IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. S-1-SC-40210

STATE OF NEW MEXICO,
Plaintiff-Petitioner,

v.

BENNIE LEWIS GARDNER,
Defendant-Appellee.

STATE'S REPLY BRIEF

Appeal from the District Court of Union County
Melissa A. Kennelly, District Judge

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Note Regarding Citations to the Record

The pertinent proceedings in this case are on the FTR-formatted CD. These are cited as **[Date CD HR:MN:SD]**. References to the record proper are cited as **[RP page]**. References to exhibits are cited as **[State's Ex. No.]** or **[Def. Ex. No.]**.

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Question Presented

> In failing to consider the new crimes and live-witness testimony exceptions, did the Court of Appeals wrongly ignore precedential development of the attenuation doctrine in affirming suppression of all evidence following an unlawful search?

In This Case, There Were Two Distinct Law Enforcement Stops Intervened by Time, Location and Notification of an Unauthorized Passenger.

Defendant wrongly suggests that the State's position is that both law enforcement stops were unlawful. **[AB 19]** The State concedes that the first law enforcement stop became unlawful at some point in time, making any object of evidence derived from it, suppressible. But the State argues that the first law enforcement stop ended after police cited Defendant and the police-ordered twenty-four-hour detention ended. Defendant was free to and did continue his journey without further law enforcement contact.

Defendant conflates facts with law by concluding without pointing anywhere to the record that police "unlawfully ordered the truck to be stopped and authorized the seizure of [the child]." **[AB 25]** The lawfulness of the stop is a mixed question of law and fact, not of solely of fact as Defendant asserts, that this Court reviews de novo. "In reviewing a trial court's denial of a motion to suppress, [this Court] observe[s] the distinction between factual determinations which are subject to a substantial evidence standard of review and application of law to the facts[,] which

is subject to de novo review." *State v. Tapia*, 2018-NMSC-017, ¶ 10 (citations omitted).

Because the second stop was a welfare stop of an unauthorized passenger, as well as a request by the truck's owner to remove the child, Defendant's asserts, without pointing to the record, that "[t]his means police officers never ceased their investigation." **[AB 23]** Defendant continues to explain that there was sufficient time to procure a warrant before making the second stop, which cuts against his argument that insufficient time elapsed for the attenuation doctrine to remove the taint of the first illegal search. **[*Id.*]** Defendant cannot have it both ways.

The second stop occurred nearly thirty-six hours after the first stop and miles away from the first stop. The second stop was based in part on the request by the truck owner to stop Defendant and remove the unauthorized passenger. However, Defendant ignored instructions to stop voluntarily so the police pulled the truck over because there was a lawful, independent basis for the second stop. The lawful basis for the second stop is found in the New Mexico Administrative Code, which has adopted substantial sections of the Code of Federal Regulations.

New Mexico Administrative Code § 18.2.3.12 Driving of Motor Vehicles, provides that "[t]he department of public safety hereby adopts Part 392 of Title 49 of the Code of Federal Regulations. 49 CFR 392 All provisions set forth in CFR 49 Part 392 as adopted are applicable to interstate and intrastate motor carriers,

commercial motor vehicles and employees, with no amendments. 18.2.3.12 NMAC."

Part 392 of the Code of Federal Regulation provides that

> Unless specifically authorized in writing to do so by the motor carrier under whose authority the commercial motor vehicle is being operated, no driver shall transport any person or permit any person to be transported on any commercial motor vehicle other than a bus.

49 CFR § 392.60 (a). When police learned from the "motor carrier" (the truck owner) that the child was unauthorized and needed to be removed, they were duty bound to stop the truck and remove the child.

In this instance, the police did not act under color of law, but they acted according to law in making the second stop.

Defendant's Sexual Intercourse with the Child Was a New Crime in Response to Unlawful Police Detention

Because the twenty-four-hour detention was based the discovery of Tylenol-with-codeine during the first and unlawful stop, it follows that the twenty-four-hour detention was unlawful, too. The discovery of the drug was the basis for the police-ordered detention. As a consequence of and during his unlawful twenty-four-hour detention, Defendant sexually assaulted the child.

