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Court of Appeals, State of Colorado 2 East 14th Ave., Denver, CO 80203 Appeal; Adams County District Court; Honorable Thomas R. Ensor; Case No. 14CR862	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee, v. JAHMAL ALI PRICE, Defendant-Appellant.	
Attorney for Defendant-Appellant Krista A. Schelhaas (Alternate Defense Counsel) Schelhaas Law LLC PO Box 621355 Littleton, CO 80162 (303) 803-4750 kschelhaas@comcast.net Attorney Reg. No. 36616	Case Number: 14CA2391
REPLY BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

1. The brief complies with C.A.R. 28(g). It contains 4,399 words.
2. C.A.R. 28(k) does not apply to this brief. The opening brief contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

I acknowledge that this brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

s/ Krista A. Schelhaas
Krista A. Schelhaas

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ARGUMENTS

I. The District Court Erred in Denying Mr. Price's Motion to Suppress the Backpack and Its Contents.

A. Because Any Abandonment of Property by Mr. Price Was the Result of Police Misconduct, the Backpack and Its Contents Must be Suppressed

Property abandoned as the result of an illegal seizure must be suppressed. *See Outlaw v. People*, 17 P.3d 150, 154, 159 (Colo. 2001) (cocaine dropped by the defendant after officers unlawfully seized him must be suppressed). "[P]roperty is considered to have been involuntarily abandoned if the defendant discards it as a consequence of illegal police conduct." *United States v. Flynn*, 309 F.3d 736, 738 (10th Cir. 2002).

The People argue that Mr. Price did not have a subjectively or an objectively reasonable expectation of privacy in the backpack because it was abandoned. (Answer Brief, pp. 10-11). In the cases upon which the People rely, however, no police misconduct was alleged or found, and in some cases no police contact was made with the defendant until after the property was abandoned. *See People v. Morrison*, 583 P.2d 924, 925-26, 196 Colo. 319, 321, 323 (1978) (police investigating murder discovered that victim was last seen with defendant, and apartment manager explained that defendant moved out of apartment with no intent to return, therefore, defendant abandoned items in apartment); *Smith v. People*, 167

Colo. 19, 21-22, 445 P.2d 67, 68 (1968) (defendant threw his bag *after* he was placed under lawful arrest for a parole violation as he deplaned in the Denver airport); *see also United States v. Austin*, 66 F.3d 1115, 1119 (10th Cir. 1995) (defendant left bag in care of stranger at an airport and assumed risk that stranger would allow authorities to search the bag and thus had no objectively reasonable expectation of privacy in the bag); *United States v. Hoey*, 983 F.2d 890, 893 (8th Cir. 1993) (defendant abandoned apartment and its contents when she moved out of apartment, was weeks behind on rent, and told landlord she was leaving); *United States v. Morgan*, 936 F.2d 1561, 1567-69 (10th Cir. 1991) (officers had reasonable suspicion to stop and probable cause to arrest defendant who was stopped in car that matched description and license plate of vehicle used in bank robbery and officers knew defendant was previously suspected of bank robbery with a similar modus operandi); *United States v. Thomas*, 864 F.2d 843, 847 (D.C. Cir. 1989) (defendant had no contact with police before abandoning his bag in an apartment building); *United States v. Jones*, 707 F.2d 1169, 1170, 1172 (10th Cir. 1983) (defendant found near vehicle matching description and license plate of vehicle used in bank robbery and threw satchel after police ordered him to halt but prior to any arrest or physical contact with him).

Here, unlawful police conduct caused Mr. Price to leave the backpack.

When the officer stopped Mr. Price, she did not have reasonable suspicion to conduct an investigatory stop. Yet she unlawfully seized him when she physically held him and restricted his movement.

B. The Police Contact With Mr. Price Was Not a Consensual Encounter

The People contend "[t]here was never any illegal police action because the encounter was consensual." (Answer Brief, p. 12). The facts and case law do not support this position.

First, the People contend that Mr. Price consented to the search of his backpack. However, he withdrew that consent when he picked it up and left. During a consensual encounter, an individual is "free to leave at any time." *Outlaw*, 17 P.3d at 155. Therefore, Mr. Price's backpack was not searched with his consent.

