

COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, CO 80203 Denver County District Court; The Honorable Shelley I. Gilman; and Case Number 18CR184	DATE FILED: July 8, 2020 3:22 PM FILING ID: AC5874C5C7485 CASE NUMBER: 2018CA1949
Plaintiff-Appellee THE PEOPLE OF THE STATE OF COLORADO v. Defendant-Appellant MARCUS VIGIL	
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REPLY BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

This brief complies with the applicable word limit and formatting requirements set forth in C.A.R. 28(g).

It contains 4,117 words.

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In response to matters raised in the Attorney General’s Answer Brief, and in addition to the arguments and authorities presented in the Opening Brief, Defendant-Appellant submits the following Reply Brief.

ARGUMENT

I. THE WARRANTLESS SEARCH OF MR. VIGIL’S CELL PHONE VIOLATED HIS CONSTITUTIONAL RIGHT TO BE FREE FROM UNREASONABLE SEARCHES.

Mr. Vigil, through counsel, urged the district court, both in writing and orally, to suppress evidence belonging to him, under both the state and federal constitutions. CF, pp 56-61; TR 08/03/18, pp 10:1-4, 53:5-12; *see also* U.S. Const. amends. IV, XIV; Colo. Const. art. II, § 7.

The district court denied Mr. Vigil’s motion to suppress finding: (1) Mr. Vigil did not have standing “to challenge any search of the car[;]” and (2) he abandoned his personal belonging in the vehicle and thus, does not have standing to challenge any search of such belongings. TR 08/03/18, p 62:7-14.

Now, on appeal, Mr. Vigil challenges the district court’s ruling. Specifically, Mr. Vigil alleges: (1) following *People v. Sotelo*, 336 P.3d 188 (Colo. 2014), he has standing under both the state and federal constitution to challenge law enforcement’s warrantless search of his *personal belongings* found inside of the vehicle; (2) he has a legitimate expectation of privacy *in the digital data* stored on his cell phone; (3)

after the United States Supreme Court decision in *Riley v. California*, 573 U.S. 373 (2014), law enforcement should be required to obtain a lawfully issued warrant prior to conducting a search of digital data stored on a cell phone; and (4) Mr. Vigil did not voluntarily abandon his legitimate expectation of privacy in the digital data stored on his cell phone.

In *People v. Sotelo*, the Colorado Supreme Court addressed “whether an *unauthorized driver* of a rental car may have standing to challenge a search of packages within the rental car, regardless of whether the driver has standing to challenge the search of the rental car itself.” 336 P.3d at 192 (emphasis added). In doing so, the Court stated:

We are mindful *not to conflate* standing to contest the search of the rental car itself *with* standing to contest the search and seizure of packages within the rental car. *They are two different inquiries.*

Id. (internal citations omitted) (emphasis added).

Here, as challenged, this Court must address whether an *unauthorized driver* of a vehicle may have standing to challenge law enforcement’s warrantless search of *personal belongings* found inside the vehicle, regardless of whether the driver has standing to challenge the search of the vehicle itself where the defendant is able to demonstrate a reasonable expectation of privacy in the belongings searched.

In the Answer Brief, the Attorney General does exactly what *Sotelo* cautioned against: conflates standing to contest the search of the vehicle itself with standing to contest the search of the personal belongings within. 336 P.3d at 192. As such, the State argues, “[t]he trial court correctly concluded that because the car had been stolen, defendant did not have standing to challenge the search of the car.” AB, pp 6-8 (“defendant argues that after the Colorado Supreme Court’s ruling in *People v. Sotelo* ... if a defendant can show a reasonable expectation of privacy in a stolen vehicle, the defendant can challenge the search of his possessions found in the vehicle.”). Standing to challenge the search of the vehicle and standing to search the personal belongings located within “are two different inquiries.” *Sotelo*, 336 P.3d at 192.

Contrary to the State’s position, Mr. Vigil has not asserted standing to challenge law enforcement’s warrantless search of the vehicle. Instead, Mr. Vigil has argued repeatedly and consistently that because he retained a reasonable expectation of privacy in his property located inside of the vehicle, he has standing to challenge law enforcement’s warrantless search of his personal belongings found within the vehicle. See TR 08/03/18, pp 10, 55.

