IN THE SUPREME COURT OF WISCONSIN

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No. 2008-AP-0658-CR

STATE OF WISCONSIN,

Plaintiff–Respondent,

v.

MICHAEL A. SVEUM,

Defendant–Appellant-Petitioner.

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

On Review from Wisconsin Court of Appeals,
District IV

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INTRODUCTION

The state misapprehends both the reality of seizures of private property, which interfered with an owner's possessory right to exclude others, not just with his right to resume use of his property when the police are done attaching something to it. The state also mistakes a court order for a valid warrant, although both the text of the Fourth Amendment and the United States Supreme Court require more of a "warrant" than this order supplied.

REPLY

I. SVEUM'S OWN FOURTH AMENDMENT INTERESTS UNDISPUTEDLY WERE AT STAKE.

Focusing primarily on the question of a search, the state suggests now that Sveum failed to prove that state actors invaded his own reasonable expectation of privacy. BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT at 9-10 (January 26, 2010).

That concern is misplaced. As the circuit court correctly found, Det. Ricksecker's affidavit itself established that Sveum was the primary user or driver of the car at issue and that he resided, in all probability, where that car was parked. R116:104. The circuit court was right. The affidavit attested to Sveum's dominion and control over the car and his residence at one of two places, including the home where police attached the GPS unit to the undercarriage of his car. R40:21-22, A. App. 1-2.

After obtaining a court order on the basis of a sworn assertion that this was Sveum's car and also was a place where he resided, the state is in a poor position to complain now about an absence of proof.

II. THE POLICE REPEATEDLY SEIZED AND SEARCHED SVEUM'S PROPERTY.

The state makes no real effort to address Sveum's principal point: three temporary seizures of his car occurred when the police crawled under it and affixed an object to the undercarriage for their own purposes, without Sveum's knowledge or consent. In framing the issue instead as whether monitoring Sveum's car on public thoroughfares was a search, the state addresses arguments that Sveum does not make.

Sveum does not contend that traveling with the GPS device amounted to a search. He argues that it was a seizure, an electronic tether that interfered with his possessory right to exclude others from making use of his automobile. He also argues that police officers effected a Fourth Amendment seizure when they temporarily appropriated his car three times to crawl under it and attach the GPS device.

The essence of the seizure here was not depriving Sveum of the possessory use of his automobile. It was depriving him of the essential possessory right of excluding others from using his car. "One of the main rights attaching to property is the right to exclude others," Justice Rehnquist wrote for the Supreme Court in ***Rakas v. Illinois***, 439 U.S. 128, 143 n.12 (1978), citing Blackstone. And, ***Rakas*** continued, "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude." 439 U.S. at 143 n.12. It is not that Sveum was unable to use his car; it is that the police *were* able to use his car, without his

knowledge and contrary to his interests. That is a seizure. The Seventh Circuit missed that entirely in ***United States v. Garcia***, 474 F.3d 994 (7th Cir. 2007).

III. THE COURT ORDER WAS NOT A VALID WARRANT.

Faced with the temporary seizures required to attach the GPS device to Sveum's car, and the usurpation of Sveum's right to the exclusive use of his property by attachment of an electronic tether, the state turns to an alternative justification for the judgment of the court of appeals: the April 22, 2003, court order was a search warrant for purposes of the Fourth Amendment. That alternative argument runs headlong into potential trouble under waiver doctrine, given the state's argument to the trial court. Even on its merits, at best the court order met only the probable cause requirement of the Fourth Amendment. It did not meet other constitutional requirements for a warrant. So assuming for the sake of argument that the state demonstrated probable cause, Judge Callaway's order was not a "warrant" that the Fourth Amendment recognizes and no reasonable police officer would have thought that it was.

