VERMONT SUPREME COURT
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SEP 24 2021

ENTRY ORDER

2021 VT 75

SUPREME COURT DOCKET NO. 2019-388

DECEMBER TERM, 2020

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	Superior Court, Orleans Unit,
	}	Criminal Division
	}	
Phillip Walker-Brazie & Brandi-Lena Butterfield	}	DOCKET NOS. 555-9-18 Oscr & 558-9-18 Oscr

In the above-entitled cause, the Clerk will enter:

Reversed and remanded for further proceedings consistent with this opinion.

FOR THE COURT:

William D. Cohen, Associate Justice

Dissenting:

Harold E Eaton Jr.
Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

Concurring:

Paul L. Reiber
Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

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No. 2019-388

State of Vermont	Supreme Court
v.	On Appeal from Superior Court, Orleans Unit, Criminal Division
Phillip Walker-Brazie & Brandi-Lena Butterfield	December Term, 2020

Scot L. Kline, J.

David Tartter, Deputy State's Attorney, and Spencer Davenport, Law Clerk (On the Brief), Montpelier, for Plaintiff-Appellee.

James Diaz and Lia Ernst, ACLU Foundation of Vermont, Montpelier, for Defendants-Appellants.

Matthew Valerio, Defender General, and Dawn Seibert, Appellate Defender, Montpelier, for Amici Curiae Office of the Defender General and Vermont Association of Criminal Defense Lawyers.

Benjamin D. Battles, Solicitor General, Montpelier, for Amicus Curiae Attorney General Thomas J. Donovan, Jr.

Jared Kingsbury Carter, Assistant Professor of Law and Co-Director, Appellate Advocacy Project, Vermont Law School, South Royalton, for Amicus Curiae Migrant Justice.

PRESENT: Reiber, C.J., Robinson, Eaton, Carroll and Cohen, JJ.

¶ 1. **COHEN, J.** In this interlocutory appeal, we must decide whether evidence seized by federal Border Patrol agents during a roving patrol—pursuant to their authority to conduct warrantless searches under 8 U.S.C. § 1357—is admissible in a state criminal proceeding when that search does not comply with Article 11 of the Vermont Constitution.[1] Defendants Phillip Walker-Brazie and Brandi-Lena Butterfield argue that because the overwhelming purpose of Vermont's exclusionary rule is to protect individual liberty, we should apply the exclusionary rule and suppress the evidence pursuant to Article 11. We agree, and hold that such evidence is inadmissible in Vermont criminal proceedings.

I. Facts

¶ 2. The court made the following findings of fact for the purpose of defendants' motion to suppress. In August 2018, United States Border Patrol agent Jeffery Vining was on roving patrol in a marked vehicle about one mile from the Canadian border. He was parked in a "semi-concealed location" at the intersection of Vermont Route 105 and North Jay Road, which he testified is a remote area historically used to smuggle people and narcotics across the border. At around 9:45 p.m., he observed a vehicle driving west on Route 105 at an estimated fifty-five miles an hour. The vehicle slowed down as if it were going to turn onto North Jay Road. Upon seeing Agent Vining's vehicle, the vehicle appeared to change course, and drove straight through the intersection.

¶ 3. Agent Vining thought this behavior was suspicious and followed the vehicle. The vehicle stayed well below the speed limit. Agent Vining thought the driver looked nervous because she kept checking her mirrors. He looked up the vehicle's registration and learned that the vehicle's owner, Butterfield, had previous "encounters involving narcotics." Based on this information, he pulled the vehicle over.

¶ 4. Agent Vining approached the vehicle, identified himself as a Border Patrol agent, and asked the occupants about their citizenship. Butterfield was in the driver's seat and Walker-

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[1] For the purpose of this appeal, we assume that the Border Patrol agents complied with federal law. See infra, ¶ 10. To the extent defendants contest the court's findings that the agent had reasonable suspicion for the stop and probable cause for the search, they are not within the question certified to this Court.

Brazie, whom Agent Vining recognized from previous law enforcement encounters, was in the passenger seat. Agent Vining smelled a strong odor of "green or unburnt marijuana," saw numerous bags in the vehicle—which in his experience were "sometimes used to carry illegal items" across the border—and thought that the occupants appeared nervous. Although defendants refused to give Agent Vining consent to search their vehicle, the car was subsequently searched by additional Border Patrol agents who arrived after the stop. During the search, marijuana and a bag of hallucinogenic mushrooms were seized.

¶ 5. Border Patrol notified Vermont law enforcement and provided them with the seized evidence upon their arrival. Based on the evidence, the Orleans County State's Attorney charged Walker-Brazie with one count of unlawfully possessing two ounces or more of marijuana, in violation of 18 V.S.A. § 4230(a)(2), and one count of possessing ten or more doses of a hallucinogenic drug, in violation of 18 V.S.A. § 4235(b)(2). Butterfield was charged with one count of possessing marijuana, in violation of 18 V.S.A. § 4230(a)(1).