Second, the People argue that Mr. Price was not seized because Officer C never threatened him. (Answer Brief, p. 15). An officer need not threaten a defendant to seize him. Instead, a seizure occurs when there is either (a) "a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful," or (b) submission to "a show of authority." *California v. Hodari D.*, 499 U.S. 621, 626 (1991); *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968) (A seizure occurs when an "officer, by means of physical force or show of authority,

has in some way restrained the liberty of a citizen."). A seizure is effected by even "the slightest application of physical force." *Hodari*, 499 U.S. at 625–26.

The officer seized Mr. Price when she physically grabbed him and placed his hands in a "bread basket," a technique that she described as having Mr. Price "place [his] hands behind [his] back and interlock [his] fingers like [he] is praying, and then [she] can hold onto that." (R. Tr. 9/19/14, p. 17, ll. 8-11). She continued to hold onto him as she removed his backpack. (*Id.* at p. 19, ll. 3-6). At that point, the officer seized Mr. Price by both physical force and a show of authority. The People do not address these significant facts.

Third, the People argue that the officer had probable cause to arrest Mr. Price for resisting arrest when he grabbed the backpack and fled. The officer could not have had probable cause to arrest Mr. Price for resisting arrest because the officer must first have probable cause to arrest Mr. Price. *See Exford v. City of Montgomery*, 887 F. Supp. 2d 1210, 1224 n.7 (M.D. Ala. 2012) ("Resisting arrest quite obviously could not serve as probable cause for initiating [the defendant's] arrest—that would put the cart before the horse."). At the time Mr. Price grabbed his backpack, the officer had no probable cause to arrest him for any crime.

Nor did the district court's finding that there was "potentially an assault on an officer" form the basis for probable cause. The officer testified at both the

hearing and at trial that Mr. Price was lunging for the backpack; he was not lunging for the officer. (R. Tr. 9/19/14, p. 18, ll. 11-12, p. 31, ll. 2-5). She also clarified that subjectively, she did not believe he was trying to assault her but was trying to retrieve his backpack. (*Id.* at p. 30, ll. 2-5). The officer then got on top of Mr. Price and tried to tase him. (*Id.* at p. 19, ll. 23-25; p. 20, ll. 3-6). Mr. Price slipped out of his jacket and ran away. He did not threaten or use violence against the officer. (*Id.* at p. 20, ll. 5-6).

Thus, the arguments that there was no illegal police conduct because the encounter was consensual fail.

C. The Investigatory Stop Was Not Justified

Next, the People contend that the encounter was justified as an investigatory stop supported by reasonable suspicion because "the defendant matched the description given of a black man in a leather jacket wearing a backpack . . . at a late hour." (Answer Brief, p. 18).

First, the facts do not support this statement because the officer did not receive information that the suspect was wearing a backpack when she initially contacted him. (R. Tr. 9/19/14, p. 24, ll. 15-19). The only information the officer received was that the suspect was a black male in a leather jacket. (*Id.* at p. 25, ll. 12-15). The description did not include the suspect's age, height, build, hairstyle

or color, or any other identifying information. (*Id*. at p. 24, ll. 15-25). When the prosecutor tried to rehabilitate the officer on re-direct examination by suggesting that the officer knew about the backpack prior to the stop, she was unable to do so. (*Id*. at p. 33, l. 15 – p. 34, l. 1). Therefore, the record establishes that the only information known to the officer at the time of the stop was that the suspect was a black male in a leather jacket.

Second, the information supplied to the officer cannot justify an investigatory stop. The People cite three cases to support their position that the stop was justified. In the first, *People v. Smith*, 620 P.2d 232 (Colo. 1980), the supreme court held that an investigatory stop was justified because the officer saw a car with an out-of-state license plate driven slowly by a woman who appeared to be nervous in an area five blocks away from and fifteen minutes after an armed robbery. *Id.* at 235. Importantly, the officers also noticed another person moving inside the vehicle, the court emphasized the importance of all of these factors combined, and the court did not base the holding entirely on race. *Id.* Here, however, Mr. Price was casually walking on the sidewalk, did not appear nervous, and gave no other indication of suspicious activity.

