

# Recent Case Report

## U.S. v. Holmes

(D.C. Cir. 2007) \_\_ F.3d \_\_ [2007 WL 3071629]

### ISSUES

(1) Was the pat search of the defendant conducted in an illegal manner? (2) If so, was the handgun they subsequently discovered admissible under either the inevitable discovery or attenuation rules?

### FACTS

At about 3:30 A.M., two officers with the Metropolitan Police Department on patrol in the District of Columbia saw a man and a woman standing together in an alley frequented by local drug dealers and prostitutes. When the pair saw the patrol car, they ran off in different directions. The man, later identified as Holmes, was quickly apprehended.

Before doing anything else, one of the officers pat searched him and, in the process, felt a set of keys inside one of his pockets. He also saw some cigarette rolling papers protruding from another pocket. After removing these items, the officer asked him why he had run. Holmes said it was because he had been soliciting sex from the woman.

Holmes had told the officers that he lived in Maryland, and that he had taken the train into D.C. But when the officers pointed out that the trains didn't run at this hour, he changed his story and said that a friend had dropped him off. So they asked him why he was carrying car keys, at which point he admitted that he had driven in, and had parked down the street.

One of the officers then activated the remote control device on Holmes's key ring which caused the lights to flash in an Acura a short distance away. Suspecting that there were drugs inside the car, the officers asked Holmes if he would consent to a search of it. At about this time, they also happened to mention that he was arrestable for possession of the rolling papers. Holmes consented to the search and signed a consent form.

Although the officers did not find any drugs in the vehicle, they *did* find a Ruger handgun under the driver's seat. As a result, Holmes was convicted of possession of a handgun by a felon.

### DISCUSSION

On appeal, the government conceded that the officer who pat searched Holmes had exceeded the permissible scope of the search when he removed the car keys which obviously did not pose a threat to anyone. Because the keys had been seized illegally, Holmes argued that the handgun should have been suppressed because it was the discovery of the keys that ultimately led to the discovery of the gun.

Although there was certainly a connection between the two discoveries, the government argued that the weapon was nevertheless admissible under two established theories: (1) inevitable discovery, and (2) attenuation.

### **Inevitable discovery**

Under the inevitable discovery rule, evidence that was obtained unlawfully will not be suppressed if prosecutors can show that it would have been obtained inevitably by lawful means.<sup>1</sup> Prosecutors need not, however, show that the evidence would have been found “unquestionably” or “certainly.”<sup>2</sup> Instead, they must prove that there was a “reasonably strong probability” that it would have been discovered “in the normal course of a lawfully conducted investigation.”<sup>3</sup> To put it another way, the evidence will not be suppressed if it “would have been ultimately revealed by usual and commonplace police investigative procedures.”<sup>4</sup>

For example, in *Nix v. Williams*<sup>5</sup> the United States Supreme Court ruled that because the members of a search party were only a short distance from the body of a murder victim they were seeking, the body was admissible even though it was actually discovered by officers as a result of their questioning of the defendant in violation of the Sixth Amendment.

Citing *Nix*, prosecutors suggested that the officer, having lawfully felt the car keys in Holmes’s pocket, might have asked him where his car was parked, and Holmes might have answered truthfully. The court responded, “All of this is nothing more than possibility. As evidence of inevitable discovery, this fails under *Nix*. It is, at best, speculative . . . .”

### **Attenuation**

As noted, prosecutors also argued that the gun should be admissible under the attenuation rule, which is part of the “fruit of the poisonous tree” doctrine. By way of background, evidence and statements that were obtained as a result of an unconstitutional search, seizure, or interrogation are known in the law as “fruit of the poisonous tree.” But unlike the fruit that falls from real-life poisonous trees, not everything that can be traced to an illegal search or seizure will be plowed under. Instead, it will be admissible if, (1) something unexpected happened between the illegal search and the discovery of the evidence, and (2) this unexpected event played a sufficiently important role in the discovery of the evidence as to break the chain of causation.<sup>6</sup>

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<sup>1</sup> See *Nix v. Williams* (1984) 467 U.S. 431, 444, 447 [“[I]f the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury.”].

<sup>2</sup> See *People v. Superior Court (Tunch)* (1978) 80 Cal.App.3d 665, 680-1.

<sup>3</sup> *Lockridge v. Superior Court* (1970) 3 Cal.3d 166, 170.

<sup>4</sup> *People v. Ramsey* (1969) 272 Cal.App.2d 302, 313. ALSO SEE *People v. Boyer* (1989) 48 Cal.3d 247, 279, fn.21.

<sup>5</sup> (1984) 467 U.S. 431.

<sup>6</sup> See *Wong Sun v. United States* (1963) 371 U.S. 471, 487-8 [“[The issue] is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be

The prosecutors in *Holmes* argued that Holmes's decision to consent to the search constituted such an unexpected act. And there are many cases in which the courts have ruled that a suspect's post-search consent constituted an independent intervening act.<sup>7</sup> But there were two significant differences between those cases and *Holmes*.

First, the seizure of Holmes's keys played a direct role in the discovery of the gun. Specifically, the keys resulted in Holmes's admission that he had driven into town and, more importantly, it led the officers to his car. It was also somewhat significant that seizure of the keys enabled the officers to unlock the car just before they sought Holmes's consent to search it.

Second, even though the officers did not engage in blatant coercion, the court ruled that they had intentionally created a coercive environment in which to seek Holmes's consent, especially their implied threat to arrest him.<sup>8</sup> Said the court:

By the time the officers sought Holmes's consent to search his car, the officers had already located his car and opened it with his car's remote door lock control as a direct result of the illegal seizure. At the very least, it appears that Holmes faced a coercive situation at the time he gave consent since the implication was that his only prayer of avoiding arrest that night was to consent to the search and simply hope that the officers would not discover the hidden handgun.

Consequently, the court ruled that the gun should have been suppressed. POV

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purged of the primary taint.”]; *Kaupp v. Texas* (2003) 538 U.S. 626, 633 [“Demonstrating such purgation is, of course, a function of circumstantial evidence, with the burden of persuasion on the state.”]; *United States v. Leon* (1984) 468 U.S. 897, 911 [“[T]he connection between police misconduct and evidence of crime may be sufficiently attenuated to permit the use of that evidence at trial”].

<sup>7</sup> See *People v. Henderson* (1990) 220 Cal.App.3d 1632, 1651 [“If, under the circumstances of a particular case, consent is found to be invalid, the People are entitled to prove attenuation; i.e., to show there is no nexus between the unlawful police conduct and the consent.”]; *People v. \$48,715* (1997) 58 Cal.App.4th 1507, 1514 [“Where subsequent events adequately dispel the coercive taint of the initial illegality—i.e., where there is no longer causality—the subsequent consent is given full effect.”].

<sup>8</sup> See *Mann v. Superior Court* (1970) 3 Cal.3d 1, 8 [“The defendant's consent may constitute such a sufficiently distinguishable means if it is not induced by compulsion, intimidation, oppressive circumstances, or other similar factors inherent in the situation which make that consent less than an act of free will.”].