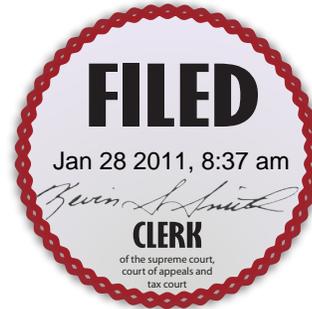


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

STATE OF INDIANA,)
)
 Appellant-Plaintiff,)
)
 vs.) No. 02A03-1003-CR-139
)
 JERMAIN BLUE,)
)
 Appellee-Defendant,)

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-0602-FA-12

January 28, 2011

MEMORANDUM DECISION ON REHEARING - NOT FOR PUBLICATION

ROBB, Chief Judge

The State petitions this court for rehearing of our November 3, 2010 opinion. In that opinion, we affirmed the trial court’s suppression of evidence obtained pursuant to a search warrant that was invalid under the fruit of the poisonous tree doctrine. State v. Blue, Cause No. 02A03-1003-CR-139 (Ind. Ct. App., Nov. 3, 2010). The warrant referred to evidence obtained in several trash pulls but not to the initial trash pull, which police conducted without reasonable suspicion. Concluding the initial trash pull was improper and that the following trash pulls and investigation were fruits of the poisonous tree, we deemed the warrant invalid and affirmed the trial court’s suppression of evidence obtained under the authority of the warrant. The State’s primary argument on rehearing is that the improper first trash pull was a single act in an ongoing investigation of Blue, and therefore its impropriety did not render all subsequent investigatory actions – and the subsequent affidavit and search warrant – invalid. We grant the State’s petition for rehearing to clarify our reasoning under the fruit of the poisonous tree doctrine, but reaffirm our opinion in all respects.

In general, the “fruit of the poisonous tree” doctrine bars admission in a criminal proceeding of evidence obtained or “evidence derivatively gained as a result of information learned or leads obtained” in the course of unlawful searches and seizures. Hanna v. State, 726 N.E.2d 384, 389 (Ind. Ct. App. 2000). We have previously acknowledged:

[A] defendant must first prove an illegal search took place and that the evidence offered was a “fruit” of that search. Then the State has the burden of proving the challenged evidence had an independent source, or to establish the attenuation of the initial taint or the applicability of another exception to the general rule of exclusion.

Herald v. State, 511 N.E.2d 5, 8 (Ind. Ct. App. 1987) (citations omitted), trans. denied.

The State argues our opinion offers no basis to conclude that officers' subsequent investigatory acts were fruits of the improper first trash pull. Blue, however, argued to the trial court at the suppression hearing that the warrant and the investigatory acts it included – notably, not the results of the first trash pull – were based on uncorroborated hearsay. Blue argued information that police obtained in the first trash pull guided its conduct going forward. Following the hearing, the trial court agreed. We decline to reweigh the evidence or reassess the credibility of witnesses. See State v. Moriarty, 832 N.E.2d 555, 558 (Ind. Ct. App. 2005) (stating that when reviewing a trial court's decision to grant a motion to suppress evidence, we do not reweigh evidence or judge the credibility of witnesses).

Next, we address whether the State met its burden of proving that the evidence obtained after the initial trash pull, which formed the basis for the affidavit and warrant, fit a recognized exception to the fruit of the poisonous tree doctrine. The State's argument that the improper trash pull was but one act in an ongoing investigation approximates a reference to an exception to the fruit of the poisonous tree doctrine that would allow evidence that has "become so attenuated as to dissipate the taint." Hanna, 726 N.E.2d at 389 (citation omitted). The State also argues the investigation would have continued regardless of whether the first trash pull revealed contraband, and consequently, the contraband in the subsequent trash pulls and investigation would have been obtained even without improper police conduct. This approximates an argument for the exceptions of inevitable discovery or perhaps even that there was or would have been

an independent source of information leading to the subsequent trash pulls and investigation. See id. (acknowledging exceptions for inevitable discovery and an independent source).

Despite raising these arguments, the State failed to meet its burden of proof. All that is evident from the record is that the initial trash pull produced contraband, and the police continued to investigate Blue and conduct additional trash pulls, which eventually led to an affidavit and search warrant. Accordingly, the search warrant was a fruit of the poisonous tree and was invalid. The State might have but failed to prove that they had an independent source for the information or that they would have continued the investigation regardless of the results of the first trash pull. The State also failed to show that the evidence later obtained had “become so attenuated as to dissipate the taint.” Hanna, 726 N.E.2d at 389 (citation omitted). In short, the State failed to prove that police did not rely on the results of the initial trash pull when continuing its investigation, and therefore we again affirm the trial court’s order granting the motion to suppress.

MAY, J., and VAIDIK, J., concur.