In the second case, *People v. Mascarenas*, 726 P.2d 644 (Colo. 1986), the supreme court held that officers had reasonable suspicion to stop a vehicle driving

away from the scene of a crime approximately one minute after a reported burglary. *Id.* at p. 646. The proximity of the vehicle immediately after the report of the crime coupled with the fact that the vehicle made several evasive turns supported the reasonable suspicion finding. *Id.* Mr. Price, however, made no evasive actions and was stopped almost thirty minutes after the report.

In the third case, *People v. Jackson*, 742 P.2d 929 (Colo. App. 1987), another division of this Court held that officers had reasonable suspicion to stop the defendant dressed in a Ninja costume with a mask and hood at a late hour because the suspect description was "an individual dressed in dark clothes, including a mask and hood," and the defendant ran upon seeing the police. *Id.* at 930. The detailed description of the suspect and evasive actions of the defendant justified the stop. Here, the only article of clothing described was a leather jacket — an item commonly worn by people in Colorado during the month of March.

Significantly, in each of the cases cited by the People, the descriptions and actions of the defendants combined to support a reasonable suspicion finding. Mr. Price was stopped because he was a black male and it was late at night. The description is very vague and his actions did not support a reasonable suspicion finding.

D. Attenuation

The People contend that the connection between the police misconduct and the backpack was so attenuated as to dissipate the taint. The People did not argue at trial that the evidence was attenuated from the police misconduct.

The burden is on the People to prove attenuation and if that burden is not met, the evidence must be suppressed. *People v. Padgett*, 932 P.2d 810, 816 (Colo. 1997). The attenuation doctrine requires that the prosecution demonstrate that a causal link between the initial illegality and the challenged evidence is so attenuated as to dissipate the original illegality. *Brown v. Illinois*, 422 U.S. 590, 601-02 (1975); *People v. Lewis*, 975 P.2d 160, 175 (Colo. 1999) (defendant's statements suppressed because they were obtained by exploitation of the illegality of his arrest).

In *Padgett*, officers stopped two individuals walking late at night in a high-crime area because one of the individuals stumbled while walking across the street. *Padgett*, 932 P.2d at 812. As the officers approached the individuals, one man appeared to rapidly walk away. *Id.* The officers asked the men for identification and ran warrant checks on them. *Id.* The officers learned of the existence of possible warrants and one of the men, Padgett, began to run. *Id.* at 813. The officers chased and caught Padgett, found drugs during a pat-down search, and also

found drugs under a bus bench near the area where Padgett was caught. *Id.* Padgett was booked on the outstanding warrant. *Id.*

The supreme court concluded that the officers did not have reasonable suspicion to justify an investigatory stop of Padgett because it could only consider the information available to the officers at the time of the stop. *Id.* at 815. The warrant for Padgett's arrest was not known to the officers at the time of the stop, and "Padgett's flight after the investigatory stop was initiated [could not] be utilized as a rationalization to justify the stop," because "[t]he articulable facts which justify the stop must preexist." *Id.* at 816.

The supreme court also concluded that the attenuation doctrine did not dissipate the taint of the police misconduct because the officers did not have a proper basis to conduct an investigatory stop and the discovery of the drugs was too close in time and proximity to meet the People's burden of proof. *Id.* at 817. Thus, the warrant could not constitute an intervening circumstance that attenuated the taint. *Id.*

Similarly here, Mr. Price was subject to an unlawful investigatory stop, was seized, and then fled. The backpack was found shortly after he fled and was dropped as a direct result of the unlawful stop. The People cannot meet its burden of proof that the attenuation doctrine dissipated the tainted evidence.

