

Summary of SC93855, *State of Missouri v. David Russell Hosier*

Appeal from the Cole County circuit court, Judge Patricia S. Joyce

Argued and submitted October 2, 2014; opinion issued February 3, 2015

Attorneys: Hosier was represented by Craig A. Johnston of the public defender's office in Columbia, (573) 777-9977, and the state was represented by Gregory L. Barnes of the attorney general's office in Jefferson City, (573) 751-3321.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A man convicted of murder and sentenced to death for the shooting death of a woman who had ended a romantic relationship with him appeals. In a unanimous decision written by Chief Justice Mary R. Russell, the Supreme Court of Missouri affirms the judgment.

Without deciding whether the “ping order” used to locate the man’s cellular telephone violated the Fourth Amendment, the evidence ultimately seized from the man’s vehicle after he was stopped in Oklahoma was admissible. He led the Oklahoma authorities on a chase, giving them reasonable suspicion to stop him, and evidence they found on his person or saw in plain sight in his vehicle – coupled with information they learned from Missouri authorities – gave them probable cause to obtain and execute a search warrant of his vehicle. He was not seized until he yielded to police by stopping his vehicle, so the stop did not violate the Fourth Amendment, and the evidence seized from the vehicle was the result of a lawful stop. Additionally, there was probable cause supporting the warrant to search the man’s apartment, and evidence seized during that search was admissible.

The trial court did not abuse its discretion in admitting photographs of weapons and unspent ammunition that were seized from the man’s vehicle but that were not alleged to be used during the crime. The trial court did not abuse its discretion in admitting certain hearsay statements from the victim, which were admissible under the doctrine of forfeiture by wrongdoing because the man’s actions were intended to prevent her from testifying. There was sufficient evidence that the man committed first-degree burglary. The trial court did not abuse its discretion in admitting a note that was found in the man’s vehicle during his flight following the murder and that was authenticated by circumstantial evidence. In its independent proportionality review, the Court does not find the man’s sentence to be disproportionate.

Facts: The bodies of Angela Gilpin and her husband were found in the hallway of their Jefferson City apartment building. The city police found 9-millimeter shell casings in the foyer and the apartment, and an autopsy later revealed that Gilpin died from gunshot wounds to the head and torso and that her husband died from gunshot wounds to the chest. Gilpin’s purse contained an application for a protective order from David Hosier, whom she wrote was stalking and harassing her and whom she indicated had “lots of weapons.” The police learned that Gilpin had been involved in a romantic relationship with Hosier but had ended it when she reconciled with her husband. Relying on information the police learned from the Gilpins’ landlord, two of their neighbors, Hosier’s former employer and threatening messages toward Gilpin that Hosier had

left on the cell phone of one of the neighbors, Missouri authorities obtained a search warrant for Hosier's apartment, where they found 9-millimeter ammunition, an empty box of 9-millimeter shells and the schematic for a 9-millimeter STEN machine gun. When they applied for the search warrant, they also applied for a "ping order" to use the cellular telephone towers that Hosier's cellular telephone "pinged" to determine his real-time location based on his phone's location. Using the ping order, police determined Hosier was traveling south through Oklahoma, so they alerted Oklahoma law enforcement officials that a "wanted car and person" was in the area. An Oklahoma officer spotted Hosier's car and activated his emergency lights to pull over Hosier. Hosier did not stop, however, and led police on a "moderate speed chase," evading one road block. When he finally stopped, Hosier exited his vehicle saying "Shoot me, and get it over with" or "end it." The officers placed Hosier in handcuffs and found a knife on his person; in plain view in his vehicle, police saw a bulletproof vest, pistol holder and gun. Oklahoma authorities obtained a search warrant for Hosier's vehicle, in which they found two cellular telephones, a knife next to the driver's seat, a bulletproof vest, 400 rounds of ammunition, and 15 firearms, including an unloaded STEN machine gun capable of firing 9-millimeter ammunition. This gun later was determined to be the murder weapon. They also found two notes, including one with Gilpin's vehicle information and the other offering incriminating evidence that Hosier had harmed someone. Missouri subsequently charged Hosier with first-degree murder for Gilpin's death, armed criminal action, first-degree burglary and unlawful possession of a firearm by a felon. A jury found him guilty as charged, and following the penalty phase trial, the jury recommended Hosier be sentenced to death. The trial court entered judgment on the verdict and sentenced Hosier to death for the murder charge, 15 years in prison for armed criminal action, 15 years for burglary and seven years for being a felon in possession of a firearm. Hosier appeals.

AFFIRMED.

