STATE OF NEW JERSEY

v.

GEORGE KELLY,
Defendant - Appellant

A-10-1234-T3

Superior Court, Appellate Division

Submitted August 12, 2010 - Decided September 3, 2010

Before Judges GRIM, REAPER and MERCY.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Cr-09-9028 and Cr-09-9029.

Russ Ryan argued the cause for the defendant-appellant (Burrows & Andrews, L.L.P., attorneys for defendant-appellant; Mr. Ryan of counsel and on the brief)

Karen Reeves, First Assistant Prosecutor, argued the cause for the State of New Jersey (Nathan Hansberger, Bergen County Prosecutor; Ms. Reeves of counsel and on the brief).

GRIM, J.A.D. joined by **REAPER, J.A.D.**

On March 16, 2010, following a trial in Superior Court, Law Division, Bergen County, defendant George Kelly was convicted of aggravated sexual assault, contrary to N.J.S.A. 2C:14-2(a)(1); sexual assault, contrary to N.J.S.A. 2C:14-2(c)(4); endangering the welfare of a child, contrary to N.J.S.A. 2C:24-4(a); and aggravated criminal sexual conduct, contrary to N.J.S.A. 2C-14-3(a). Following the jury verdict, he entered a conditional guilty plea to unrelated robbery charges, reserving the right to appeal the denial of a motion to suppress evidence that was used to support both sets of charges.

In this consolidated appeal, defendant contends that the trial court committed constitutional error when it denied his motion to suppress evidence seized in and statements made during a search incident to an unlawful arrest. Second, he claims that the trial court improperly allowed the jury in the sexual assault case to consider expert testimony that crossed the line into areas of witness credibility.

We disagree on both counts. We hold that, despite any alleged defects in the arrest warrant in this case, there is no basis for suppressing the evidence seized by police and statements made by the defendant during the execution of the warrant. We further hold that the testimony of the State's expert did not stray into impermissible comment on credibility and therefore was properly before the jury.

The Facts

In September 2009, officers of the Paramus Police Department were investigating defendant George Kelly and a female friend A.B.M.* as possible suspects in a string of recent robberies and began canvassing their informants for information about the two. On September 29, 2009, Officer Saturday of the Paramus Police Department was told by a previously-reliable informant that defendant had bragged about molesting A.B., A.B.M.'s ten-year-old daughter. The informant provided details of defendant's statements and admissions and also advised Officer Saturday that Kelly sometimes stayed overnight at A.B.M.'s apartment.

Based on the informant's tip, Officer Saturday prepared a complaint and an arrest warrant for defendant, which he intended to execute on October 1, 2009. In doing so, however, he mistakenly dated the warrant October 4, 2009 and mistakenly entered A.B.M.'s address (1000 Fordham Place, Paramus) as defendant's address rather than correctly entering defendant's home address which was well-known to police and contained in various state databases accessible to the police. The prepared complaint and warrant were submitted to a supervisory officer within the Paramus Department who made a cursory inspection of the documents and then submitted them to the sitting magistrate on September 30, 2009. The signed warrant was returned to Officer Saturday late in the day on September 30.

On October 1, 2009, Officer Saturday and his partner, Officer Kannon, drove to 1000 Fordham Place in Paramus to execute the arrest warrant. The police knocked on the apartment door, and A.B.M. answered. They told her they had a warrant for defendant's arrest and, although saying nothing, she stepped aside, retreating into the apartment and standing in front of a closed door. The officers followed and, once inside the apartment, they heard muffled crying coming from the other side of the door. They asked A.B.M. what was in the room and she replied: "That is my bedroom." The police asked her to step aside and then entered the bedroom. Both testified at trial that they saw a little girl, later identified as A.B., sitting on a bed, while defendant was in the process of dressing himself.

Officer Saturday placed defendant under arrest and conducted a search of the room incident to the arrest, while Officer Kannon took the child out of the room to speak with her. Officer Saturday saw in plain view a revolver on the dressing table and seized it, and also searched a bag that he found in the bedroom closet that contained a mask and military style clothing similar to that used in the robberies as well as a folded paper with the addresses of three of the five establishments recently robbed at gunpoint.