Accordingly, this Court need only address whether Mr. Vigil, as an unauthorized driver of the vehicle, has standing to challenge law enforcement’s

warrantless search of the digital data stored in his cell phone, where he has demonstrated a reasonable expectation of privacy not only in the phone as a physical object, but also in the digital data stored therein.

Next, the Attorney General does not rebut Mr. Vigil's position that individuals possess a legitimate expectation of privacy in the digital data stored on a cell phone. OB, pp 13-15; *see People v. Bondsteel*, 2015 COA 165, ¶ 61 n.6, *aff'd*, 2019 CO 26 ("An appellant's failure to respond in the reply brief to an argument made in the answer brief may be taken as a concession."); *see also Polk v. State*, 233 P.3d 357, 359-60 (Nev. 2010) (the State's failure to address a defendant's argument in its answer brief may be deemed a confession of error).

Instead, the Attorney General summarily concludes that "the record supports the trial court's finding that defendant abandoned his cell phone." AB, p 9. In doing so, the State claims: (1) "the privacy interests discussed in *Riley* do not apply[;]" and (2) because Mr. Vigil fled and did not attempt to grab his cell phone, he relinquished his reasonable expectation of privacy in the digital data. *Id.*

The State misconstrues Mr. Vigil's argument regarding *Riley*'s effect. As challenged, Mr. Vigil contends that in the wake of *Riley*, this Court should not employ a mechanical application of common law doctrines that limit constitutional privacy protections. OB, pp 17-22; *see Riley*, 573 U.S. at 386 (the United States

Supreme Court rejected “a mechanical application” of the search incident to arrest exception to cell phone data because unlike ordinary physical objects, cell phones “place vast quantities of personal information literally in the hands of individuals.”).

In *Riley*, the Supreme Court “made it clear that the breadth and volume of data stored on [cell phones] and other smart devices make today’s technology different in ways that have serious implications for the Fourth Amendment analysis[.]” *United States v. Kim*, 103 F. Supp. 3d 32, 54 (D.C. Cir. 2015) (the analysis of whether the search was reasonable under the Fourth Amendment does not simply end with the invocation of a well-recognized exception); see *Carpenter v. United States*, 138 S.Ct. 2206, 2222 (2018) (when “confronting new concerns wrought by digital technology,” the Supreme Court “has been careful not to uncritically extend existing precedents.”).

As such, following *Riley*, several state and federal courts have heightened privacy protections for electronic devices and refused to mechanically apply and extend deeply rooted doctrines that limit constitutional privacy protections. See, e.g., *Carpenter*, 138 S.Ct. at 2222 (the Supreme Court declined to extend the third-party doctrine to cellular site location information); *Kim*, 103 F. Supp. 3d at 59 (the district court refused to mechanically apply the border exception to a forensic search of a laptop computer); *Eunjoo Seo v. State*, 2020 WL 3425272 (Ind. 2020) (the Indiana

Supreme Court refused to apply the foregone conclusion exception and instead, held that forcing the defendant to unlock her cell phone would violate her fifth amendment right against self-incrimination); *Wertz v. State*, 41 N.E.3d 276, 281 (Ind. Ct. App. 2015) (An electronic storage device, such as a GPS unit, computer, or cell phone cannot be treated as a container under the automobile exception); *Chung v. State*, 475 S.W.3d 378, 387 (Tex. App. 2014) (“treating a cell phone as a container which may be searched as a part of the automobile exception: it is a bit strained.”) (internal quotations omitted); *Commonwealth v. Mauricio*, 80 N.E.3d 318, 322-24 (Mass. 2017) (following *Riley*, a warrant is required to search a digital camera seized incident to arrest).

