IN THE SUPREME COURT OF THE STATE OF VERMONT
DOCKET NO. 2017-146

State of Vermont,
Appellee

v.

Phillip Walker-Brazie & Brandi Lena-Butterfield,
Appellants

APPEAL FROM SUPERIOR COURT, CRIMINAL DIVISION (ORLEANS)
Docket Nos. 555-9-18, 558-9-18 Oscr

Brief for Amicus Curiae Attorney General Thomas J. Donovan, Jr.

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ISSUE PRESENTED

I. Does Chapter I, Article 11 of the Vermont Constitution require the exclusion of evidence lawfully seized by federal officers during a traffic stop on a Vermont highway and turned over to state officers, where the seizure would have violated the defendants' Article 11 rights had it been made by the state officers themselves?

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INTEREST OF THE ATTORNEY GENERAL

Vermont Attorney General Thomas J. Donovan, Jr. files as *amicus curiae* to explain why, in his view, Chapter I, Article 11 of the Vermont Constitution should determine whether evidence seized by federal officers in Vermont can be admitted in a Vermont criminal prosecution. The Vermont Attorney General has statewide criminal prosecutorial authority and is responsible for "the general supervision of criminal prosecutions" in the State of Vermont. 3 V.S.A. §§ 152, 153, 157. The Attorney General files this brief as of right, with the parties' consent and the Court's permission as to the time of filing. *See* V.R.A.P. 29.

STATEMENT OF THE CASE

The relevant facts in this appeal are straightforward and undisputed. On the evening of August 12, 2018, appellants Philip Walker-Brazie and Brandi Lena-Butterfield were returning to their home in Richford, Vermont, after visiting Ms. Lena-Butterfield's mother in New Hampshire. PC 26, 116, 119, 133. As they were driving westbound on Vermont Route 105, they were stopped by an officer of the United States Customs and Border Protection (CPB) as they passed the intersection of Route 105 and North Jay Road, less than two miles from the United States-Canada border. PC 65. Another CPB officer arrived at the scene shortly thereafter. PC 50. After concluding there was probable cause to believe appellants' vehicle contained evidence of drug smuggling activity, the CPB officers' searched the vehicle without obtaining a warrant or appellant's consent. PC 38-39, 53-54, 58. The search revealed 50 grams of marijuana belonging to Ms. Lena-Butterfield and 135

grams of marijuana and 50 grams of psilocybin mushrooms belonging to Mr. Walker-Brazie. PC 114-120.

The CPB officers then notified the Vermont State Police of the stop and the contents of the search. PC 55-56. No state or local police agency had any involvement in the stop or the search before that point. PC 55-56. The evidence seized by the CPB officers was turned over the Vermont State Police trooper who responded to the scene. PC 56.

Based on the evidence obtained by the CPB officers and turned over to the Vermont State Police, the Orleans County State's Attorney charged Mr. Walker-Brazie with possessing more than 2 ounces of marijuana in violation of 18 V.S.A. § 4230(a)(2) and possessing more than 10 doses of a hallucinogen in violation of 18 V.S.A. § 4235(b)((2). PC 114-17. Ms. Lena-Butterfield was charged possessing more than 1 ounce of marijuana in violation of 18 V.S.A. § 4230(a)(1). PC 118-20.

Appellants moved in superior court to suppress the evidence seized by the CPB officers on the ground that (i) the CPB officers lacked reasonable suspicion to stop appellants' vehicle; and (ii) that Chapter 1, Article 11 of the Vermont Constitution required suppression of the evidence seized by the CPB officers. The superior court denied the motion but certified an interlocutory appeal on the second issue under V.R.A.P. 5(b)(1), which this Court accepted. PC 189-94

ARGUMENT

The analysis in this brief rests on two assumptions, which appear to be undisputed for the purpose of this appeal, but nonetheless should be noted at the

outset. First, the CBP officers' search of appellant's vehicle was within those officers' authority under federal law and consistent with the requirements of the Fourth Amendment to the United States Constitution.[1] Second, if state officers had searched appellants' vehicle based on identical facts, those officers would have violated appellant's rights under Chapter 1, Article 11 of the Vermont Constitution by performing the search in the absence of appellant's consent, a warrant based on probable cause, or exigent circumstances. *See generally State v. Savva*, 159 Vt. 75, 616 A.2d 774 (1991) (declining to adopt an "automobile exception" to Article 11's warrant requirement).

Accepting these assumptions as true, the Attorney General believes the decision below should be reversed. A person charged with a crime in a Vermont court should be entitled to the protection of the Vermont Constitution. When the State seeks to introduce evidence seized in Vermont to convict someone of a Vermont offense in a Vermont court, Vermont law should determine admissibility.