Officer Saturday testified at trial as to statements made by the defendant at the apartment after being advised of and waiving his right to remain silent:

> Q. Did you question the defendant in the apartment?
> A. Yes, after reading him his rights which he waived.
> Q. What did he say?
> A. He stated: "I am sorry I did it. It was a mistake. I am not a bad person. I cannot help myself, I love her. I did not mean to do it." He then admitted that

*. Initials are used throughout this opinion to protect the identity of the minor victim.

he had engaged in inappropriate behavior with A.B. I then asked him about the gun on the dressing table. He also admitted that he robbed several stores to buy his “little sugar baby some toys as a reward." At the station house, I re-read his Miranda rights, which he again waived and restated the same confession.

Meanwhile, Officer Kannon interviewed the child A.B., and testified at trial as to her statements to him:

Q. Officer Kannon, you questioned A.B. separately?
A. Yes I did.
Q. Why did you do that?
A. I wanted to allow my partner the opportunity to question the defendant in private. Also I was concerned about what we saw. A.B. was lying or sitting on the bed crying and the defendant was dressing himself. He was wearing pajama bottoms and he was putting on a shirt. So I wanted to question the girl further. I asked A.B. why she had been crying. At first, she denied that she had been crying, that everything was okay. I continued to talk to her and she finally said: "He touched me and made me hurt." Then A.B. related how he touched her with his penis and "did naughty things."

Officer Kannon called the Division of Youth and Family Services (DYFS) which responded and further interviewed the child, this time on videotape. In the videotaped interview, which was played for the jury at trial pursuant to N.J.R.E. 803(c)(27), A.B. stated that the defendant had penetrated her vagina with his penis.

The Prosecution

Defendant was indicted on October 14, 2009, in two separate indictments. The first charged him with aggravated sexual assault, contrary to N.J.S.A. 2C:14-2(a)(1); sexual assault, contrary to N.J.S.A. 2C:14-2(c)(4); endangering the welfare of a child, contrary to N.J.S.A. 2C:24-4(a); and aggravated criminal sexual conduct, contrary to N.J.S.A. 2C-14-3(a). The second charged him with three robberies, contrary to N.J.S.A. 2C:15-1. Because the physical evidence and the confession obtained during the execution of the arrest warrant constituted the primary evidence underlying both indictments, the defendant was permitted to file a single pretrial suppression motion in both cases attacking the validity of the warrant and the evidence. The trial court (Hon. Evangeline Judy, J.S.C.) held a pretrial hearing on February 17, 2010, at which Officer Saturday explained the errors in the application for the arrest warrant:

Q. Officer Saturday, who wrote up the arrest warrant for George Kelly?
A. I wrote it up and the Deputy Clerk of the municipal court gave me some of the required data.
Q. When was the arrest effected?
A. October 1, 2009.
Q. Where is the official filed copy of the warrant?
A. It appears that the filed warrant has been misplaced.
Q. You earlier stated that the warrant was dated October 4, 2009, three days after the arrest. Can you explain this discrepancy?

A. Yes I can. It was a clerical error. We were in a hurry to get a warrant as we were concerned that a child was being molested.

Based on the officer's testimony, the trial court held that the errors did not invalidate the arrest warrant and that suppression of the evidence was inappropriate.

Trial began on March 11, 2010. The State presented the testimony of the officers and, without objection, the videotape of the child's statement to DYFS. The defense then presented both the child A.B. and her mother as defense witnesses. A.B.M. claimed that she was distraught when the police entered her apartment unannounced and that the police confused her into allowing them access to the apartment and to the child. A.B. testified that she claimed that the defendant sexually assaulted her because she was angry with the defendant for keeping her home from school and not letting her attend a friend's birthday party. In rebuttal, the State was permitted to call Dr. Seminal Quackery as an expert on Child Sexual Abuse Accommodation Syndrome (CSAAS) to explain why a sexually abused child such as A.B. might make contradictory statements as to the abuse. The defense's objection to the testimony on grounds of relevance, prejudice and invading the province of the jury was overruled.

