STATE OF WISCONSIN

C O U R T OF A P P E A L S

DISTRICT I

2009AP002916 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

GREGORY M. SAHS,

Defendant-Appellant.

ON APPEAL TO REVIEW THE JUDGMENT OF CONVICTION
ENTERED ON MAY 4, 2009, THE HONORABLE
JEFFREY CONEN PRESIDING, ENTERED IN
THE CIRCUIT COURT FOR MILWAUKEE COUNTY.

BRIEF AND APPENDIX OF THE APPELLANT

ISSUE PRESENTED

I. Whether the Trial Court erred in denying both of Defendant's Motions to Exclude Evidence even though relevant case law required the exclusion of the evidence, a statement made to Probation and Parole, as well as the statement's derivative

evidence, in question?

Trial Court Answered: No

POSITION ON ORAL ARGUMENT AND PUBLICATION

This Appeal involves issues of law which are not settled. Arguments need to be presented in more detail in oral argument. Therefore, oral argument and publication are requested.

STATEMENT OF THE CASE

Defendant Gregory Sahs was charged in a two Count Criminal Complaint dated June 28, 2008. This Complaint charged Defendant with Possession of Child Pornography, contrary to Wis. Stats. 948.12(1m) & (3)(a). Essentially, Defendant was alleged to have possessed a computer that contained two photo recordings of child pornography. Law enforcement determined that the photos had been captured on two separate dates. Each Count applied to each photo recording. (2:1-2).

An initial appearance occurred on July 3, 2008. At that time, the Court Commissioner informed the Defendant of the maximum possible penalties. (22:2-3).

On July 24, 2008, Defendant waived his preliminary hearing. After this waiver, the Court Commissioner bound Defendant over for

trial. At that time, the State filed a Criminal Information. This Information contained the two original Counts originally charged in the Criminal Complaint. At that time, the Defendant entered pleas of Not Guilty to both Counts. (24:2-3; 6:1).

On October 27, 2008, Defendant filed two Motions to Exclude Evidence. His first Motion to Exclude Evidence sought to exclude statements that Defendant provided to his probation officer allegedly admitting to the conduct alleged in the Criminal Complaint. (7:1-7).

Defendant's second Motion to Exclude Evidence sought to exclude all evidence obtained by law enforcement after obtaining the Probation and Parole statement. This was derivative evidence. According to this second Motion, Defendant's probation officer provided this statement to law enforcement. Law enforcement then, as a result of this statement, obtained a search warrant, seized Defendant's computer, and obtained a custodial statement. Defendant sought to exclude this evidence as illegally obtained derivative evidence. (8:1-3).

On November 10, 2008, the State filed its Response to Defendant's Motions. (9:1-10).

On December 17, 2008, the trial court orally denied both of Defendant's Motions to Exclude Evidence. The trial judge was John Franke. (25:6-16). The trial court later issued a written Order Denying Defendant's Motions to Exclude Evidence. This Order was

dated January 12, 2009. The trial judge that signed this written Order was Jeffrey Conen. (10:1).

On February 9, 2009, Defendant changed his plea to that of Guilty as to Count One, pursuant to plea negotiations. The State agreed to dismiss and read in Count Two and not to issue any other charges out of this case. Finally, the State agreed to recommend the presumptive mandatory minimum of three years initial confinement with the defendant free to argue. (26:2). After a plea colloquy, the trial court convicted Defendant of Count One and adjourned sentencing. (26:10-11).

On April 30, 2009, the trial court sentenced Defendant to seven years prison, consisting of three years initial confinement plus four years extended supervision. The trial court issued a written Judgement of Conviction on May 4, 2009. (28:29-30; 18:1-2).

Defendant timely filed his Notice of Intent to Pursue Postconviction Relief. (19:1).

Defendant filed his Notice of Appeal in a timely fashion. This Brief is being submitted pursuant to the schedule established by the Court.