I. The Court should apply Article 11 to determine whether evidence seized by federal officers in Vermont may be admitted in a Vermont criminal prosecution.

Although the Vermont Constitution generally does not restrict the authority of a federal officer acting pursuant to federal law, this Court should require the exclusion of evidence seized by a federal officer from a state prosecution if the seizure was inconsistent with the requirements of the Vermont Constitution.

[1] The Attorney General expresses no opinion on whether the first CBP officer had lawful grounds to stop appellants' vehicle. That issue is not currently before the Court. PC 189-94.

Extending Vermont's exclusionary rule to these circumstances promotes the interests protected by Article 11.

A. The federal officers in this case were not bound by Article 11.

There appears to be no dispute in this case that Article 11 of the Vermont Constitution did not bind the CPB officers when they searched appellants' vehicle and seized the evidence at issue. The officers acted under their federal authority and independently of any coordination with Vermont law enforcement. *See* Appellants' Br. 24; PC 31, 93. Indeed, if a state constitutional provision purported to restrict the authority granted to a federal law enforcement officer by Congress or the federal constitution, the state provision likely would be preempted. *See* U.S. Const. art. IV, cl. 2 (providing that federal law "shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding"); *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-89 (1986) (describing bases for federal preemption of state law).

The Vermont Constitution does not purport to restrict the conduct of federal officers. Article 11 was adopted in 1777 by the representatives of "the people of this State" and was "derived from, and founded on, the authority of the people only." Vt. Const. of 1777, pmbl. Then, as now, that authority does not extend to the actions of a separate sovereign governed by its own laws and constitution. The U.S. Supreme Court made this point long ago, when explaining why—before the adoption of the

Fourteenth Amendment—the federal bill of rights did not restrict the actions of state governments:

> Each state established a constitution for itself, and in that constitution, provided such limitations and restrictions on the powers of its particular government, as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.

Barron v. City of Baltimore, 32 U.S. 243, 247 (1833) (Marshall, C.J.). The federal officers here did not violate Article 11 because that provision does not apply to them.[2] As discussed below, however, that should not end the inquiry.

B. The admissibility of evidence in a state criminal proceeding is subject to state constitutional requirements.

Although the Vermont Constitution may not have extended to the federal officers when they searched appellants' vehicle, the state constitution does extend to the other actors in these proceedings. Critically, a defendant accused of a crime in state court may invoke the protection of the state constitution and the state court must provide that protection if warranted. *See State v. Badger*, 141 Vt. 430, 448, 450 A.2d 336, 347 (1982) ("The Vermont Constitution is the fundamental charter of our state, and it is this Court's duty to enforce the constitution."); *State v. Slamon*, 73 Vt. 212, 50 A. 1097, 1098 (1901) ("[W]hen a party invokes the constitutional right

[2] If, however, a federal officer acts in concert with state officials, he or she may be deemed to have acted under color of state law and thus be subject to state constitutional requirements. *See, e.g.*, *State v. Mollica*, 554 A.2d 1315 (N.J. 1989). That is not the situation here. *See* PC 31, 93.

of freedom from unlawful search and seizure, the court will take notice of the question and determine it.").

There is no dispute that the state constitution would require the trial court to exclude the evidence in this case had it been seized by a state officer. The question before the Court is whether a different result is required simply because the evidence was instead seized by a federal officer? Courts in other states have divided on this question:

> Some states appear to bar such evidence in all circumstances (stressing the invasion of the protected liberties of the defendant), others appear to accept such evidence under all circumstances (reasoning that the underlying constitutional prohibition does not apply to federal officers carrying out their duties), and still others appear to key rejection to whether the federal agents were working so closely with state officers as to be deemed their agents.

Wayne R. LaFave et al., 1 Crim. Proc. § 2.12(c) (4th ed.) (citations omitted); *see also State v. Torres*, 262 P.3d 1006, 1013-14 (Haw. 2011) (describing in greater detail the various approaches courts have taken to the issue).

The first approach described above appears to be the law in both of Vermont's northern border neighbors. *See State v. McDermott*, 554 A.2d 1302, 1305-06 (N.H. 1989) (applying state constitution to affirm suppression of statement made to DEA officer); *People v. Griminger*, 524 N.E.2d 409, 412 (N.Y. 1988) (applying state constitution to affirm suppression of evidence obtained by federal agents pursuant to federal warrant).