The jury returned its verdict on March 16, 2010, finding the defendant guilty on all counts. As noted, defendant then entered a conditional guilty plea to the robbery indictment. On April 16, 2010, defendant was sentenced on both indictments to an aggregate sentence of 20 years imprisonment. The defendant was committed to the custody of the Department of Corrections; bail pending appeal was denied.

Defendant filed notices of appeal to this Court from both judgments of conviction on June 1, 2010. This Court consolidated the appeals due to the identical suppression issue underlying both appeals.

Discussion

We conclude, first, that the trial court did not err in determining that the physical evidence and confession obtained by the police during the execution of the arrest warrant on October 1, 2009, were not subject to suppression.

First and foremost, we regard the errors as to the date on the warrant and the address of the defendant as immaterial clerical errors that in no way affect the validity of the warrant and its execution. See *State v. Cataldo*, 294 N.J. Super. 527, 536 (Law Div. 1996) ("an extraneous reference in a search warrant that is deemed to be merely a technical error will not taint the search made pursuant to the warrant"). See also R. 3:5-7; *State v. Huguenin*, 662 A.2d 708, 710 (R.I. 1995) ("A mere clerical error will not void an otherwise valid warrant"); *Bell v. State*, 200 Md. 223, 225 (Md. 1952); *Donahoe v. Shed*, 49 Mass. 326, 328 (Mass. 1844). Additionally, we do not regard the address as an error of any kind since the informant told the police defendant occasionally stayed at that location.

Even if the errors could be regarded as non-clerical, the facial invalidity of the warrant would not require that we apply the exclusionary rule to the physical evidence gathered as a result of its execution, and the suppression of the incriminating statements that defendant gave while detained pursuant to the warrant. We therefore reject defendant's

contention that the evidence is fruit of the poisonous tree and automatically subject to the doctrine that evidence obtained directly or indirectly from a violation of the defendant's rights must be excluded from evidence unless the State can establish that it obtained the evidence from a source that was independent of the illegal conduct. *State v. Johnso*n, 118 N.J. 639, 651-63 (1990).

To the contrary, we consider this case controlled by the holding of *Herring v. United States*, — U.S.—, 129 S. Ct. 695 (2009), and we see no reason to depart from the federal rule. In *Herring*, 129 S. Ct. at 699, the U.S. Supreme Court made it clear that simple police errors in searches and seizures do not require suppression of evidence. Indeed, that Court has long recognized that however laudable an exclusionary policy might be, it exacts a high price on society by depriving the jury or judge of reliable evidence that may point the way to the truth. *United States v. Janis*, 428 U.S. 433, 448-49 (1976). While suppressing reliable evidence may vindicate the Fourth Amendment rights of the defendant, and perhaps more generally the privacy rights of all persons, it may also result in the guilty going free. See *Herring v. United States*, 129 S. Ct. at 701. These competing concerns are best addressed by limiting application of the exclusionary rule to those circumstances where its remedial objectives can best be achieved. *United States v. Calandra*, 414 U.S. 338, 348 (1974); *State v. Badessa*, 185 N.J. 303, 311 (2005). Thus, in *Herring*, 129 U.S. at 702, the Court concluded that "to trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it..." Such conduct must be "reckless, or grossly negligent" or represent "recurring or systemic negligence." *Id*. Under our constitution and jurisprudence, the same view is appropriate. The exclusionary rule is a judicially created policy that seeks to deter the police from engaging in constitutional violations by denying the prosecution any profit from illicitly obtained evidence. *State v. Johnso*n, 118 N.J. at 651-63. Our high court has also stated that a corollary purpose is to uphold judicial integrity. *State v. Lee*, 190 N.J. 270, 278 (2007). For these reasons, under *Herring* and under our own law, where a police error does not undermine an advance judicial conclusion that probable cause to arrest exists, suppression is simply not called for.