STATEMENT OF THE FACTS

Defendant Gregory Sahs was charged in a two Count Criminal Complaint dated June 28, 2008. This Complaint charged Defendant

with Possession of Child Pornography, contrary to Wis. Stats. 948.12(1m) & (3)(a). Essentially, the Complaint alleged that Defendant possessed a computer that contained two photo recordings of child pornography. Law enforcement determined that the photos had been captured on two separate dates. Each Count applied to each photo recording. The Complaint also indicated that the Defendant had given a statement admitting to that the computers belonged to him, that he had downloaded the material, that he did know the sexually explicit nature of the material, and that the material related to children. (2:1-2).

An initial appearance occurred on July 3, 2008. At that time, the Court Commissioner informed the Defendant of the maximum possible penalties. The Commissioner informed the Defendant that there was a presumptive minimum sentence of three years. (22:2-3).

On July 24, 2008, Defendant waived his preliminary hearing. After this waiver, the Court Commissioner bound Defendant over for trial. At that time, the State filed a Criminal Information. This Information contained the two original Counts originally charged in the Criminal Complaint. At that time, the Defendant entered pleas of Not Guilty to both Counts. (24:2-3; 6:1).

On October 27, 2008, Defendant filed two Motions to Exclude Evidence. His first Motion to Exclude Evidence sought to exclude written and oral statements that Defendant had provided to his probation officer allegedly admitting to the conduct alleged in the

Criminal Complaint. The Motion indicated that Defendant had provided these statements to his probation agent on January 12, 2007. The Defendant's rules of supervision required that he make these statements to his probation agent or face revocation of his probation. The written statement contained this notification. Because the Defendant had to make those statements or face revocation of his probation, the statements were compelled, testimonial, and incriminating. Therefore, exclusion was required. (7:1-7).

The first Motion indicated that Defendant had been placed on probation for three years in 2005. This, after a conviction of Possession of Child Pornography out of Waukesha County. Standard rules of probation included providing true and correct information when asked, submitting to polygraphs, and full cooperation with sex offender treatment. (7:1).

The first Motion also indicated that Defendant had participated in sex offender treatment as part of his probation rules of supervision. On December 15, 2005, he had failed a polygraph test on the question of whether he had broken any of his rules of supervision. The treatment provider temporarily expelled Defendant from the sex offender treatment program. Defendant's agent had been informed of this test result as well as Defendant's perceived noncompliance with treatment. Another polygraph had been scheduled for January 13, 2007. (7:1-2).

On January 12, 2007, Defendant attended a meeting with his probation agent, Michael Krause. He made oral statements that Mr. Krause noted in writing. The statements contained admissions to having accessed child pornography again on a personal computer that he had at a friend's house. The written statement was on a standard Department of Corrections form with a box checked off next to the following notification:

> "I have been advised that I must account in a true and accurate manner for my whereabouts and activities, and that failure to do so is a violation for which I could be revoked. I have also been advised that none of this information can be used against me in criminal proceedings."

The notification was at the top of the written statement. A checked box appeared in front of this notification.

Agent Krause took Defendant into custody and revoked his probation. (7:2).

The State's Response also acknowledges that Agent Krause, and not the Defendant, wrote the entire written statement on a Department of Corrections form. (9:2).

Defendant argued that Defendant's January 12, 2007 statements to Agent Krause had been compelled, were testimonial, and were incriminating. Therefore, these statements were inadmissible. (7:6).

Defendant's second Motion to Exclude Evidence sought to

exclude all evidence obtained by law enforcement after obtaining the Probation and Parole statement. According to this second Motion, Agent Krause provided Defendant's information obtained in statements to law enforcement. These were the written and oral statements made on January 12, 2007, as discussed in Defendant's First Motion to Exclude Evidence. Law enforcement then, as a result of these statements, obtained a search warrant, seized Defendant's computer, and obtained a custodial statement. The custodial statement related to the statements that Defendant had made to Agent Krause. Law enforcement obtained all of this evidence entirely due to the statements that Defendant had made to Agent Krause, and Agent Krause's subsequent passing on of the information to law enforcement. Defendant sought to exclude this evidence as illegally obtained derivative evidence. This, because the underlying original statements provided to Agent Krause were inadmissible, as argued in Defendant's first Motion to Exclude Evidence. (8:1-3).