Similarly, here, this Court should adopt a different approach “when faced with the task of applying eighteenth-century principles to this twenty-first-century technology.” *Kim*, 103 F. Supp. 3d at 51; see *Eunjoo Seo, supra* at 6-7 (“the cheapest model of last year’s top-selling smartphone, with a capacity of 64 gigabytes of data, can hold over 4,000,000 pages of documents[.] ... An unlocked smartphone, ... contains far more private information than a personal diary or an individual tax return ever could.”); *United States v. Djibo*, 151 F. Supp. 3d 297, 310 (E.D.N.Y. 2015) (cell phones can contain, in digital form, the “combined footprint of what has been occurring socially, economically, personally, psychologically, spiritually and

sometimes even sexually, in the owner's life."). Modern cell phones implicate privacy concerns far beyond those implicated by a search of any other physical object. *See Riley*, 573 U.S. at 396-97 (citing *United States v. Kirschenblatt*, 16 F.2d 202, 203 (2d. Cir. 1926) (a search of cell phone data is akin to "ransacking [an individual's] house for everything which may incriminate him.")). Thus, a phone that is lost, dropped, or misplaced must retain the protection of both the federal and state constitutions. *See State v. Samalia*, 375 P.3d 1082, 1095 (Wash. 2016) (Yu, J., dissenting) ("It would be patently absurd to suggest that abandonment of a traditional key means that warrantless access is allowed to the house it locks; the same must be true of digital keys to electronic information.") (quoting Amicus Curiae Br. Of Am. Civil Liberties Union of Wash. at 11).

Especially in light of the fact that the evidence at trial established Mr. Vigil did not voluntarily or intentionally abandon his reasonable expectation of privacy in the digital data stored on his cell phone. *See* George L. Blum et al., *Searches and Seizures*, 68 Am. Jur. 2d, § 23 (2019) ("abandonment is a question of intent and exists only if property has been voluntarily discarded under circumstances indicating no future expectation of privacy with regard to it.")).

As relevant here, Mr. Vigil did not voluntarily exit the vehicle. Rather, the police officer "yanked him out of the car." TR 08/20/18, pp 212:22-25, 213:1-5.

Thus, unlike the traditional abandonment case, Mr. Vigil did not engage in a clear and unequivocal physical act, such as discarding a personal belonging to make flight easier. Further, at no point did Mr. Vigil personally disclaim ownership of the cell phone as a physical object, or the digital data stored therein. On the contrary, Mr. Vigil did not cancel his cellular service and he repeatedly challenged the search of his personal possession. Finally, although the cell phone was not password protected, Mr. Vigil did enable the sleep/lock screen function. As such, the digital data stored therein was only accessible to the outside world if police took affirmative action to awake/open the phone. *See* TR 08/20/18, p 158:5-7 (“pressed the button to make [the phone] light up”); 246:21 (“I opened [the phone] up”).

Absent unfounded clear-cut evidence establishing that Mr. Vigil voluntarily and intentionally abandoned his cell phone as a physical object, or his reasonable expectation of privacy in the digital data stored therein, this Court must find that law enforcement’s warrantless search intruded upon Mr. Vigil’s individual privacy. *See Eunjoo Seo, supra* at 9 (“Nearly a century ago, U.S. Supreme Court Justice Louis Brandeis cautioned, ‘Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enable to expose to a jury the most intimate occurrences of the

home.”) (quoting *Olmstead v. United States*, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting)).

Finally, the Attorney General argues, “the error was harmless beyond a reasonable doubt[]” because “Officer Sullivan could have identified defendant by looking at the pictures available on his patrol car’s computer database.” AB, p 11-12.

As relevant here, Detective Duran testified that he took affirmative action to “open[the phone] up.” TR 08/20/18, p 246:21; *see id.* 158:5-7 (“pressed the button to make [the phone] light up”). He then “maneuvered” through the phone’s applications and “open[ed] up” the settings folder in an effort to record the serial and model numbers. TR 08.03.18, p 47:2-6. Once inside the phone’s settings folder, Detective Duran was able to “pull up the [profile] picture” to present to Officer Sullivan. TR 08/03/18, p 20:16-19; *see* TR 08/20/18, p 218:15-17 (“pulled up the picture on it”). After viewing the photo, Detective Duran made a phone call to the Denver Police landline using the phone application. In doing so, he was able to identify the owner’s name – Marcus Vigil – and phone number. TR 08/20/18, pp 247-48. Thereafter, Officer Sullivan searched the police database with the name Marcus Vigil, revealing the photograph the Attorney General claims was retrieved in a harmless manner.