Time and again, we have made it clear that the exclusionary rule does not apply to all instances where mistakes are made in executing a warrant. As we stated in *State v. Green*, 318 N.J. Super. 346, 354 (App. Div. 1999):

> The basic test under both the Fourth Amendment and Article I, paragraph 7 of the New Jersey Constitution is one of "objective reasonableness" in light of "the facts known to the … officer at the time." ... This reasonableness test may be satisfied even though the police have made a mistake in executing a warrant. As the Court observed in Illinois v. Rodriguez, 497 U.S. 177, 185, 110 S. Ct. 2793, 2800, 111 L. Ed. 2d 148, 159 (1990), "what is generally demanded of the many factual determinations that must regularly be made by agents of the government--whether the magistrate issuing a warrant [or] the police officer executing a warrant … --is not that they always be correct, but that they always be reasonable." Therefore, if a police officer's actions in executing a warrant are reasonable, there is no constitutional violation and thus no need to consider the availability of a good faith exception to the exclusionary rule..

Thus, we have never held and we decline to hold here that law enforcement errors per se require the automatic invocation of the exclusionary rule. Instead, it is appropriate for courts to determine whether there are more efficacious remedies available to the defendant that might mitigate the disturbing consequence of withholding reliable evidence from the jury. Alternative remedies include litigation under 42 U.S.C. § 1983, Bivens actions, tort suits and injunctions. See, e.g., *Hudson v. Michigan*, 547 U.S. 586, 597 (2006) (Scalia, J.). Only where the remedial purposes of the exclusionary rule are served and the police conduct is recurring and systemic is suppression required.

Far from being the kind of illegal conduct by police that requires exclusion, the police errors in this case represent an inconsequential mistake that does not implicate the concerns underlying the exclusionary rule. What we have here is simple error, not gross or systemic negligence. The facts in *Herring* are clearly analogous to the facts here. There, a defendant was stopped while driving and arrested in Alabama with an outdated arrest warrant erroneously kept active in a police record database. A search incident to the arrest led to the discovery of illicit drugs and a gun. The district court accepted that the officers acted in good faith and that there "was no reason to believe that application of the exclusionary rule here would deter the occurrence of future mistakes." *Herring,* 129 S. Ct. at 699. While the police were "negligent" in issuing an outdated warrant, the arresting officers "were innocent of any wrongdoing or carelessness." *Id*. The Court agreed with the district court's holding that police negligence, absent evidence of systemic error or reckless disregard of constitutional requirements, does not implicate the exclusionary rule. The deterrent effect of suppression must be "substantial and outweigh any harm to the justice system." *Id*. The Court further stated that the "exclusionary rule is not an individual right." *Id*. at 700. It is worth noting that the Court rejected the defendant's claim that Alabama's 13% error rate in issuing arrest warrants compared to the FBI's "wanted" list error rate of only 3% was evidence of systemic error. Tr. of Oral Arg. 25-26, *Herring v. United States*, 129 S. Ct. 695, 07-513 (2009). The error rate for Paramus-issued arrest warrants is no worse than that found in Alabama.

Moreover, we are satisfied that A.B.M. gave at least her implied consent for the police to enter her apartment. See *State v. Maristany*, 133 N.J. 299, 305 (1993). Certainly, the police's entry into the apartment bedroom was justified under the exigent circumstances exception when the police officers heard the child crying. *State v. Johnson*, 193 N.J. 528, 552 (2008). Once inside the bedroom, the police saw the gun in plain view and then made a reasonable search of the bedroom closets to ensure that possible accomplices of the defendant were not hiding.

In sum, we do not consider the arrest warrant invalid. Even if we were to agree that the warrant was facially deficient, the errors here were essentially clerical rather than substantive, and our law does not invalidate a search based solely on a technical violation. See, e.g., *Massachusetts v. Sheppard*, 468 U.S. 981, 991 (1984). Even a substantive violation would be excused based on A.B.M.’s consent to the entry into the apartment and the exigent circumstances that presented themselves to the police on the scene. The trial court properly denied the suppression motion.

