STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2010AP3034-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KENNETH M. SOBCZAK,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District II,
Affirming a Judgment of Conviction
Entered in Washington County,
the Honorable Patrick J. Faragher, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

ARGUMENT

I. As a Weekend Houseguest, Ms. Podella Lacked Actual or Apparent Authority to Consent to a Police Entry and Search of Mr. Sobczak's Home.

A. Ms. Podella's status as a weekend houseguest did not give her the actual authority to allow Officer Dorn to enter Mr. Sobczak's house and search his computer.

As it did in the court of appeals, the state maintains that a police "entry" into a dwelling is distinct from a "search" and may thus be justified on the consent of someone who does not live there. (Respondent's Brief at 5). The state continues to rely on a line of cases springing from a single paragraph of Professor LaFave's treatise. Mr. Sobczak has already noted that the paragraph rests on a questionable reading of one case from 1975. (Opening Brief at 10-12). The state does not argue to the contrary. Nor does it dispute Mr. Sobczak's observation that none of the other cases cited by the treatise approve an incursion as substantial as Officer Dorn's on the consent of a visitor as casual as Ms. Podella.[1] (Opening Brief at 13-15).

---

[1] As the state notes, in the court of appeals Mr. Sobczak asserted an independent privacy interest in his computer and disputed Ms. Podella's authority to consent to its search. (*See* Court of Appeals Appellant's Brief at 18-20; Respondent's Brief at 3). He is not pursuing that claim in this court. It does not follow, however, that Officer Dorn's examination of the computer is irrelevant to the remaining claim. The "entry" exception that the state posits and relies upon assumes a minimal intrusion into the home; most if not all the cases it cites involve the police simply crossing the threshold into a front room or entry area. To accept that a guest may allow the police into a foyer is not necessarily to

The state cites a few cases in addition to the ones Mr. Sobczak has already discussed. Most are simply not on point: In ***State v. Harrell***, the house sitter who gave consent was also the defendant, so whether such consent would be valid against the regular occupant of the home was not discussed. 2010 WI App 132, ¶11, 329 Wis. 2d 480, 791 N.W.2d 677. In ***State v. Tomlinson***, the police reasonably believed the consenting party to be one of the defendant's resident daughters. 2002 WI 91, ¶27, 254 Wis. 2d 502, 648 N.W.2d 367. ***Tomlinson*** thus does not address whether a non-resident may consent to police entry of a home; in fact its discussion suggests that a minor *resident* may lack authority over some areas of the home. ***Id.***, ¶32. In ***Hilbish v. State***, the search occurred in the defendant's yard, rather than her home; further the tarp that the officers looked under was owned by the visitor and the defendant owner explicitly authorized the visitor to consent to the search. 891 P.2d 841, 848-49 (Alaska Ct. App. 1995). The discussion in ***People v. Brown*** demonstrates that it is an apparent authority case. 515 N.E.2d 1285, 1290 (Ill. App. Ct. 1987). That is, the police were "entitled to assume" that a teenager coming out of a home in her pajamas was a resident. *See* ***id.*** at 1290-91.

Only ***People v. White*** addressed the actual authority of a visitor to consent to a police entry of the home. 64 P.3d 864, 872 (Colo. App. 2002). There, the visiting family friend's consent was held to authorize only the police entry of the defendant's father's house; the disputed evidence was discovered during an apparently consensual conversation with the defendant and the father. ***Id.*** at 869, 872.

---

accept that the guest may allow the police 20 or 30 feet into the home, and further allow the police to inspect containers within the home, whether those containers be cupboards, breadboxes or computers.

Foreign cases aside, the real problem with the state's "entry" theory is that it cannot be squared with the Supreme Court's jurisprudence. First, the notion that the government may "enter" a home with less justification than that required for a "search" is contrary to the firm line that the Court has drawn at the front door. ***Payton v. New York***, 445 U.S. 573, 590 (1980).

Second, the Court has announced only a "co-occupant consent rule"; and has never held that a visitor's consent can authorize the police to enter a private dwelling. ***Georgia v. Randolph***, 547 U.S. 103, 109 (2006). The critical language of ***United States v. Matlock*** bears repeating:

> The authority which justifies the third-party consent [rests on] mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

415 U.S. 164, 171 n.7 (1974). As ***Randolph*** explained, this rule is founded in "widely shared social expectations" and the "commonly held understanding about the authority that co-inhabitants may exercise in ways that affect each other's interests." 547 U.S. at 111.