Contrary to the State’s argument, the warrantless search of the cell phone and the data stored therein provided law enforcement with Mr. Vigil’s name, his phone number, the cell phone’s serial and model numbers, and two photographs used to identify Mr. Vigil. As such, the warrantless search provided the central evidence of guilt used at trial to connect Mr. Vigil to the stolen vehicle.

Accordingly, the evidence relied on by the Attorney General to claim the error was harmless is fruit of the poisonous tree. *See People v. Schoondermark*, 759 P.2d 715, 718 (Colo. 1988); *Wong Sun v. United States*, 371 U.S. 471 (1963).

For these reasons, this Court should reverse Mr. Vigil’s conviction and remand to the district court for a new trial.

II. OFFICER SULLIVAN’S OUT-OF-COURT IDENTIFICATION WAS UNNECESSARILY SUGGESTIVE AND UNRELIABLE.

In the Answer Brief, the Attorney General does not challenge Mr. Vigil’s contention that the identification procedure was impermissibly suggestive. Failure to respond may be taken as a concession. *See Bondsteel*, ¶ 61 n.6, *aff’d*, 2019 CO 26 (“An appellant’s failure to respond in the reply brief to an argument made in the answer brief may be taken as a concession.”); *see also Polk*, 233 P.3d at 359-60 (the State’s failure to address a defendant’s argument in its answer brief may be deemed a confession of error).

Rather, the Attorney General argues “that Officer Sullivan’s identification of defendant was reliable under the totality of the circumstances.” AB, pp 14-16. The defendant bears the burden of showing that the out-of-court identification procedure was impermissibly suggestive. *People v. Godinez*, 2018 COA 170, ¶ 56. Upon a showing of suggestiveness, the burden then shifts to the State to show by clear and convincing evidence that the identification was nevertheless reliable. *People v. Borghesi*, 66 P.3d 93, 103 (Colo. 2003).

Factors relevant in determining whether a show-up identification was reliable include: (1) the witness’ opportunity to observe the accused at the time of the crime; (2) the witness’ degree of attention; (3) the accuracy of the witness’ prior description of the accused; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the alleged offense and the confrontation. *Manson v. Braithwaite*, 432 U.S. 98, 114 (1977).

Contrary to the State’s argument, Officer Sullivan’s out-of-court identification of Mr. Vigil was not reliable.

First, Officer Sullivan observed the suspect for only a brief few seconds before a struggle occurred and the individual disappeared. His degree of attention to the suspect’s appearance was minimal, as he was distracted by the struggle and subsequent flight of the suspect. See TR 08/20/18, p 233:20 (“I was busy fighting”).

Moreover, his description was inaccurate. Initially, Officer Sullivan aired a description that the suspect involved had a shaved head, but after viewing the photographs, he testified at trial that the suspect had brown hair. *Id.* at pp 234-36; TR 08/03/18, p 35:6-12. And, although Officer Sullivan seemed confident about his identification, “there is no significant correlation between an eyewitness’s level of certainty in an identification and accuracy of that identification.” Benjamin E. Rosenberg, *Rethinking the Right to Due Process in Connection with Pretrial Identification procedures: An Analysis and a Proposal*, 79 Ky. L.J., 259, 291 (1991). Finally, the time between Officer Sullivan’s observation and the impermissibly suggestive photo array was several days. See Amy Luria, *Showup Identifications: A Comprehensive Overview of the Problems and a Discussion of Necessary Changes*, 86 Neb. L. Rev. 515, 529 (2008) (“An eyewitness’s memory ... deteriorates rapidly immediately after an event[.]”).

Under the totality of the circumstances, the identification is unreliable because it is conducive to an “irreparable mistake identification.” *Manson*, 432 U.S. at 116. The impermissibly suggestive and unreliable identification violated Mr. Vigil’s state and federal constitutional rights to due process and a fair trial. U.S. Const. amends. V, XIV; Colo. Const. art. II, § 25.