Under this approach, as described by the Oregon Supreme Court, "if the government seeks to rely on evidence in [a state] criminal prosecution, that evidence must have been obtained in a manner that comports with the protections

given to the individual by [the state constitution]." *State v. Rodriguez*, 854 P.2d 399, 403 (Or. 1993) (en banc) (quotation omitted); *see also Torres*, 262 P.3d at 1021 (requiring that "due consideration" be given to the Hawai'i Constitution and applicable case law when the State seeks to prosecute a defendant in state court and admit evidence seized in another jurisdiction); *Griminger*, 524 N.E.2d at 412 ("Since defendant has been tried for crimes defined by [New York]'s Penal Law, we can discern no reason why he should not also be afforded the benefit of [New York]'s search and seizure protections."); *State v. McCarthy*, No. 469-2017-CR-0188, 2018 WL 2106769 (N.H. Super. Ct. May 1, 2018) ("[G]iven that the defendants in this matter are facing prosecution in the State court for violations of State laws the constitutional protections of the *New Hampshire Constitution* should apply.").

C. The Court should apply an Article 11 analysis in this case.

This Court should apply an Article 11 analysis to determine whether evidence seized by federal officers in Vermont may be admitted against a defendant in a Vermont criminal proceeding.

Such a holding would be consistent with the purpose of Vermont's exclusionary rule. Vermont has long viewed its exclusionary rule as an essential feature of the Article 11 right itself rather than simply a judicially created remedy for a violation of that right. *See State v. Oakes*, 157 Vt. 171, 174-75, 598 A.2d 119, 121-22 (1991). Indeed, this Court may have been the first state court to ever apply an exclusionary rule to evidence obtained in violation of the state constitution. *See* Jeffrey S. Sutton,

51 Imperfect Solutions: States and the Making of American Constitutional Law 49 (Oxford Univ. Press 2018) (discussing *Slamon*, 73 Vt. 212, 50 A. 1097).

In any event, "[i]n determining the scope of the exclusionary rule . . . the focus should be on the individual constitutional rights at stake." *State v. Lussier*, 171 Vt. 19, 30, 757 A.2d 1017, 1025 (2000). And the "core value protected by Article 11" is "freedom from unreasonable government intrusions into legitimate expectations of privacy." *Savva*, 159 at 87, 616 A.2d at 781. Under Vermont law, appellants had a legitimate expectation of privacy in the contents of their vehicle when they were traveling home on Route 105. *See id.* From their perspective, "it matters not" whether that expectation was "invaded by a federal agent or by a state officer," when the stop occurred on a state highway and the end result is a criminal prosecution in state court. *See Elkins v. United States*, 364 U.S. 206, 215 (1960).[3]

It bears noting, however, that tension exists between applying an Article 11 analysis in this case and this Court's decisions in *State v. Coburn*, 165 Vt. 318, 683 A.2d 1343 (1996), and *State v. Rennis*, 2014 VT 8, 195 Vt. 492, 90 A.3d 906. *But see State v. Muhammad*, 2007 VT 36, ¶ 7, 182 Vt. 556, 927 A.2d 769 (applying Article 11 to determine whether evidence obtained by DEA agent was properly suppressed).

In *Coburn*, which involved a search by a federal customs official following an international flight, the Court applied a balancing test to determine that "the federal interest in the conduct at issue outweighs Vermont's interest," and thus "the Vermont Constitution does not apply to the conduct of federal government officials

[3] As appellants explain, the other rationales underlying Vermont's exclusionary rule also support applying an Article 11 analysis on the facts of this case. *See* Appellant's Br. 21-28.

acting under the exclusive federal authority to safeguard the borders of the United States." *Coburn*, 165 Vt. at 325, 683 at 1347. In *Rennis*, the Court extended *Coburn*'s holding to a federal border patrol checkpoint in Hartford, approximately 100 miles from the border, which the Court assumed without deciding was the "functional equivalent" of the border. *Rennis*, 2014 VT 8, ¶¶ 8-16. The Attorney General respectfully suggests the analytical framework of those cases should be revisited. *See generally State v. Byam*, 2017 VT 47, ¶ 18 205 Vt. 173, 172 A.3d 171.

Based on its conclusion in *Coburn* that Article 11 could not be applied to federal officials conducting border searches, this Court held that its scrutiny under Article 11 must be "limited to the conduct of the Vermont State Police" who eventually received the evidence from the federal officials. *Coburn*, 165 Vt. at 325, 683 A.2d at 1347. The Attorney General believes this focus is too narrow. As discussed above, many state courts have now focused their constitutional lens on the state criminal proceeding itself. They have applied their state exclusionary rules to ensure that evidence used in state courts to convict a defendant of a state criminal offense was obtained consistently with the defendant's state constitutional rights.[4]

This Court has in the past adjusted the scope of Vermont's exclusionary rule to better fit its evolving understanding of the Article 11 right. *See Badger*, 141 Vt. at 451-53, 450 A.2d at 348-49 (noting that the relevant law "has undergone substantial changes in the last century"). After pioneering the use of the exclusionary rule as a