Court en banc holds: (1) The evidence seized from Hosier's vehicle was admissible. Missouri authorities obtained the ping order pursuant to a federal statute that requires specific and articulable facts showing there are reasonable grounds to believe the contents of electronic communication or other records or information sought are relevant and material to an ongoing criminal investigation. This is a lesser standard than the probable cause the state and federal constitutions require to obtain a search warrant. No Missouri court has ruled on the issue of whether police must show probable cause to seek cellular telephone location data through a ping order, and courts that have considered the issue reach differing results. Even if this Court assumes – without deciding whether relying on the less stringent standard of the federal statute to obtain the ping order violated the Fourth Amendment – the evidence was admissible because it was "purged of the primary taint." Although the first attempt to stop Hosier in Oklahoma occurred about two hours after the Jefferson City police obtained the ping order, the intervening event of Hosier leading Oklahoma authorities on a chase gave them reasonable suspicion to stop him, and the bulletproof vest, knife, gun and pistol holder officers found on Hosier or in plain view in his vehicle – coupled with the information they learned from Jefferson City police – gave them probable cause to obtain and execute a search warrant independent of the ping order. Further, under a 1991 United States Supreme Court decision, Hosier was not "seized" until he submitted to police authority by stopping his vehicle. By that point, he had led police on a moderate speed chase, violating numerous traffic laws and giving Oklahoma authorities probable cause to stop him for those violations. Because there was probable cause to stop him for the

traffic violations, and because Hosier was not seized until he yielded to police by stopping his vehicle, the stop in Oklahoma did not violate the Fourth Amendment. Because the evidence seized from Hosier's vehicle was the result of a lawful stop, it was admissible.

(2) Evidence seized from Hosier's apartment was admissible. There was probable cause to believe there would be evidence of the crime in Hosier's home that supported the warrant to search his apartment. About four hours after discovering Gilpin's death, police applied for a search warrant. In his affidavit supporting the application, the detective stated that: he had found the bodies of two victims and spent cartridges from a 9-millimeter weapon; the neighbor had messages on her cellular telephone from Hosier with a threatening tone toward Gilpin; Gilpin told her landlord that Hosier was threatening her and that she wanted to move because she was afraid of Hosier; the landlord had told Hosier to move out; court records indicated Gilpin had applied for an order of protection from Hosier; and Hosier's former employer had fired Hosier for harassing and stalking Gilpin. While the affidavit does not provide a timeline or the content of the threats, it identifies four different sources indicating Hosier had been threatening, stalking or harassing Gilpin.

(3) The trial court did not abuse its discretion in admitting photographs of 14 weapons and unspent ammunition that were seized from Hosier's vehicle but that were not alleged to be used during the crime. The weapons and ammunition were relevant because they were found in Hosier's vehicle during his flight from Jefferson City after the murders, as evidence of flight is admissible to show consciousness of guilt. Any prejudicial effect they would have had was minimized by admitting only photographs of the evidence rather than the weapons and ammunition themselves, and numerous other weapons found in Hosier's apartment and storage shed were introduced at trial, eliminating any prejudicial value of weapons found in his vehicle.

(4) The trial court did not abuse its discretion in admitting certain hearsay statements by Gilpin. Statements she made on her application for an order of protection from Hosier – found on her person the night of her murder – that were read to the jury did not violate Hosier's Sixth Amendment rights. Even if the statements were inadmissible under the confrontation clause, they were admissible under the doctrine of forfeiture by wrongdoing, which provides that if a defendant made the declarant absent with the intent to prevent the declarant to testify against the defendant, then the declarant's statements may be admissible. There was ample evidence from the neighbors, the landlord and Hosier's former employer that Hosier had been harassing Gilpin before her death and that Gilpin had sought judicial intervention. His actions were intended to cause Gilpin to be unavailable to testify. Statements Gilpin made to her landlord about Hosier and the letter she sent her landlord also were admissible under this doctrine.

(5) There was sufficient evidence that Hosier committed first-degree burglary. A person commits this crime when he knowingly enters unlawfully or knowingly remains unlawfully in a building for the purpose of committing a crime there when he is not licensed or privileged to enter or remain in the building. The evidence showed that the landlord expressly told Hosier he no longer was allowed in Gilpin's building, that Gilpin's body was found in the hallway of her building, that Hosier asked his neighbor to call his family and check on his storage locker "in case something happened" and that he left Jefferson City directly after the murders. This was

sufficient evidence from which a reasonable juror could find Hosier had entered the building with the intent to commit a murder.

(6) The trial court did not abuse its discretion in admitting a note found in Hosier's vehicle. The note was authenticated by circumstantial evidence – it was found in Hosier's vehicle that was in continuous flight from the murder scene when it was stopped; it was written on the same type of paper as the note he left on his neighbor's vehicle; and the sentiment of the note was consistent with communications about his relationship with Gilpin to his neighbors and his statements to Oklahoma authorities to "just end it" when he stopped his vehicle.

(7) In its independent proportionality review, this Court does not find Hosier's sentence to be disproportionate. It was not imposed under the influence of passion, prejudice or other arbitrary factor; the evidence supports the jury's findings of two statutory aggravating factors; and the death sentence is neither excessive nor disproportionate to the penalty imposed in similar cases.