Next, the Attorney General argues “[a]ny error in denying the motion to suppress was harmless beyond a reasonable doubt.” AB, pp 17-18. In doing so, the State claims that Officer Sullivan’s identification of Mr. Vigil from the cell phone and police database “render this error harmless beyond a reasonable doubt.”

For the following reasons, the State’s claim fails.

First, Officer Sullivan’s in-court identification was the unreliable product of the suggestive pre-trial photo array identification. *See Bernal v. People*, 44 P.3d 184, 190 (Colo. 2002) (quoting *United States v. Wade*, 388 U.S. 218, 229 (1967)) (“it is a matter of common experience that, once a witness picked out the accused at the line-up, he is not likely to go back on his word later on[.]”). The State relied on this identification as the central evidence of guilt linking Mr. Vigil to the stolen vehicle and flight.

Nevertheless, any additional identification of Mr. Vigil through alleged cell phone images and/or police database photographs are fruit of the poisonous tree. As stated above, the police performed a warrantless and unconstitutional search of Mr. Vigil’s cell phone’s digital data. Evidence obtained as a result of an illegal search must be suppressed. *See People v. Wambolt*, 421 P.3d 681, 697 (Colo. App. 2018). The exclusionary rule “applies to both the illegally obtained evidence itself and to the ‘fruit of the poisonous tree’ – any other evidence derived from the primary

evidence.” *Schoondermark*, 759 P.2d at 718; *see Wong Sun*, 371 U.S. at 471. The illegality of the search, combined with the prosecution’s failure to present evidence of attenuation, requires suppression of the search and any statements or identifications as a result of the unconstitutional search.

For these reasons, this Court should reverse Mr. Vigil’s conviction.

III. PHOTOGRAPHS OF THE HATCHET WERE IRRELEVANT AND HIGHLY PREJUDICIAL.

First, the Attorney General contends that “evidence of the hatchet being found in the car made a consequential fact – defendant having exercised control over the motor vehicle of another – more probable.” AB, p 21. However, in doing so, the State implicitly admits that the prosecution presented no evidence establishing the fact that Mr. Vigil owned or ever possessed the hatchet. *Id.* at 20. Rather, the Attorney General relies solely on the speculative inference that “because Officer Sullivan saw defendant getting into the car, the jury could reasonably conclude that he was the person who had exercised control over the vehicle [and hatchet].” *Id.*

“As a general rule, facts are relevant when they logically tend to prove or disprove a fact in issue or they afford a reasonable inference or shed light upon the matter contested.” *People v. Dooley*, 944 P.2d 590, 597 (Colo. App. 1997). Further, facts that “afford only conjectural inference[s] should not be admitted in evidence.” *People v. Rudnick*, 878 P.2d 16, 20 (Colo. App. 1993).

Here, the prosecution sought to introduce photographs of a hatchet found in the stolen vehicle into evidence. In the Answer Brief, the State alleges the hatchet is relevant to prove Mr. Vigil exercised control over the vehicle.

However, as cautioned in the Opening Brief, the prosecution's lack of evidence at trial forced the jury to guess and speculate as to whether Mr. Vigil owned and possessed the hatchet. *See, e.g., People v. Franklin*, 782 P.2d 1202, 1206 (Colo. 1989) (any probative value from the evidence would only arise if a number of speculative assumptions were made). The record contains no evidence to establish ownership or control over the hatchet. The State concedes this. In fact, the State solely relies on an inference to prove the hatchet belonged to Mr. Vigil. AB, p 20. Thus, without proof or sufficient evidence connecting ownership or possession of the hatchet to Mr. Vigil, any bearing on relevancy is strained and based entirely on conjectural inferences. *See, e.g., Dooley*, 944 P.2d at 597 ("because the package could only provide conjectural inference, it was properly excludable on grounds of relevancy.").

For these reasons, the hatchet should have been excluded under CRE 401.

Next, the Attorney General argues that "the picture's probative value was not substantially outweighed by the danger of unfair prejudice" because "the prosecution

did not offer any testimony at trial that defendant intended to use or had threatened to use the hatchet as a weapon.” AB, p 21.

