *State v. Spears*, 53 S.W. 247, 248 (Tenn. Ch. App. 1899). This separation of authority is consistent with the practice in the federal system. *See, e.g., Dickerson v. United States,* 530 U.S. 428, 444 (2000) (holding that, since the warnings set forth in *Miranda* announced a constitutional rule protecting Fifth Amendment rights, Congress could not legislatively supersede *Miranda*'s requirements).

At least one other state—Arizona—has legislatively adopted a good-faith exception to its exclusionary rule. When that exception was invoked as grounds to deny a suppression motion, the criminal defendant attacked the constitutionality of the Arizona statute. *State v. Coats*, 165 Ariz. 154, 797 P.2d 693, 696 (Ariz. Ct. App. 1990). Arizona's legislature, like Tennessee's, has plenary power to adopt evidentiary rules unless restrained by provisions of the state constitution. *Id.* Because the Arizona Supreme Court had previously held that Arizona's exclusionary rule was no broader than the federal rule, the Arizona Court of Appeals concluded that the legislature could properly amend the rule to conform with the federal rule and thus rejected the defendant's attack on the statute. *Id.* at 697.

As previously noted, unlike the Arizona Supreme Court, the Tennessee Supreme Court has never addressed whether the state exclusionary rule is identical to the federal rule, or whether a broader rule is necessary to protect privacy rights under Article I, § 7. In one opinion refusing to adopt the good-faith exception to the exclusionary rule, though, the Court of Criminal Appeals concluded that weakening Tennessee's rule in this fashion would unduly reduce the protections contemplated for Tennessee's citizens under Article I, § 7. *Huskey,* 177 S.W.3d at 890. If the Tennessee Supreme Court were to concur in that rationale and find that a broader exclusionary rule is constitutionally required, any legislative attempt to weaken the exclusionary rule would be an unconstitutional exercise of legislative power. If, on the other hand, the Supreme Court were to review its prior decisions and conclude, as did the United States Supreme Court, that its exclusionary rule was simply a judicially created safeguard for Article I, § 7, but not required by the constitution, then legislative adoption of a good-faith exception would withstand constitutional scrutiny.

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