This is true even in light of the United States Supreme Court's recent holding in *Utah v. Strieff*, 579 U.S. ___ (2016 WL 3369419, U.S. June 20, 2016) (No. 14-1373). First, the "Colorado Constitution affords broader protections than the Fourth Amendment of the United States Constitution." *People v. Roth*, 85 P.3d 571, 575 (Colo. App. 2003); *see Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1056 (Colo. 2002) (Colorado Constitution requires higher standards from the government than the Fourth Amendment). And the Colorado Supreme Court has already concluded that the later discovery of an arrest warrant does not dissipate tainted evidence. *Padgett*, 932 P.2d at 816.

Second, the flagrancy of the misconduct is much higher in this case because in *Strieff*, the defendant was stopped after leaving a house that was under surveillance for known drug-dealing activity. Here, Mr. Price was stopped because of the color of his skin and the fact that he was walking at a late hour. Justice Sotomayor highlighted this exact concern in her dissent: "it is no secret that people of color are disproportionate victims of this type of scrutiny." *Strieff*, 2016 WL 3369419 (Sotomayor, J., dissenting) (citing M. Alexander, *The New Jim Crow* 95-136 (2010)).

The attenuation doctrine does not dissipate the taint here, and the backpack evidence must be suppressed.

E. The Introduction of the Backpack Evidence Cannot be Harmless

The People argue that even assuming an invalid seizure, the error was harmless as to the criminal trespass, resisting arrest, and false reporting convictions. Constitutional error requires reversal unless the error was harmless beyond a reasonable doubt. *People v. Burola*, 848 P.2d 958, 964 (Colo. 1993). The prosecution bears the burden of proving beyond a reasonable doubt that the guilty verdict was "surely unattributable to the error." *People v. Morehead*, 2015 COA 131, ¶ 35 (quoting *People v. Fry*, 92 P.3d 970, 980 (Colo. 2004)).

The backpack contained gun and identification evidence, the People argued that Mr. Price gave a fake name because he was carrying a gun, and the defense changes considerably without the backpack evidence. Specifically, the prosecutor argued:

> Based on the circumstances, based on the fact that [the police] had prior found a gun in his backpack that Officer [C] saw him holding, based on the fact they didn't know if he was still armed, the fact that he had run, they took precautions that were necessary. When they found the defendant with his hands in his shirt like this, they didn't know what he was doing. Some of the officers said he was hunched over and couldn't see his hands. They didn't know if he had another weapon. They didn't know if he was trying to harm them.

(R. Tr. 11/4/14, p. 35, ll. 15-24). Under these circumstances, the gun evidence was used to support all of the charges, and it cannot be said that the

guilty verdicts were surely unattributable to the error in admitting the backpack evidence. *See Morehead*, ¶ 40.

II. The District Court Erred in Denying Mr. Price's Request for Substitution of Counsel Based on a Complete Breakdown in Communications

A. Preservation

The People assert that Mr. Price waived his right to appeal the district court's ruling because he said that he wanted to keep his appointed attorneys rather than proceed pro se. The People cite cases regarding invited error and trial strategy. *See People v. Gross*, 2012 CO 60, ¶ 8 (invited error by tendering jury instruction); *People v. Zapata*, 779 P.2d 1307, 1309 (Colo. 1989) (same); *see also People v. Wittrein*, 221 P.3d 1076, 1082 (Colo. 2009) (counsel invited error because witness's answer was a foreseeable result of counsel's examination); *People v. Rediger*, 2015 COA 26, ¶ 64 (jury instructions); *People v. Foster*, 2013 COA 85, ¶¶ 25, 34 (stipulation by counsel regarding defendant's failure to register as a sex offender). None of the cited cases involve a defendant's request for substitute counsel.

The People also assert that even if the error was not waived, plain error applies to the October 14, 2014, hearing because Mr. Price did not specifically request substitute counsel at that hearing. However, the record shows that Mr.

Price accepted his counsel only because he thought he had no other choice. *See People v. Kelling*, 151 P.3d 650, 654 (Colo. App. 2006) (defendant did not have to continually request substitute counsel to demonstrate that problems existed with counsel).