Relevant evidence is subject to exclusion under CRE 403 if “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]” CRE 403, *see People v. Welsh*, 80 P.3d 296, 307 (Colo. 2003) (“a trial court should exclude evidence which has only the most minimal probative value, and which requires a jury to engage in undue speculation as to the probative value of that evidence.”); *see, e.g., Franklin*, 782 P.2d at 1206 (finding that the danger of unfair prejudice or confusion of issues outweighed the probative value of a hearsay statement, where the jury would have been required to reach a number of speculative assumptions about that statement in order to find any probative value).

In the Answer Brief, the State argues that Mr. Vigil “has not shown any record support for his assertions that the jury was prejudiced by the picture or may have made its decision on an improper basis.” AB, p 21.

However, the prejudice at trial lies in the photographs themselves, which were admitted into evidence as People’s Exhibit 5 and published to the jury. As stated in the Opening Brief, without question, a hatchet is a deadly weapon. *See* § 18-1-901(3)(e)(II), C.R.S. (a deadly weapon is defined as: “[a] knife, *bludgeon*, or any

other weapon, device, instrument, material, or substance, whether animate or inanimate, that, in the manner it is used or intended to be used, is capable of producing death or serious bodily injury.”). Mr. Vigil was not on trial for possession of a weapon. The prosecutor could have exclusively relied on the remaining evidence, such as the air freshener, yellow or black gloves, glasses, pill bottles, backpack, mask, key, jacket, purse, or makeup kit to establish dominion and control over the vehicle. TR 08/20/18, pp 177-81; P.EX #4-17 (TR 08/20/18), p 177. Unlike the hatchet, the use of these items did not prejudice Mr. Vigil and proved the same point the State intended to make.

Further, the negative connotations implicit in admitting evidence of a hatchet is highly prejudicial and misleading to the jury. For example, a division of this Court in *People v. Wakefield*, 428 P.3d 639, 653 (Colo. App. 2018), found that the probative value of a photograph of marijuana growing plants was substantially outweighed by the danger of unfair prejudice because the photograph leaves “the impression that defendant may have been conducting a grow operation in the apartment,” and the photograph “could have caused the jury to view him unfavorably.”

Similarly, here, a hatchet is a deadly weapon. See § 18-1-901(3)(e)(II), C.R.S. As such, the photograph leaves the negative impression that Mr. Vigil possessed and

intended to use a deadly weapon, causing the jury to view him unfavorably. This stigma could have been removed by excluding the evidence under CRE 403 and exclusively relying on the laundry list of additional items located within the vehicle to establish control over the vehicle.

Under these circumstances, the district court abused its discretion in admitting the photograph of the hatchet. CRE 403.

Finally, the Attorney General argues that “[a]ny error in admitting the picture was harmless.” AB, p 22. In doing so, the State argues the evidence was overwhelming because of Officer Sullivan’s identification and the cell phone located within the vehicle. *Id.*

However, as stated above, Officer Sullivan’s identification is unconstitutional as an impermissibly suggestive identification. Moreover, the police search of the cell phone located within the car is an unconstitutional search.

Nevertheless, admission of the hatchet was so unduly prejudicial that it rendered the trial fundamentally unfair in violation of Mr. Vigil’s due process rights. U.S. Const. amends. V, XIV; Colo. Const. art. 25; see *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). Further, the inadmissible evidence misled the jury, thus, denying Mr. Vigil his constitutional right to a fair trial by an impartial jury. U.S. Const.

amends. VI, XIV; Colo. Const. art. II, §§ 16, 25; *Harris v. People*, 888 P.2d 259, 264 (Colo. 1995).

CONCLUSION

For the reasons and authorities set forth in Arguments I, II, and III, and in the Opening Brief, Mr. Vigil respectfully asks this Court to reverse his conviction and remand to the district court for a new trial.

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CERTIFICATE OF SERVICE

I certify that, on July 8, 2020, a copy of this Reply Brief of Defendant-Appellant was electronically served through Colorado Courts E-Filing on Danny E. Rheiner of the Attorney General's office.