Turning to the question of the expert’s testimony, we conclude that the testimony was proper and admissible. Our Supreme Court has explained that CSAAS does not detect sexual abuse but rather it assumes the presence of sexual abuse and explains the child's reactions to it. *State v. J.Q.*, 130 N.J. 554, 582 (1993). CSAAS provides a rational explanation for why some sexually abused children delay reporting abuse, recant

allegations of abuse and later assert that nothing improper occurred. *Id*. Our courts have long recognized the unique problems of cases involving sexual abuse of children. See e.g., *State v. Crandall*, 120 N.J. 649 (1990); *State v. R.W.*, 104 N.J. 14 (1986). We must balance the unique requirements attending a child sexual abuse case with the defendant's right to receive a fair trial. Under both our state Constitution and the Fifth and Sixth Amendments of the U.S. Constitution the defendant has the right to due process and a fair trial. This requires the right to confront all evidence that the State offers against him. It also requires that only credible and reliable evidence be submitted to the jury. See, e.g., *Maryland v. Craig*, 497 U.S. 836, 868 (1990). We are therefore mindful of the heavy burden of the court to balance the legitimate needs of the defendant to receive a fair trial with society's demand that our children be protected from sexual predators.

Our Supreme Court in *State v. R.W.*, 104 N.J. at 30-31, instructs that the testimony of an expert is allowed when it relates to a subject matter beyond the understanding of persons of ordinary experience, intelligence, and knowledge. In cases of child sex-abuse offenses, such testimony may be used to explain generally the behavior, feelings and attitudes of child victims when it is demonstrated that persons of ordinary intelligence and ordinary experience do not readily understand their condition. Id. An expert or scientific explanation of their condition, one accepted as reliable by the scientific community that is involved in the diagnosis, treatment, and care of such individuals, can assist a jury in understanding the evidence. *Id*. See also N.J.R.E. 702.

The expert relied on here was a board-certified psychiatrist who was an expert in treating sexually abused children with more than 20 years experience in direct clinical research, behavioral science and the treatment of sexually abused children. She has written numerous articles on the subject matter. There is no question as to Dr. Quackery's expertise in the field, and the defense at trial conceded she was an expert. There is also no question that A.B.'s recantation of her earlier allegations involved psychological issues beyond the comprehension of the ordinary juror. The defendant did not dispute the general acceptance within the scientific community that CSAAS identifies or describes behavioral traits commonly found among sexually abused victims. See *State v. J.Q.*, 130 N.J. 554, 573 (1993).

There are of course limits to expert testimony. In *State v. Odom*, 116 N.J. 65, 79 (1989), the Supreme Court clarified that expert witness opinion is permitted in a criminal trial "as long as the expert does not express his opinion of defendant's guilt but simply characterizes defendant's conduct based on the facts in evidence in light of his specialized knowledge." Here, Dr. Quackery's testimony was not used to describe the defendant's conduct nor was it used to explain A.B.'s recantation. It was used for the limited purpose of explaining generally why children may change their later in-court testimony in a sexual abuse context. It would be valid criticism if the CSAAS evidence were offered for the purpose beyond the scope of scientific theory. *State v. J.Q.*, 130 N.J. at 574. However, as the Supreme Court recognized, a qualified behavioral-science expert might be able to demonstrate a sufficiently reliable scientific opinion to aid the jury in determining the ultimate issue that abuse had occurred. Id. at 565. Expert opinion may be adduced to rehabilitate a sexual assault victim's testimony against a charge of delay in reporting and recantation. *State v. Schnabel*, 196 N.J. 116, 133-134 (2008). Again Dr. Quackery's testimony demonstrates that she was testifying within those limits and merely relating generally accepted scientific theory and expert conclusions:

Q. Now, doctor, as an expert in child sexual abuse and CSAAS, how would you explain this discrepancy in A.B.'s testimony?

A. Well, frankly this is not that uncommon. The research is very consistent. The great majority of children do not lie about being sexually abused. I would say that anywhere from five percent to ten percent of children are found to lie, certainly no more than that. However, the vast majority of children do not lie about being sexually abused.

Q. Why is that, doctor?

A. Children are innocent in their formative stages. Sexual abuse is beyond their comprehension. So to make up such a story would be beyond their imaginative capabilities. It is true there are rare cases of children lying about being sexually abused. But even there the research is not clear. We're not even sure whether it was an actual lie or just something that was preventing them from telling the truth. There could be many factors why a child lies: guilt, fear, and the influence of another adult such as a co-parent. Many factors could have interceded here to cause A.B. to change her testimony. Certainly, some undue external influence or threat in close proximity is highly probable.