A. *Waiver.*

Like any other litigant, the state may both forfeit and waive arguments. *See, e.g.*, ***State v. Milashoski***, 159 Wis. 2d 99, 108-09, 464 N.W.2d 21, 25 (Ct. App. 1990); ***State v. Lopez***, 2001 WI App 265, ¶¶ 23-24, 249 Wis. 2d 44, 60-61, 637 N.W.2d 468, 476-77; ***State v. Nawrocki***, 2008 WI App 23, ¶ 2 n.3, 308 Wis. 2d 227, 231 n.3, 746 N.W.2d 509, 511 n.3. In brief, a forfeiture is a failure timely to assert a right or claim. A waiver is the intentional relinquishment of a known right or claim. *See generally* ***State v. Ndina***, 2009 WI 21, ¶¶ 29-30, 315 Wis. 2d 653, 670, 761 N.W.2d 612, 620.

Waiver gets murky, though, when a respondent seeks to support a decision below on alternate grounds. Ordinarily, a respondent may point to any basis for upholding the decision below, even if the lower court overlooked or disclaimed it. The court of appeals even has refused to enforce the waiver rule against the state when it seeks affirmance on appeal on an argument contrary to its position in the trial court. *See* ***State v. Holt***, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679, 686-87 (Ct. App. 1985). The court of appeals later explained ***Holt*** this way: "we may address a respondent's argument that is otherwise waived if the respondent seeks to uphold the trial court's ruling and the argument does not require any fact-finding." ***State v. Ortiz***, 2001 WI App 215, ¶¶ 25, 247 Wis. 2d 836, 848, 634 N.W.2d 860, 866.

But the court of appeals also has distinguished ***Holt*** more than once and bound the state to its waivers. *See, e.g.,* ***Milashoski***, 159 Wis. 2d at 108-09, 464 N.W.2d at 25; ***State v. Nichelson***, 220 Wis. 2d 214, 229-31, 582 N.W.2d 460, 467-68 (Ct. App. 1998); ***Ortiz***, 2001 WI App 215, ¶¶ 25-26, 247 Wis. 2d at 848, 634 N.W.2d at 866.

In the circuit court, the state well may have waived the argument that the court order here was a search warrant. Specifically, the prosecutor argued to the trial court "why a search warrant is not appropriate." R116:98. Expanding, he said:

> Because, as [defense] counsel pointed out, if it's a search warrant, they've got to return it within five days which totally defeats the purpose of the device. He could have not gone to a phone booth for five days. Now the search warrant has to be returned. And then on the sixth day he goes to a phone booth, not because the GPS device is on the car, but because that's what he choose to do.

> That was his pattern of conduct. He wasn't—He had to work for five days, whatever it is. So that's why using a search warrant to engage in the activity that we engaged in here makes no sense.

R116:98.

The prosecutor went on to note the point that he wished to "emphasize to the court, is this is not a search." R116:98. He elaborated on why no search or seizure occurred and concluded:

> A search warrant should not be required and I claim you don't even have to reach the question because an adequate probable cause affidavit was presented to Judge Callaway to justify more than the actions the police took here in order to be able to discover the defendant's activities, which activities were probably going to be activities engaging in stalking of Jamie Johnson. And, as long as that was probably true, we have met the requirements of any perception of an invasion of privacy if that's the analysis, of a Fourth Amendment analysis. We have justified our action to an independent magistrate.

R116:99.

While the state insisted that there was a probable cause showing and a court order, this Court can understand that argument as an explicit waiver of the proposition that the Fourth Amendment required a *warrant* or that the court order in fact was a warrant within

the ambit of the Fourth Amendment. Further, the Court need not relieve the state of its waiver. A seasoned prosecutor deliberately staked out the position in the trial court that a search warrant "is not appropriate" in the context of surreptitiously attaching and monitoring a car with a GPS device. R116:98.

B. *Not a Valid Warrant.*

Waiver or no, Judge Callaway's order fell short of Fourth Amendment requirements[*] of a warrant. The state's argument supporting that order centers on probable cause. Indeed, it addresses nothing else.