On November 10, 2008, the State filed its Response to Defendant's Motions. (9:1-10).

On December 17, 2008, the trial court orally denied both of Defendant's Motions to Exclude Evidence. The trial court determined that the statements were not compelled. (25:8). The court determined that the Defendant had initiated the January 12, 2007 by calling his agent. The court concluded that the Defendant had

volunteered the information that he had been violating the rules, to include using a friend's computer to download images of child pornography. The court found these facts to be undisputed. The court denied suppression of these statements to Agent Krause, based upon these facts. Accordingly, the trial court also denied suppressing the fruits of those statements. (25:11-12). The court found that the facts were insufficient to show compulsion and, therefore, suppression was not warranted. (25:16).

On December 17, 2008, the trial court also indicated that, simply because an agent might revoke is not enough to establish compulsion. (25:14).

Here, the trial court insufficiently considered the written notification at the top of the January 12, 2007 statement. This notification was that "I have been advised that I must account in a truthful and accurate manner for my whereabouts and activities, and that failure to do so is a violation for which I could be revoked." There is a checked box in front of this notification. Defendant's First Motion to Exclude refers to this notification. The State's Response does not deny the existence of this notification. Clearly, this notification creates a requirement for probationers to provide information. Or, the probationer reasonably believes that revocation will occur. Whether or not this information must be in response to a probation agent's questions is irrelevant, under this notification. This notification does not so

limit the warning.

Furthermore, under the notification of the January 12 statement, failure to provide information creates the possibility of revocation. This is a threat that compels the providing of the statement. To threaten revocation is to threaten a loss of freedom. Clearly, this notification compels the statement. The statement is, therefore, legally compelled. This, regardless of whether or not Defendant voluntarily contacted his agent to schedule an appointment, and voluntarily appeared at this appointment. Contrary to the trial court, the compulsion does not occur in the appointment, but in the providing of the statement. Here, Defendant's statement was compelled.

Furthermore, the trial court ignores the process in the taking of the written statement itself. Agent Krause himself wrote out the written statement, with the notification box checked, on a Department of Corrections form. Clearly, Defendant did not have a choice in the matter. The notification required that Defendant provide the statement. This process clearly evidences compulsion. This, once again, regardless of whether or not Defendant voluntarily scheduled, and subsequently appeared at, the meeting.

The trial court later issued a written Order Denying Defendant's Motions to Exclude Evidence. This Order was dated January 12, 2009. The trial judge was Jeffrey Conen. (10:1).

Defendant subsequently pled guilty to one Count of the two

Count Criminal Information. The trial court eventually sentenced him to seven years prison, to consist of three years initial confinement plus four years extended supervision. (28:29-30).

Defendant filed his Notice of Appeal in a timely fashion. This Brief is being submitted pursuant to the schedule established by the Court.

ARGUMENT

I. DEFENDANT'S JANUARY 12, 2007 STATEMENT WAS COMPELLED. THEREFORE, THE TRIAL COURT ERRED IN DENYING DEFENDANT'S SUPPRESSION MOTION. FURTHERMORE, ALL SUBSEQUENT DERIVED EVIDENCE SHOULD HAVE ALSO BEEN SUPPRESSED.

A. The Trial Court Erred in Denying Defendant's First Motion to Exclude Evidence.

A written statement to a probation agent that contains the provision that the probationer must "account in a truthful and accurate manner for my whereabouts and activities, and that failure to do so is a violation for which I could be revoked," is compelled. Furthermore, the State has the burden of showing that such statements are not compelled. The Defendant does not have this burden. In re. Mark, 308 Wis.2d 191, 747 N.W.2d 727 (Ct.App. 2008).