At one point, the expert was asked specifically to explain the scope of her testimony to make it clear that she was not testifying that A.B. had in fact been sexually abused:

A. I am not testifying that abuse occurred in this case. I am stating that generally children do not lie when they claim they are sexually abused and when they later recant it is more often than not from undue influence or fear. And that is the consensus of the scientific community.

The defense was provided ample opportunity during cross-examination to confront Dr. Quackery's opinions as well as the chance to bring in its own expert witness. Allowing the evidence here in the face of the child victim’s changed story did not run afoul of our rules or the defendant’s rights.

Accordingly, the decision of the trial court is hereby ***affirmed***.

MERCY, J.A.D., dissenting

I find the majority's conclusions to be irreconcilable with a proper reading of the law and the Constitution and, therefore, I respectfully dissent.

The majority concludes that the errors on the defendant's arrest warrant were inadvertent and clerical. Based on the actual record in this case, I cannot agree. Instead, I am deeply troubled by what appears to be both deliberate subterfuge as to the address at which defendant could be found to search for evidence of the robberies and not to arrest defendant for child abuse, and a pattern of negligence and misconduct in securing arrest warrants generally on the part of the Paramus Police Department.

The testimony of the officer who made out the complaint and the warrant at the pretrial hearing is disturbing:

Q. You filled out the warrant application on September 29, correct?

A. Yes.

Q. Every bit of the warrant is in your handwriting, right?

A. Yes, except for the judge's signature.

Q. The date on the warrant is in your handwriting, too, right?

A. Yes.

Q. Isn't it true that you were reprimanded on another occasion for back dating an arrest warrant?

A. Yes.

Q. You did not personally take this warrant to the magistrate on the 29th, did you?

A. No.

Q. You don't have a copy of the warrant the magistrate signed from the official court files, do you?

A. No.

Q. And that's because the original filed copy is missing, right?

A. Yes.

Q. And the magistrate whose signature you say is on the warrant has died, right?

A. Yes.

Q. You knew when you filled out the warrant that A.B.M. was a suspect in the robberies, true?

A. Yes.

Q. And you knew you didn't have probable cause to get an arrest or a search warrant for A.B.M. or Mr. Kelly as to the robberies, right?

A. Right.

Q. And you knew Mr. Kelly didn't live at 1000 Fordham Place?

A. Yes, I knew that.

Q. And you entered that address anyway, didn't you?

A. I don't recall whether the Clerk, who helped me, or I made the error.

This exchange underscores the very serious issues that underlie the police actions in this case. The probability that this arrest warrant did not receive careful scrutiny by a neutral and detached magistrate cannot be gainsaid, and the likelihood that this was a back-dated document used as a pretext to justify pursuing the defendant and searching A.B.M.'s residence for evidence of the robberies is very real. This is not a case of a mere minor clerical error but rather a case where the very foundation of the police power to arrest is questionable at best. I see no distinction between this case and such cases as *State v. Handy*, 412 N.J. Super. 492 (App. Div. 2010), and I would find that the arrest pursuant to the warrant was unlawful.

The majority's reliance on *Herring v. United States*, 129 S. Ct. 695 (2009), is totally misplaced. First and foremost, the New Jersey Constitution "affords our citizens greater protection against unreasonable searches and seizures" than the Fourth Amendment. *State v. Novembrino*, 105 N.J. 95, 145 (1987) (finding that Article I, Paragraph 7, unlike the Fourth Amendment, does not provide a good-faith exception to exclusionary rule). There is therefore every reason to depart from the federal rule and apply our own jurisprudence and our own jurisprudence does not regard such errors as minor clerical mistakes of no consequence.

Second, even the *Herring* Court would apply the exclusionary rule where there is evidence of a clear institutional pattern by the police issuing deficient warrants. Other testimony by the officer at the pretrial hearing so indicates:

> Q. Officer Saturday, isn't it true that the Paramus Police Department has been sanctioned by the Attorney General's Office for issuing defective arrest warrants?
>
> A. Yes, but we are small police department with limited resources so mistakes happen. Nothing serious.
>
> Q. You were assigned the responsibility to prepare a report for the state Attorney General which concluded that Paramus has an 11% arrest warrant error rate, compared to 5% for the rest of Bergen County, correct?
>
> A. Yes, that is correct.