Additionally, the district court was put on notice through the pro se motion, the September 30, 2014, hearing, and the October 14, 2014, hearing that problems existed with Mr. Price's trial counsel. Additionally, Mr. Price's counsel requested a *Bergerud* hearing and stated that there was a "complete breakdown in communication . . . to the point where he's unable to assist us in the preparation of his defense." (R. Tr. 10/14/14, p. 3, ll. 18-21). That statement by counsel sufficiently preserved the issue that there was a breakdown in communication requiring substitute counsel.

B. Discussion

When an attorney-client relationship is fractured due to a complete breakdown in communication, an accused must receive substitute counsel. *Kelling*, 151 P.3d at 656. A breakdown in communication creates good cause for substitution of counsel, *see People v. Arguello*, 772 P.2d 87, 94 (1989), and is different than trial preparation, strategy, and tactics, *see Kelling*, 151 P.3d at 654.

The People argue that (1) Mr. Price did not state that there was a complete breakdown in communication, (2) the district court did not place limits on Mr. Price's ability to present additional complaints, and (3) trial counsel's statement that there was a complete breakdown in communication was too far removed from Mr. Price's original request for substitute counsel. Each argument will be addressed in turn.

1. Breakdown in Communication

Mr. Price's counsel stated that there was a complete breakdown in communication. This is not a case, like those cited by the People, where a defendant's statements did not allege a complete breakdown in communication. *See People v. Thornton*, 251 P.3d 1147, 1151 (Colo. App. 2010) (trial counsel did not state that there was a complete breakdown in communication but stated that there had been some communication breakdowns and maintained that he could continue to effectively represent his client); *People v. Buckner*, 228 P.3d 245, 249 (Colo. App. 2009) (the defendant's complaints regarded trial strategy and the number of visits he received from counsel, but there was no allegation that counsel's representation was limited in any way); *People v. Apodaca*, 998 P.2d 25, 28 (Colo. App. 1999) (defense counsel stated on the record that he and his client "worked together as a good team" and had gotten past any differences).

Here, in striking contrast to those cases, Mr. Price's attorney stated that there was a complete breakdown in communications of such significance that he could not assist in the defense.

2. Whether the District Court Limited Mr. Price's Objections

At the first hearing, Mr. Price was not given an opportunity to voice his concerns outside of the presence of the prosecution. (R. Tr. 9/30/14, pp. 3-4). At the second hearing, trial counsel stated that a complete breakdown in communications occurred and the district court took no curative action. (R. Tr. 10/14/14, pp. 3-4). Instead, the district court skipped over the fact that good cause had been shown for substitute counsel and inquired whether Mr. Price wanted to represent himself. (*Id.* at p. 3, l. 25 – p. 4, l. 1). This was error because when good cause, such as a complete breakdown in communications, is shown, the district court is required to substitute counsel. *Arguello*, 772 P.2d at 94. Only after the district court has "appropriately . . . determined that a substitution of counsel is not warranted [can the district court] insist that the defendant choose between continued representation by existing counsel and appearing pro se." *Id.*

3. Timing of Counsel's Statements

Regarding the People's third argument, as soon as trial counsel stated that there was a complete breakdown in communication, good cause for substitution

was established and the district court was required to substitute counsel. *Id.* The fact that this statement came two weeks after Mr. Price's initial request for substitute counsel is inconsequential to the fact that a complete breakdown in communication occurred. After this statement, even though the district court also erred during its prior ruling by failing to remove the prosecutor before inquiring into Mr. Price's reasons for dissatisfaction with counsel, the district court was under a new duty to substitute counsel. It could not simply overlook this statement with no further action or inquiry. *Id.*

Because Mr. Price has established good cause for substitution of counsel, he is entitled to a new trial with conflict-free counsel.

III. The District Court by Admitting Evidence of Prior Criminal Conduct

A. Preservation

The People argue that Mr. Price has waived any review of this error because trial counsel did not object when the exhibit was admitted. However, when trial counsel fails to contemporaneously object to evidence, this Court reviews for plain error. *See* CRE 103(d); *People v. Bieber*, 835 P.2d 542, 547 (Colo. App. 1992), *aff'd*, 856 P.2d 811 (Colo. 1993).