Mark was a case that involved sexually violent commitment proceedings under Wis. Stats. 980. However, the Court of Appeals indicated that a respondent at a 980 commitment trial had the same

rights as a defendant in a criminal case. Therefore, a respondent's statement to a parole agent is properly excluded under the Fifth Amendment privilege against self-incrimination if it is testimonial, compelled, and incriminating. Id. at 199. Accordingly, this case applies to criminal cases.

Here, no party is disputing that Defendant's January 12, 2007 statement is both testimonial and incriminating. The only issue presented by the parties, and discussed by the trial court on December 17, 2008, was the issue of compulsion. Accordingly, this Brief will only discuss the matter of compulsion.

In Mark, the State offered into evidence at a Wis. Stat. 980 jury trial both a written and an oral statement provided by Mark to his parole agent. The written statement, signed by Mark, was on a form at the top of which was printed:

> "PROBATION/PAROLE OFFENDER I have been advised that I must account in a truthful and accurate manner for my whereabouts and activities, and that failure to do so is a violation for which I could be revoked. I have also been advised that none of this information can be used against me in criminal proceedings..."

This is the exact notification present on the top of the January 12, 2007 statement at issue in this present matter.

In Mark, the Court of Appeals concluded that the State had the burden of showing that the written statement was not compelled. The

Court discussed the written provision at the top of that statement. The Court discussed this provision as creating a perception on the part of Mark that he had an obligation to give a true and accurate account in order to avoid a revocation. The Court found important his thinking that he had an obligation to provide a true and accurate account in order to avoid a revocation. His perception created the compulsion. Based upon this statement, the Court concluded that this statement had been compelled. Id. at 208.

The Court in Mark did not base its conclusion as to compulsion on who asked the questions, or how the process of taking the written statement commenced. According to the Court's holding, the written notification supports a finding of compulsion; the probationer must provide a true and accurate statement in order to avoid a revocation. The perception that the probationer must provide a true and accurate account in order to avoid revocation is clearly crucial. Whether or not revocation occurs is not the test.

The Court's holding in Mark rebuts the trial court's conclusion that simply because an agent might institute revocation is not sufficient to establish coercion. As discussed, the probationer's perception, and not the actual commencement of revocation proceedings, is crucial to a finding of compulsion. The perception is the test.

Here, as discussed, the trial court insufficiently considered the written notification on the top of the January 12, 2007

statement. This notification is identical to that present in Mark. Defendant's First Motion to Exclude refers to this notification. The State's Response does not deny its existence. Clearly, as indicated in Mark, this notification creates a requirement for probationers to provide information. Whether or not this information must be in response to a probation agent's questions is irrelevant, under this notification. Mark essentially states that this notification does not so limit its warning. The notification creates the compulsion.

Furthermore, under the provision of the January 12 statement, failure to provide information creates the possibility of revocation. This is a threat that compels the providing of the statement. To threaten revocation is to threaten a loss of freedom. Clearly, a probationer thinks that failure to provide the statement will lead to revocation. This perception compels the statement. The notification creates the perception. Therefore, according to Mark, the statement is, therefore, compelled. This, regardless of whether or not Defendant voluntarily contacted his agent to schedule an appointment, and voluntarily appeared at this appointment. Contrary to the trial court, the compulsion does not occur in the appointment, but in the providing of the statement. Here, Defendant's statement was compelled.

Furthermore, the trial court ignores the process in the taking of the written statement itself. Agent Krause himself wrote out the

written statement, with the notification box checked, on a Department of Corrections form. Both parties agreed as to such a process. Logically, Defendant did not have a choice. The notification required that Defendant provide the written statement. Therefore, this process clearly evidences compulsion. This, regardless of whether or not Defendant voluntarily scheduled, and subsequently appeared at, the meeting.

Based upon the foregoing, Defendant's January 12, 2007 written statement to Agent Krause was compelled. The trial court erred in concluding otherwise. It must be suppressed.