The majority suggests that the Paramus warrant error rate is no greater than that of the Alabama police department in *Herring*, but the *Herring* error was purely clerical without the direct involvement of the arresting police officer. Here we have the arresting officer in control of the warrant. Lacking probable cause to seize the defendant for robbery or search A.B.M.'s residence for robbery, the arresting officer suddenly ended up with a misdated, misaddressed warrant allegedly issued by a magistrate who is not alive to testify as to the circumstances of its issuance and where the original official filed warrant mysteriously cannot be found. The trial judge failed even to inquire into the factual assertions underlying this alleged warrant, and the identity of the informant is unknown to us. I cannot regard this as other than police misconduct fully warranting application of the exclusionary rule. Even the *Herring* Court held that "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." 129 S.Ct. at 702. This is exactly that type of case.

The majority also suggests that suspects whose constitutional rights are violated have access to other remedies. The practicality of alternative remedies as effective deterrents may be more presumptive than real. See Stewart Potter, *The Road Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365, 1387-88 (1983). Moreover, that entire theory of alternative remedies goes hand in hand with the notion of a good-faith exception to the warrant requirement -- a notion not accepted in our jurisprudence.

I therefore regard the warrant as fatally defective and all evidence seized pursuant to it -- both physical evidence and statements -- as inadmissible under the exclusionary rule. The illegality of this arrest and search cannot be saved by any notion of consent. *State v. Johnson*, 68 N.J. 349 (1975). See also *State v. Domicz*, 188 N.J. 285, 307 (2006); *State v. Todd*, 355 N.J. Super. 132 (App. Div. 2002). Consent cannot be implied from silence. *State v. Rice*, 115 N.J. Super. 128 (App. Div. 1971).

I also cannot agree with the majority as to the testimony of the State's expert witness in rebuttal. In my view, defendant's fundamental right to a fair trial was irreparably harmed when the trial judge allowed testimony by the expert that went beyond permissible limits and amounted to an expert opinion that A.B.'s initial allegations against the defendant were nearly certainly true. In essence, the jury was provided with unreliable and prejudicial evidence disguised as an expert witness conclusion.

I am troubled by the increased use of expert witness testimony in child sexual abuse cases-particularly where the forensic evidence is problematic. Recent case history should give us pause as, too often, we have seen innocent defendants convicted of sexual assault based not on objective evidence but on the testimony of so-called child sex abuse experts. The names of these travesties of justice must haunt all courts where a defendant is convicted by expert testimony. McMartin Day Care Center, Wenatchee, among others, will live in the same infamy as the Salem Witch Trials, where so-called experts were similarly used to explain the recantation of an accusation.

Expert testimony is appropriate where it is used to assist the jury to better comprehend facts and issues that are not readily apparent to the average juror of ordinary intelligence and experience. We allow the expert to testify to facts as well as to draw conclusions from those facts. However, the expert witness is not permitted to stray beyond the facts to engage in baseless speculation and conjecture. A witness offered as an expert may never express her opinion as to the truthfulness of a statement by another witness. *State v. J.Q.*, 252 N.J. Super. 11, 39 (App. Div. 1991), *aff'd* 130 N.J. 554 (1993). *J.Q.* involved accusations of child sexual abuse where the expert testified that she believed in the truthfulness of the alleged victims. The Supreme Court held such testimony entirely improper for, if it were based on a credibility assessment of the children, it "would introduce an unwarranted aura of scientific reliability to the analysis of credibility issues," 130 N.J. at 577-78, and if it were offered as a purported part of the Child Sexual Abuse Accommodation Syndrome (CSAAS), it would be improper opinion evidence because the scientific community does not accept CSAAS as a method to detect abuse. *Id*.