[4] In *Rennis*, this Court briefly noted that the New Mexico Supreme Court had adopted a version of this approach. *See Rennis*, 2014 VT 8, ¶¶ 14-15 (discussing *State v. Cardenas-Alvarez*, 25 P.3d 225 (N.M. 2001). This Court found that approach precluded by *Coburn* and by application of that decision's interest-balancing approach. *Id.*

matter of state constitutional law in *State v. Slamon*, this Court "completely overruled" *Slamon* in a series of intervening cases and began allowing the admission in criminal proceedings of evidence obtained in contravention of constitutional standards. *Id.* (citing *State v. Stacy*, 104 Vt. 379, 160 A. 257 (1932)). Those intervening cases, in turn, were "unequivocally repudiated" both by this Court and intervening developments in federal case law. *Id.* (citing *Mapp v. Ohio*, 367 U.S. 643 (1961); *State v. Dupaw*, 134 Vt. 451, 365 A.2d 967 (1976)). Vermont's exclusionary rule has since been extended to delinquency proceedings, *In re E.T.C.*, 141 Vt. 375, 449 A.2d 937 (1982), and to civil license suspension proceedings, *Lussier*, 171 Vt. 19, 757 A.2d 1017.[5]

Moreover, the interest-balancing test applied in *Coburn* and reaffirmed in *Rennis* was adopted from an entirely inapposite situation, involving whether a federal statute deprived a state trial court of subject matter jurisdiction over the criminal prosecution of several Abenaki men for offenses committed on what they claimed was tribal land. *See State v. St. Francis*, 151 Vt. 384, 563 A.2d 249; *see also McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 (2020) (discussing federal Major Crimes Act). The question here is not about jurisdiction. The State is prosecuting appellants in state court for state offenses committed on a state highway. No one has challenged the trial court's jurisdiction.

[5] Vermont's experience in this regard is by no means unique. The development of an exclusionary rule in this country has been "surprisingly complicated, filled with starts and halts," and "sprinkled with varying justifications." Sutton, *supra*, at 47. "The story is a classically American one, turning on interaction between the federal and state courts. And the story continues to evolve, remaining more itinerant than stationary and just as susceptible to change as when the first permutations of the rule came into existence." *Id.*

And a test that sets aside the Vermont Constitution "where the federal interest in the conduct at issue outweighs Vermont's interest" risks devaluing the legitimate interests of the federal government, the state constitution, *and* the individual criminal defendant. The federal government may lawfully exercise the authority given to it by Congress and the federal constitution, regardless of a state court's conclusion regarding the strength of its interest. But the Vermont Constitution controls the conduct of a state criminal proceeding, even if there was federal involvement in the underlying investigation. And a defendant in state court should be free to invoke the state constitution to challenge the evidence the State intends to use to secure a conviction.

Accordingly, the Attorney General urges this Court to apply an Article 11 analysis to determine whether evidence seized in Vermont by a federal officer may be admitted in a Vermont criminal proceeding.[6]

II. The evidence in this case should have been excluded.

It is undisputed that the search in this case did not comply with the requirements of Article 11. The CPB officers search appellants' vehicle in the

[6] This test would not necessarily have required a different result in *Coburn*. "In order to involve Article 11 protection, a person must exhibit an actual subjective expectation of privacy that society is prepared to recognize as reasonable." *State v. Bryant*, 183 Vt. 255 (2008). But "[a]s this Court has recognized, when persons enter the United States at a border crossing, a routine search of those persons and their belongings without reasonable suspicion . . . is per se reasonable." *State v. Lawrence*, 2003 VT 68, ¶ 12, 175 Vt. 600, 603, 834 A.2d 10, 15 (quotation and alterations omitted); *see also Torres*, 262 P.3d at 398 ("Petitioner's consent to the search of his vehicle may be implied from his act of driving past the guard shack and onto [naval base], and imputed from the posted notice indicating that entry onto [the naval base] constituted consent to a search."). In *Rennis*, defendant apparently did not dispute that a border patrol checkpoint 97 miles from the border was "the 'functional equivalent' of the U.S. border." 2014 VT 8, ¶ 10.

absence of a warrant, appellants' consent, or exigent circumstances. Accordingly, the evidence seized as a result of that search should not be used to convict appellants of a state criminal offense.

CONCLUSION

For the reasons set forth above, the superior court's decision denying appellants' motion to suppress should be reversed.

Dated: August 11, 2020

STATE OF VERMONT

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CERTIFICATE OF COMPLIANCE

Benjamin D. Battles, Solicitor General and Counsel of Record for *amicus curiae* the Vermont Attorney General, certifies that this brief complies with the word count limit in V.R.A.P. 32(a)(7)(A). According to the word count of the Microsoft Word processing software used to prepare this brief, the text of this brief contains 3,041 words.

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