¶ 6. Defendants filed motions to suppress the evidence the Border Patrol agents seized during the August 2018 search. They argued that Agent Vining lacked reasonable suspicion because, among other things, their vehicle did not cross the border and Agent Vining knew, based on Butterfield's registration, that Butterfield lived in Vermont. Alternatively, defendants argued the search violated Article 11 of the Vermont Constitution because the agents did not have a warrant and there were no exigent circumstances. See State v. Bauder, 2007 VT 16, ¶ 21, 181 Vt. 392, 924 A.2d 38 (explaining that under Article 11, warrantless search of automobile is per se unreasonable absent showing of exigent circumstances in form of threat either to officer safety or to preservation of evidence).

¶ 7. In opposition, the State's Attorney argued that Agent Vining had reasonable suspicion to believe the vehicle was engaged in illegal activity because defendants were driving suspiciously in an area close to the border that is known for smuggling people and illegal drugs.[2] In addition, the State's Attorney argued that the subsequent search was legal because according to State v. Rennis, 2014 VT 8, 195 Vt. 492, 90 A.3d 906, and State v. Coburn, 165 Vt. 318, 683 A.2d 1343 (1996), Article 11 does not apply to federal officials exercising exclusive federal authority to safeguard the border.

¶ 8. Following a hearing, the trial court denied the motion to suppress. The court concluded that based on United States Supreme Court precedent, Border Patrol agents on roving patrol must have reasonable suspicion of illegal activity to stop a vehicle. Although the court acknowledged it was a "close call," it concluded that Agent Vining had reasonable suspicion because, among other things, he observed unusual driving in a remote area very close to the border that has historically been used for smuggling. As to the search, the court concluded that the agents complied with federal law because they had probable cause for the search and therefore no warrant was required under the Fourth Amendment. However, the court recognized that this conclusion did not resolve the issue of whether the Vermont Constitution applied to the use of the evidence in a Vermont criminal prosecution.

¶ 9. Turning to that issue, and based on our decisions in Rennis and Coburn, the court reasoned that the Vermont Constitution does not apply to evidence seized by federal officials pursuant to their exclusive federal authority to safeguard the border and independent of state actors. The court acknowledged that Coburn and Rennis were factually distinguishable in that the searches in those cases occurred at an international airport and permanent checkpoint, respectively. However, it concluded that those decisions governed because the search in this case occurred "so close to the border" by agents exercising exclusive federal authority to safeguard the border that

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[2] Because the State is represented in this appeal by two different authorities—the State's Attorney and the Attorney General—and because they argue divergent positions, we refer to the "State's Attorney" or "Attorney General" rather than "the State" throughout this opinion.

the federal interest in securing the border outweighed any state interest. The court determined that this conclusion was consistent with the "prevailing view" among states that when a search is validly conducted under federal law, "the law of the state of prosecution will not apply its exclusionary" rule to suppress the evidence. Finally, the court reasoned that Vermont's exclusionary rule should not apply because its primary purpose is to deter illegal police conduct and applying the rule to evidence lawfully seized under federal law would not deter any illegal conduct, especially when, as here, there is no evidence in the record of any collusion between federal and state authorities.

¶ 10. Defendants subsequently requested permission to file an interlocutory appeal of two questions: (1) whether Agent Vining had reasonable suspicion to stop their vehicle, and (2) whether the evidence gathered by federal agents during the warrantless search, which was illegal under Article 11, was admissible in a Vermont criminal prosecution. The court denied the motion on the reasonable-suspicion issue, explaining that because the issue relied on a "factual record for the appellate court to consider the circumstances surrounding and the reasons for the stop," the issue was not a pure question of law appropriate for interlocutory review. On the second issue, however, the court granted the motion and certified the question of "whether federal border patrol agents effecting a search of a vehicle very near but not at the border or formal checkpoint must follow Vermont law and obtain a search warrant before conducting a search of a motor vehicle."

¶ 11. On appeal, defendants argue that the trial court improperly relied on Coburn and Rennis because those cases are expressly limited to searches conducted at the border and its functional equivalent. Defendants submit that the Court should reject the so-called reverse-silver-platter doctrine and hold that evidence seized in Vermont by federal officials is subject to Article 11 because Vermonters' expectation of privacy is the same regardless of who conducts the search.[3]

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[3] The "reverse-silver-platter doctrine" refers to decisions permitting the admission in state prosecutions of evidence obtained by federal authorities in a manner that complies with the Fourth Amendment but not the relevant state constitution. See Commonwealth v. Britton, 229 A.3d 590, 603 (Pa. 2020) (Wecht, J., concurring). The term originates from a line of U.S. Supreme Court

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