COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Ave. Denver, CO 80203	DATE FILED: August 7, 2014 2:42 PM
Adams County District Court Honorable Jill-Ellyn Straus Case Number 10CR52	
THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee v. Jesus Jimenez-Ayala Defendant-Appellant	σ COURT USE ONLY σ
Douglas K. Wilson, Colorado State Public Defender JOSEPH P. HOUGH, # 34384 1300 Broadway, Suite 300 Denver, CO 80203 PDApp.Service@coloradodefenders.us (303) 764-1400 (Telephone)	Case Number: 12CA120

REPLY BRIEF OF DEFENDANT-APPELLANT

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<tr><td colspan="2">CERTIFICATE OF COMPLIANCE</td></tr>
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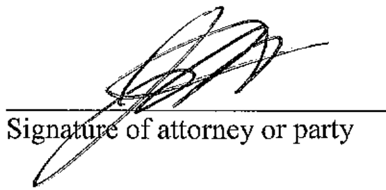
I hereby certify that this Reply Brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The Reply Brief complies with C.A.R. 28(g).

☑ It contains 1,331 words.

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



Signature of attorney or party

Concerning the trial court's denial of the defendant's motion to suppress, while the State correctly notes that the "initial contact between the defendant and the officer was a consensual encounter," it then goes on to erroneously contend that the officer's subsequent, but virtually immediate, seizure and pat-down of the defendant was "supported by reasonable suspicion of criminal activity."(AB,p17,19) Despite this claim, however, just prior to the search and seizure, the officer had absolutely no "reason to believe that he [was] dealing with an armed and dangerous individual" *Terry v. Ohio*, 392 U.S. 1, 27 (1968), such as if he had observed a large, or suspicious or weapon-like bulge in Jimenez's pocket or under his clothing. *See, e.g. Pennsylvania v. Mimms*, 434 U.S. 106, 112 ("bulge in the jacket permitted the officer to conclude that [defendant] was armed and thus posed a serious and present danger to the safety or the officer"). Rather, Jimenez (an unarmed and unaccompanied Hispanic male) was merely walking (not running) down the street, a mile from and an hour after the crime, in a dirty t-shirt and pants that were damp up to the shin, and he had a reasonable explanation for being in the cold—that he had briefly stepped outside to smoke a cigarette.

Second, the State argues that just after or during the seizure and pat-down, when the officer found no cigarettes or other smoking implements on the defendant's person, there was then sufficient "probable cause for the

arrest."(AB,p23-26) But as the trial court below found, at that point in time, Jimenez was, at most, a "suspicious individual in the general vicinity" who "to some extent fit the description" of a suspect in the home invasion, and it is well-settled that mere "[s]uspicion alone does not amount to probable cause" (*People v. McCoy*, 870 P.2d 1231, 1236 (Colo. 1994)), and the burden of proof is on the State to prove that the officer possessed sufficient probable cause to effectuate the warrantless arrest. *People v. King*, 16 P.3d 807, 813-14 (Colo. 2001).

Third, the State contends that even if the seizure, pat-down or arrest of the defendant were unlawful, the evidence obtained from him (statements and DNA) was nevertheless admissible because it was sufficiently "attenuated from any illegality."(AB,p27) In support of this notion, the State primarily relies on *People v. Rodriquez*, 945 P.2d 1351 (Colo. 1997) and *People v. Lewis*, 975 P.2d 160 (Colo. 1999).(AB,p28) However, in both of those cases, our Supreme Court found that because there were no significant "intervening circumstances" that "occurred between the illegal arrest and the consent" (*Rodriquez* at 1364) or "attenuating events…between the [unlawful] arrest and the interview" (*Lewis* at 175), the evidence and statements must be suppressed.

For instance, relying on *Brown v. Illinois*, 422 U.S. 590 (1975), the *Lewis* Court first noted that the State bears the burden of proving that the "connection

between the initial illegality and the evidence has become so attenuated as to dissipate the taint." *Lewis* at 172. And in determining whether the defendant's statements or evidence was sufficiently attenuated from his unlawful arrest, the "temporal proximity of the arrest and the confession," "the presence of intervening circumstances," and "the purpose and flagrancy of the official misconduct" must all be considered. *Id.* at 173 (quoting *Brown* at 603-04). In evaluating these three factors, *Lewis* noted that "temporal proximity is the least determinative" and "intervening circumstances" constitute such things as, between the time of the illegal arrest and the confession, the defendant was: (1) "represented by counsel"; (2) "consult[ed] with counsel"; (3) "brought before a magistrate who advised him of his rights and set bail"; or (4) "terminat[ed] from the illegal custody." *Id.* at 174.

