

Herring v. United States and the Future of the Exclusionary Rule

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Earlier this month, the United States Supreme Court decided *Herring v. United States*, no. 07-513, a case that raises interesting questions about the future of the exclusionary rule. An officer learned that the eventual defendant, Herring, was at the impound lot, retrieving items from his impounded truck. The officer was apparently familiar with Herring, and called the county's warrant clerk to see if Herring had any outstanding warrants. He didn't. The officer then asked the clerk to check with the warrant clerk in the next county over. *That* clerk said that Herring *did* have a warrant outstanding. Based on that information, the officer pulled over Herring's vehicle, arrested him, and found drugs on his person and a gun in his vehicle. However, shortly after arrest, the warrant clerk in the neighboring county realized that the warrant against Herring had been recalled. Herring was charged with federal drug and firearm offenses, and he moved to suppress, arguing that he had been arrested in violation of the Fourth Amendment because there was no valid warrant, nor any other basis for the arrest.

The government did not argue that the arrest was legal, but contended that the exclusionary rule should not apply because the officer acted in good faith and applying the exclusionary rule under these circumstances would be unlikely to deter the conduct that led to the arrest, i.e., the negligent record-keeping by the neighboring county. The lower courts agreed, and the Supreme Court affirmed 5-4, with the majority opinion written by Chief Justice Roberts. The Court suggested that the arrest itself was legal, based on the officer's probable cause to believe that there was a warrant. However, because the government did not make that argument, the Court assumed that the arrest violated the Fourth Amendment and asked whether that required suppression. It held that "suppression is not an automatic consequence of a Fourth Amendment violation. Instead, the question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct. Here the error was isolated negligence attenuated from the arrest. We hold that in these circumstances the jury should not be barred from considering all the evidence."

Given the North Carolina appellate courts' refusal, as a matter of state constitutional law, to adopt the *Leon* good faith exception to the exclusionary rule, see *State v. Carter*, 322 N.C. 709 (1988), it is doubtful that *Herring* will have an immediate impact here. However, it may prompt reconsideration of *Carter*, and so it is at least worth considering whether it is a harbinger of additional future limitations on the exclusionary rule. On its face, it is a narrow decision, applying only to negligent conduct that is (1) isolated and (2) attenuated from the arrest. But perhaps the justices in the majority would go further if the opportunity presented itself, and would hold that the exclusionary rule should apply only when police violate the Fourth Amendment on purpose. At least one School of Government faculty member reads the tea leaves that way, though others believe that the majority would distinguish a case where, for example, the arresting officer negligently misread a computer warrant check and arrested a suspect who, in fact, had no outstanding warrants. As always, we welcome your thoughts and invite your comments.