While Dr. Quackery testified that she was not assessing the truthfulness of A.B.'s conflicting statements, when viewed in the context of the State's entire case that is effectively what occurred. A careful reading of her testimony demonstrates that her statements, in the guise of expert opinion, were used to establish that A.B.'s recantation was based on undue influence and that her earlier claims of abuse were most certainly true. Dr. Quackery's testimony was that there was a high statistical certainty that A.B. was lying when she recanted her earlier accusations. By sleight of hand, the State effectively used its expert witness to accuse the defendant (the "co-parent") of employing "undue influence or threats" to silence his accuser. The damaging effect of this testimony is underscored by the absence of a scientific basis for it:

> Q. Isn't it true that have never met or spoken with A.B. before seeing her today in court?
>
> A. Yes that is correct.
>
> Q. And it is also true that you have never met or spoken with A.B.M. or the defendant, correct?
>
> A. Well yes but I am only here testifying about CSAAS. I am not testifying whether CSASS applied to A.B. or not.
>
> Q. Can you provide any evidence whether CSAAS has been validated? I mean what is its predictive value. You say for example that fewer than 10% of children might not be telling the truth when they claim sexual abuse. Is there statistical evidence to support that assertion?
>
> A. Well that is based on the general consensus of the professional discipline looking at several actual anecdotal case studies.

Thus, Dr. Quackery's opinion was not based on scientific observation but on personal intuitive evaluation, which has no basis in evidence. Here, personal speculation was offered to the jury in the guise of expert opinion, and the testimony inevitably had the same effect as if the witness had flatly said that (1) sexual abuse had occurred and (2) the defendant who had earlier been accused by A.B. was most certainly the culprit. This type of testimony is not permitted. *State v. J.Q.*, 130 N.J. at 577-578. See also *State v. Frisby*, 174 N.J. 583, 594-595 (2002); *State v. Pasterick*, 285 N.J. Super. 607, 620 (App. Div. 1995).

The damaging effect is underscored by the fact that, without the expert testimony, the State's case against the defendant is far from overwhelming. Officer Saturday admitted on cross examination that no corroborating physical evidence of any kind was found and the defendant refused to sign a written statement of his supposed confession:

> Q. Now isn't it true that the defendant refused to sign a written statement you prepared, stating it was a lie?
>
> A. Yes, that is correct.
>
> Q. Isn't it true that the defendant later explained his statements: "I am sorry I did it. It was a mistake. I am not a bad person. What I did was wrong," that he was referring to keeping A.B. home from school to go to the zoo that day and not to sexually abuse her?
>
> A. Yes he said that.
>
> Q. Officer, isn't it true that you did not find any physical evidence of any kind to support A.B.'s allegation?
>
> A. That is correct.

Officer Kannon's testimony on cross-examination was no more convincing:

> Q. Officer Kannon, isn't it true that you had a physician trained in child sexual abuse physically examine A.B. and that the result was inconclusive whether A.B. had been sexually abused?
>
> A. That is correct.
>
> Q. Isn't it also true that DYFS prepared a psychological report on A.B that was inconclusive whether A.B. had been sexually abused?
>
> A. Yes.

Since the forensic and psychological examinations of A.B. were inconclusive, A.B. recanted her earlier allegations that the defendant sexually assaulted her, the defendant denies that he confessed such to the police and there was no corroborative evidence that an assault ever took place, I am convinced that a reasonable jury would have found reasonable doubt as to the defendant's guilt but for the improper testimony of Dr. Quackery. Defendant timely objected to the testimony based on relevance, on its potential for undue prejudice and on its tendency to invade the province of the jury as improper expert testimony. The trial court should have excluded the testimony and it was error not to do so.

I dissent.

IN THE SUPREME COURT
OF THE STATE OF NEW JERSEY

No. 61,804

STATE OF NEW JERSEY	:	
	:	
v.	:	**ORDER**
	:	
GEORGE KELLY,	:	
	:	
Defendant-Appellant.	:	
_____	:	

This matter having been brought before the Court on September 7, 2010, by the defendant-appellant, it is, on this 8th day of September 2010, hereby docketed as to all appropriate issues. Simultaneous briefing is directed and both parties are to file briefs with the Court on or before November 22, 2010.

Jonus Pettifogger, Deputy Clerk
For the Court