The Live Witness Arguments Before This Court Were Preserved and Should Be Reviewed as a Matter of Public Interest

As a preliminary matter, the Defenant argues that State did not preserve the issue of live-witness testimony. "Although Rule 12–216(A) NMRA 2004 states that

to preserve an issue for review 'it must appear that a ruling or decision by the district court was fairly invoked, but formal exceptions are not required.'" *State v. Balderama*, 2004-NMSC-008, ¶ 18, 135 N.M. 329 "In explaining why [this Court] declines to require 'formal exceptions,' [it has] stated that our rule 'disregards form and relies upon substance, and merely requires that a question be fairly presented to the court and a ruling invoked.'" *Id.* (citations omitted). "In this case, the issue [live-witness testimony as considered a part of the attenuation doctrine] was fairly presented to the court, and a ruling was fairly invoked inasmuch as the court invoked its own ruling." *Id.*

Moreover, Rule 216(2)(B) (recompiled as Rule 12-321, NMRA) provides the exceptions to the Rule:

> This rule does not preclude a party from raising or the appellate court, in its discretion, from considering issues that by case law, statute, or rule may be raised for the first time on appeal. These issues include, but are not limited to, issues involving: (a) general public interest.

Criminal activity perpetrated in response to law enforcement unlawful detention, particularly, such a heinous act of sexually assaulting a child falls within the realm of "public interest." The State urges this Court not to apply a formalistic filter to this case and allow for the fullness of the attenuation doctrine to be examined.

The Child's Disclosure of Defendant's Sexual Assault While in Police Detention was Freely Given Without Coercion

Defendant suggests that "the record is unclear as to coercion." **[AB 37]** Without support, Defendant goes on to discuss the police investigation of him as never-ending. However, by the time the child revealed Defendant's abuse, he was continuing his journey because the police were no longer detaining or investigating him. What is "unclear" is how Defendant's freedom to continue his journey could be confused with coercion. There is no suggestion the child was coerced into confiding in her foster parents. The child's mother lived in Texas so as a practical matter a foster family was appropriate. Defendant's attempt to muddy the waters with "coercion" conjecture logically fails.

The *Brown* Factors Support a Remand to the District Court

Each of the *Brown* factors support remanding this matter to the district court for a trial on the evidence. As articulated by our appellate court these *Brown* factors are "(1) the lapsed time between the illegality and the acquisition of the evidence, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct." Id. ¶ 15 (citing *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975)). *State v. Ramey*, 2020-NMCA-041, ¶ 20. These factors show here that the unlawful police conduct during the first stop was sufficiently attenuated to remove the unlawful taint from the evidence gathered.

Here, the first factor weighs heavily in favor of attenuation. The time between the first stop and the second was approximately thirty hours. Furthermore, the time is even greater between the first stop and the child's revelation – the evidence, which was a time lapse of approximately forty-eight hours. During this time Defendant was free to travel and was not subject to police investigation.

Factor number two is equally weighted in favor of attenuation. First, the police were contacted by the truck owner and asked to intervene. When the Defendant failed to stop voluntarily at the truck owner's request, the police made a lawful traffic stop. Second, once the child was settled in with her foster family, she felt safe enough to confide in them that she had been sexually assaulted by Defendant while he was unlawfully detained. These intervening factors are wholly unrelated to the first stop investigation and weight heavily in favor of attenuation.

Finally, the conduct by the police during the first stop eventually rose to the level of unlawfulness. However, after that investigation ended, the conduct of the police in stopping Defendant to remove the child does not rise to a level of flagrancy. Even if the police were acting on their professional skill and experience in performing only a welfare check, it would still not rise to the level of a flagrant violation of Defendant's constitutional rights. "[T]o be flagrant, more severe police misconduct is required than the mere absence of proper cause for the seizure." *Id.* citing *State v. Edwards*, 2019-NMCA-070, ¶ 12 (internal quotation marks and

citation omitted). But the police were also acting on a request by the truck owner to remove the unauthorized passenger, presumably, to keep the motor carrier in compliance with New Mexico motor carrier regulations.

The *Brown* factors each support remanding this matter to the district court for a trial on the evidence and the State asks this Court to so remand.

CONCLUSION

For the foregoing reasons, the State asks this Court to remand this matter to the district court for a trial on the evidence collected after the second stop.

Respectfully submitted,
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STATEMENT OF COMPLIANCE

As required by Rule 12-318(F)(3) NMRA, this brief uses Times New Roman, a proportionately spaced typeface, and in compliance with the rule, the body of the brief contains less than 1,960 words out of a maximum permitted word count of 4,400. This petition was prepared using the most recent version of Microsoft Word.

/s/ Peter James O'Connor
Assistant Solicitor General

CERTIFICATE OF SERVICE

I hereby certify that this brief was electronically filed using Odyssey E-File, which caused a copy to be served on the New Mexico Law Office of the Public Defender at lopd-appealsservice@lopdnm.us on this 6th day of June 2024.