B. Because the January 12, 2007 Statement had been Compelled, the Derivative Evidence must also be Suppressed.

The Fifth Amendment protection at trial also precludes the Government from presenting evidence that is the result or derivative use of compelled statements. The prosecution cannot use the compelled evidence in any respect, to include any evidence derived either directly or indirectly from such evidence. Kastigar vs. United States, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972), New Jersey vs. Portash, 440 U.S. 450, 99 S.Ct. 1292, 59 L.Ed.2d 501 (1979); In re. Mark, 308 Wis.2d 191 at 213-214.

Once a Defendant establishes that a statement is compelled, the Government has the burden of showing that it had an independent, legitimate source for the disputed evidence. There is an affirmative duty on the prosecution to prove that the evidence

that it proposes to use is derived from a legitimate source wholly independent of the compelled statement. Kastigar vs. United States, 406 U.S. 441 at 453, 460.

Here, the sole source of the law enforcement's evidence, to include the computer and Defendant's custodial statement, was the January 12, 2007 compelled statement to Agent Krause. Even the State's Response acknowledges that the sole source of the police department's information concerning the content of the statement arrived from Agent Krause. The State indicates that, upon completion of the taking of the statement, Agent Krause took Defendant into custody and initiated revocation proceedings. Then, Agent Krause notified the appropriate police department regarding the Defendant's statements. Shortly thereafter, on January 24, 2007, law enforcement recovered the computer. On January 25, 2007, law enforcement obtained a custodial statement from the Defendant while he was in custody. On February 1, 2007, the Detective obtained a search warrant and examined the computer. Finally, the police Detective re-interrogated the Defendant on June 26, 2007. (9:2-3).

There is no legitimate, independent source for the evidence that law enforcement obtained in this matter. The sole source for all of this evidence is Defendant's compelled January 12, 2007 statement to Agent Krause. Accordingly, this Court must suppress all of this evidence.

CONCLUSION

The trial court erred in denying Defendant's Motion to Suppress his January 12, 2007 statement to Agent Krause. This statement was compelled. This Court should reverse this Order. Furthermore, all of the evidence that law enforcement obtained in this case was derived from this statement. Therefore, this Court must suppress all of this evidence.

Based upon the foregoing, Defendant respectfully requests that this Court reverse the Judgment of Conviction and Motion hearing Order. Defendant requests that this Court suppress the January 12, 2007 statement to Agent Krause and all derivative evidence, as discussed within this Brief. Defendant requests that this Court enter either: (1) enter Judgment of Acquittal; (2) allow Defendant to withdraw his guilty plea.

Dated this _____ day of January, 2010.

Respectfully Submitted,

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STATE OF WISCONSIN

C O U R T O F A P P E A L S

District I

Case No. 2009AP002916 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

GREGORY SAHS,

Defendant-Appellant

ON APPEAL TO REVIEW THE JUDGMENT OF CONVICTION
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THE CIRCUIT COURT FOR MILWAUKEE COUNTY.

BRIEF AND APPENDIX OF APPELLANT

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CERTIFICATION

I hereby certify that the Appellant's Brief of Defendant-Appellant in the matter of State of Wisconsin vs. Gregory Sahs, 2009AP001916-CR conforms to the rules contained in Wis. Stats. 809.19 (8)(b)(c) for a Brief with a monospaced font and that the length of the Brief is seventeen (17) pages.

Dated this 18th day of January, 2010, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-Appellant
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CERTIFICATION

I hereby certify that filed with this Brief, either as a separate document or as a part of this Brief, is an appendix that complies with Wis. Stats. 809.19(2)(a) and that contains:

(1) a table of contents;

(2) relevant trial court record entries;

(3) the findings or opinion of the trial court; and

(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decision showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 18th day of January, 2010, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-
Appellant

CERTIFICATION

I hereby certify that the text of the e-brief of Appellant's Appellant's Brief of Defendant-Appellant in the matter of State of Wisconsin vs. Gregory M. Sahs, Court of Appeals Case No. 2009 AP 2916-CR is identical to the text of the paper brief in this same case.

Dated this 18th day of January, 2010, in Waukesha, Wisconsin.

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