Assuming without conceding that Det. Ricksecker's affidavit established probable cause, that alone does not make the court order a "warrant" under the Fourth Amendment. This order invited multiple entries and seizures on a single showing of probable cause. It found only that installation of a tracking device on Sveum's car was "relevant to an on-going criminal investigation and that the vehicle is being used in the commission of a crime of stalking," R40:25, A. App. 5, not that the order itself would lead to seizure of evidence of a crime, let alone where or when. Certainly there was no particular designation of the information or evidence to be seized. The order then allowed open-ended search or seizure, or both, for up to 60 days. It failed to

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[*] The court order also failed requirements of Ch. 968 of the Wisconsin Statutes. *See, e.g.*, WIS. STAT. §§ 968.15 (5-day execution requirement), 968.17 (48-hour return requirement), 968.12(1) (the order leaves a question whether it authorized seizing "designated property or kinds of property"). But Sveum limits his discussion here to the constitutional shortcomings of the court order that cannot be excused as harmless. Only a true "warrant" survives minor failings. *See* WIS. STAT. § 968.22. Sveum's argument is not that this was a warrant marred by technical defects. His argument is that it was not a "warrant" at all, as the Fourth Amendment understands such a document.

provide for notice to the target of the search or seizure after execution of the order. And it required no return to the court.

Those are essentials of a valid warrant. Yet all were absent here. This order was not a warrant as the Fourth Amendment comprehends that word. For good reasons, the court of appeals decided this case on the assumption that the state's actions were warrantless.

1. *Particularity*. The requirement that a warrant identify with particularity the objects to be seized is textual, not judicial. The Fourth Amendment commands explicitly that warrants may not issue unless "particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. Considering a search warrant that did rest on probable cause and did describe the place to be searched, but did not describe the evidence to be seized, the Supreme Court wrote, "The warrant was plainly invalid." ***Groh v. Ramirez***, 540 U.S. 551, 557 (2004). The fact that the application described items for seizure did not save the warrant. ***Groh***, 540 U.S. at 557. To the contrary, "the warrant did not describe the items to be seized *at all*. In this respect the warrant was so obviously deficient that we must regard the search as 'warrantless' within the meaning of our case law." ***Id***. at 558 (italics in original); *see generally* ***Marron v. United States***, 275 U.S. 192, 195-96 (1927) (reviewing history and purposes of particularity requirement).

2. *Timely Execution*. The court order here allowed officers to monitor a GPS device on Sveum's car for up to sixty days after issuance of the order. R40:26, A. App. 6. That set a plainly unreasonable expanse of time in which to search and seize, at least on a single application. By statute, Wisconsin allows only five days in which to execute a warrant. WIS. STAT. § 968.15. While that statutory period itself is not necessarily a constitutional requirement, it also has been clear for almost 80 years that a new warrant then is necessary. And

"[t]he new warrant must rest upon a proper finding and statement by the commissioner that probable cause then exists. That determination, as of that time, cannot be left to mere inference or conjecture." ***Sgro v. United States***, 287 U.S. 206, 211 (1932).

Indeed, even executing a warrant within Wisconsin's statutory five-day period is no guarantee of the necessary reasonableness. "Irrespective of compliance with a rule or statutory time limit within which a search must be executed, a delay in the execution of a warrant may be constitutionally impermissible under the Fourth Amendment." ***State v. Edwards***, 98 Wis. 2d 367, 372, 297 N.W.2d 12, 14-15 (1980). "We also believe," this Court continued, "that any consideration of the timeliness of the execution of a search warrant necessarily requires an inquiry into the continued existence of probable cause at the time of the execution." ***Edwards***, 98 Wis. 2d at 372, 297 N.W.2d at 15.

The court order here presented a related problem. Sveum's case is close to ***Berger v. New York***, 388 U.S. 41 (1967), where the Supreme Court invalidated a New York eavesdropping statute under the Fourth Amendment in part because "authorization of eavesdropping for a two month period is the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause." ***Berger***, 388 U.S. at 59. A leading academic commentator on the Fourth Amendment observes that "a warrant may be executed only once, and thus where police unsuccessfully searched premises for a gun and departed but then returned an hour later and searched further because in the interim an informant told the police of the precise location of the gun, the second search could not be justified as an additional search under authority of the warrant." 2 Wayne R. LaFave, SEARCH AND SEIZURE § 4.10(d), at 767 (4th ed. 2004); *see also* ***State v. Parsons***, 83 N.J. Super. 430, 447-48, 200 A.2d 340, 350 (A.D. 1964); ***State v. Trujillo***, 95 N.M. 535, 539, 624 P.2d 44, 48 (1981).