Finding that the "People ha[d] not satisfied their burden under *Brown* because the causal chain between the illegal arrest and confession was not broken by any intervening event," the *Lewis* Court relied heavily on the following: (1) that after the defendant's arrest, he was taken to a "holding cell in the police station where he was confined until the interrogation began"; (2) "that the time between the illegal arrest and the statement was less than nine hours"; (3) "that despite the fact that the defendant was shirtless and shoeless in a cold cell, the police offered him neither a blanket nor other clothing until mid-way through the interrogation";

(4) "that the defendant did not consult with a lawyer or with anyone else during the period he was detained." *Id.*

While the State here is correct that Jimenez was read his *Miranda* rights prior to his interrogation and also permitted a buccal swab to be performed by officers, this is simply insufficient to purge the taint of the initial and illegal arrest. *See Lewis* at 173 ("the fact that statements were made pursuant to an otherwise valid, voluntary waiver following *Miranda* warnings does not necessarily purge the taint of the underlying Fourth Amendment violation, such as an illegal arrest"); *Perez v. People*, 231 P.3d 957, 962 (Colo. 2010) (*Miranda* "advisement did not attenuate the taint of a Fourth Amendment violation"). Indeed, just as in *Lewis*, Jimenez was arrested and thereafter, immediately transported to the police station where he was held until he was interrogated. Additionally, the time between Jimenez's arrest and interrogation was under nine hours (approximately seven and in the wee hours of the morning), and Jimenez did not consult with a lawyer, or anyone else for that matter, prior to the interrogation. *See Lewis* at 174; *See also Taylor v. Alabama,* 457 U.S. 687, 691 (1982) (though six hours lapsed between illegal arrest and interrogation, "a difference of a few hours is not significant where, as here, petition was in police custody, unrepresented by counsel…"). Furthermore, no other legitimate or conceivable "intervening circumstances"

existed here, such as Jimenez being represented by counsel, being advised by a judicial officer, or being released from his unlawful confinement prior to being interrogated.

In sum then, the State failed to prove that there was sufficient attenuation between Jimenez's unlawful arrest and the gathering of incriminating evidence from him because there was inadequate "temporal proximity" (less than nine hours as in *Lewis* and near six as in *Taylor v. Alabama*, *supra*), no legitimate or substantial "intervening circumstances," and the "purpose" and "flagrancy" of the illegal arrest was clearly to discover incriminating evidence and mount a case against the defendant. *See Rodriquez* at 1364 ("was the consent obtained through exploitation of the prior illegality"). Thus, because the defendant's confession and DNA were obtained as a direct result of an illegal seizure and arrest, such evidence was inadmissible at trial. *See Wong Sun v. United States*, 371 U.S. 471 484 (1963) (articulation of "fruit of the poisonous tree doctrine").

Finally, in a highly cursory fashion, the State claims that even if the defendant's pat-down and arrest were unlawful (which they were), and even if the prosecution also failed to prove sufficient attenuation (which it did), the trial court's failure to suppress the evidence was nevertheless harmless. As discussed in the Opening Brief, however, without Jimenez's lengthy and incriminating

confession (100 pages in length) and DNA (which irrefutably placed him at the scene of the home invasion), the only evidence tying the defendant to the crimes charged was the testimony of a single co-defendant who had a significant motive and bias against Jimenez—including a favorable plea bargain and evidence that he was more culpable for the crime than the defendant.

Again, as discussed in the Opening Brief, it is also quite possible that without the defendant's confession and DNA, he would not have been prosecuted at all. In any event, it simply cannot be said that the trial court's error in failing to suppress such critical and incriminating evidence (that was repeatedly exploited by the prosecution throughout the trial and in closing argument) was "harmless beyond a reasonable doubt" and therefore, Jimenez's convictions should be reversed and his case remanded for a new trial. *See Crider v. People*, 186 P.3d 39, 42 (Colo. 2008).

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CERTIFICATE OF SERVICE

I certify that, on August 7, 2014, a copy of this Reply Brief of Defendant-Appellant was electronically served through ICCES on Katherine A. Hansen of the Attorney General's office.

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