B. Warrant

The People contend that the warrant was not prejudicial because the jury

heard evidence that there was an outstanding warrant against Mr. Price. However, the fact of a warrant is different than the details contained in the warrant. Exhibit 13 details the following allegations:

- Probationer violated Rule #4 of his probation in that Mr. Price failed to show he works at a lawful occupation.

- Probationer violated Rule #5 of his probation in that Mr. Price failed to inform his Probation Officer before changing his residence or employment. Mr. Price's whereabouts are unknown at this time. The last home visit was conducted on 12/04/2012; a contact card was left.

- Probationer violated Rule #6 of his probation in that Mr. Price failed to provide an address to allow his Probation Officer to visit his home. Mr. Price failed to show proof of employment. Mr. Price failed to report to his Probation Officer as instructed.

- Probationer violated Rule #9 of his probation in that Mr. Price failed to pay all required fees to the Supervision and Criminal Injuries fund. Mr. Price owes $560.00 at this time. Mr. Price failed to pay court costs in this manner. Mr. Price has a balance of $21,597.50 at this time.

- Probationer violated Rule #10 of his probation in that Mr. Price failed to serve his special conditions imposed by the Court. Mr. Price failed to show full-time employment, submit to random screens and complete MRT classes.

(PR. Ex. 13, pp. 5-6).

The People also argue that admission of the warrant was not an obvious error because the jury already heard evidence about an outstanding warrant. However, the warrant was not an element of any of the offenses and the actual warrant was not necessary to prove an offense. It was attached to a prior conviction for attempted aggravated assault, and the admission of that prior conviction was an obvious error. Additionally, defense counsel explained to the district court on the morning of trial that the outstanding warrant was for failure to appear at a motions hearing. (R. Tr. 11/3/14, p. 5, ll. 24-25).

C. Prosecutorial Misconduct

In a similar argument, the People contend that the introduction of the attempted aggravated assault conviction and warrant were not prosecutorial misconduct because the evidence was relevant to prove the charges against Mr. Price. Evidence of criminal activity unrelated to a charged offense is not admissible. *People v. Goldsberry*, 181 Colo. 406, 409, 509 P.2d 801, 803 (1973). The attempted aggravated assault was not related to any charged offense. "When a prosecuting attorney purposefully exposes the jury to inadmissible and highly prejudicial evidence, his [or her] conduct will not be condoned, and a new trial will be granted." *People v. District Court*, 767 P.2d 239 (Colo. 1989).

Mr. Price is entitled to a new trial without the attempted aggravated assault conviction, aggravated robbery charge, and probation revocation warrant evidence.

IV. The District Court Erred in Denying Mr. Price's Request to Sever

The People contend that Mr. Price cannot demonstrate prejudice because the conviction would have been admissible on the criminal impersonation charge. However, the People also assert on page 22 of the Answer Brief that the gun, and thus the theory for possession of a weapon by a previous offender, was not necessary for the criminal impersonation charge. The prior conviction was not relevant or admissible for any of the other charges.

Because evidence of a prior conviction is prejudicial, a district court abuses its discretion when it fails to sever a charge that requires evidence of a prior conviction from those charges that do not require evidence of a prior conviction. *Ruark v. People*, 158 Colo. 287, 291, 406 P.2d 91, 93 (1965). And contrary to the People's contention, a jury instruction does not cure the prejudice. *Id.*

V. Correction of Mittimus

The People concede that the mittimus should be corrected to state that Mr. Price was convicted based on jury verdicts.

CONCLUSION

WHEREFORE, Mr. Price respectfully requests that this Court reverse his

judgments of conviction, remand for a new trial, and grant such other relief as the Court deems necessary.

Respectfully submitted,

s/ Krista A. Schelhaas
Krista A. Schelhaas, #36616

CERTIFICATE OF SERVICE

I certify that on the 5th day of July 2016, a true and correct copy of the foregoing REPLY BRIEF was filed through the Integrated Colorado Courts E-Filing System (ICCES), with a copy checked to be sent to JOHN T. LEE, Office of the Attorney General.

s/ Krista A. Schelhaas
Krista A. Schelhaas