Here, the court order purported to invite not just 60 days of continued searches and seizures, but as many re-entries as necessary to replace batteries on the GPS device. R40:25-26, A. App. 5-6. That explicitly invited more than one search or seizure on the authority of a single warrant and a single showing of probable cause, contrary to this rule.

At a minimum, the court order here invited second or subsequent searches well after probable cause may have become stale, contrary to ***Edwards*** and ***Sgro***. These related problems of timeliness and repetition of execution combine to make the court order something outside the ambit of a Fourth Amendment warrant.

3. *Notice*. "'The presence of a search warrant serves a high function,'" the Supreme Court noted in ***Groh v. Ramirez***, 540 U.S. at 557, quoting ***McDonald v. United States***, 335 U.S. 451, 455 (1948). Part of that high function is providing a document that either is known to the person whose home is searched or is available for the person's inspection, as ***Groh v. Ramirez*** explained. 540 U.S. at 557. The absence of a requirement for notice was one factor that contributed to the ***Berger*** Court's refusal to find New York's eavesdropping statute congruent with the Fourth Amendment. 388 U.S. at 60 ("the statute's procedure, necessarily because its success depends on secrecy, has no requirement for notice as do conventional warrants, nor does it overcome this defect by requiring some showing of special facts").

Notice of the authority for and purposes of a search are important enough to give rise to a due process right. "It follows that when law enforcement agents seize property pursuant to a warrant, due process requires them to take reasonable steps to give notice that the property has been taken so the owner can pursue available remedies for its return." ***City of West Covina v. Perkins***, 525 U.S. 234, 240 (1999). This, of course, is the basic purpose of statutes requiring a

receipt after a search and seizure, just as WIS. STAT. § 968.18 does. The absence of a receipt was one more statutory violation here.

More importantly, the absence of any timely notice to Sveum, either before or after police repeatedly seized his car, secretly attached something to it, and used their electronic tether to monitor his movements in the car for weeks, denied due process under ***Perkins***. The denial of due process adds to the unreasonableness of these seizures (and searches).

4. *Timely Return*. Another Fourth Amendment failing that ***Berger*** identified in New York's eavesdropping statute was that it did not "provide for a return on the warrant thereby leaving full discretion in the officer as to the use of seized conversations of innocent as well as guilty parties." ***Berger***, 388 U.S. at 60. This court order has exactly the same failing. It required no return at all.

C. *No Reasonable Officer Would Have Thought the Order Adequate Under the Fourth Amendment.*

In whole, the Fourth Amendment makes clear that mere probable cause plus a judge's signature do not a warrant make. Additional requirements of particularity in the items officers may seize, timely execution, notice after a search, and timely return are not new or unforeseen. As ***Groh v. Ramirez*** held, the facial defect in particularity of the items to be seized alone meant that "no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid." 540 U.S. at 563.

This case is more striking, and less amenable to the good faith exception of ***United States v. Leon***, 468 U.S. 897 (1984), because the absence of particularity hardly was the only facial defect in this court order. On its face, the court order did not even claim to be a

warrant. Rightly; it was not. This is no case for saving a warrantless search on good faith.

CONCLUSION

Michael Sveum requests again that this Court REVERSE the judgment of the Wisconsin Court of Appeals and REMAND.

Dated at Madison, Wisconsin, February 5, 2010.

Respectfully submitted,

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CERTIFICATION

I certify that this reply brief conforms with the rules contained in WIS. STAT. §§ 809.19(8)(b) and (c), for a brief produced using proportional serif font. The length of the portions of this reply brief described in WIS. STAT. § 809.19(1)(d), (e) and (f) is 2,992 words. *See* WIS. STAT. § 809.19(8)(c)1.

Dated this _____ day of February, 2010.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this reply brief, excluding the appendix, if any, which complies with the requirements of WIS. STAT. § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the reply brief filed as of this date.

A copy of this certificate has been served with the paper copies of this reply brief filed with the court and served on the opposing party.

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Dean A. Strang