Recognizing that Ms. Podella is not a co-inhabitant, the state seeks to read that term out of ***Matlock*** by claiming that it does not describe those who may consent. (Respondent's Brief at 13). A glance at the quotation above refutes this argument: "any of the co-inhabitants has the right to permit the inspection." The state also posits that the "thrust" of ***Matlock*** can be reduced to four words: "mutual use," "access" and "control" (Respondent's Brief at 13); it

ignores the fact that the opinion uses these words in reference to "co-inhabitants."

Nor does the state make any attempt to show the existence of any "widely-shared social expectation[]" that a houseguest may subject his or her host's premises to inspection. In fact, the social expectation is just the opposite, as Mr. Sobczak has previously argued and as ***Minnesota v. Olson*** confirms: "few houseguests will invite others to visit them while they are guests without consulting their hosts." (Opening Brief at 6-7); 495 U.S. 91, 99 (1990).[2] For this reason, ***Olson*** stated that guests "do not have the legal authority to determine who may or may not enter the household." ***Id.***

In sum, the state's "entry" theory is untenable in light of the Supreme Court's pronouncements on the nature of common authority. This court was right in ***State v. McGovern***: a citizen has a legitimate expectation of privacy in his or her home, right up to the front door. To cross that threshold, "a valid consent in the full constitutional sense [is] required." 77 Wis. 2d 203, 214, 252 N.W.2d 365 (1977). Ms. Podella, as a guest in Mr. Sobczak's home, was not empowered to give such consent.

---

[2] *See also* ***United States v. Cos***, 498 F.3d 1115, 1128 (10th Cir. 2007) (no "widely shared social expectation" that a resident forfeits the right to exclude the government by leaving a guest briefly alone in the dwelling). Instead of addressing any of the substance of ***Cos***, the state faults the Tenth Circuit for not "relying" on the ***Matlock*** phrase "assumed the risk." (Respondent's Brief at 16). The state's criticism is meritless. The ***Cos*** court simply declined to rely on that phrase *in isolation* from the rest of the ***Matlock*** discussion. *See* ***Cos***, 498 F.3d 1126. In other words, the state would prefer the ***Cos*** court do what it is asking of this one – disregard inconvenient language in ***Matlock*** and successor cases and instead focus on single words taken out of context.

B. Ms. Podella's apparent authority was no greater than her actual authority.

As Mr. Sobczak explained in his opening brief, the apparent authority doctrine announced in ***Illinois v. Rodriguez*** excuses only a police officer's reasonable mistakes of fact. 497 U.S. 177 (1990). Because Officer Dorn correctly understood all of the relevant facts about Ms. Podella's relationship to the premises, her apparent authority was no broader than her actual authority. (Opening Brief at 16-18).

The state insists to the contrary, urging that the doctrine creates a sort of vague, undefined nebula of searches that are "reasonable" even though not grounded in valid consent. The state's standardless standard defies basic principles of Fourth Amendment law, finds no support in any authorities (and is outright rejected by many), and is contrary to ***Rodriguez*** itself.

The state first accuses Mr. Sobczak of "ignore[ing]" that "consent itself is a question of fact." (Respondent's Brief at 19). It is not. As with all ultimate Fourth Amendment issues, whether the facts meet the constitutional standard is a question of law. *See, e.g.*, ***State v. Phillips***, 218 Wis. 2d 180, 194, 577 N.W.2d 794 (1998). Of all the cases the state cites, only one actually states that the authority to consent is a question of fact: the 1974 Texas case of ***Morrison v. State***, 508 S.W.2d 827, 828 (Tex. Crim. App. 1974). Texas has since changed its mind. ***Hubert v. State***, 312 S.W.3d 554, 560 (Tex. Crim. App. 2010).

The state next posits that, because the exclusionary rule is designed to deter unlawful police behavior, it should not be applied to cases where the officer holds a reasonable, but incorrect, view of the legality of his actions, rather than about the facts confronting him. (Respondent's Brief at

20-21). The state cites no case holding that an officer's misapprehension of the law can legalize his conduct. In fact, many cases hold to the contrary: an officer's mistaken view of the law will not justify a search. ***State v. Longcore***, 226 Wis. 2d 1, 9, 594 N.W.2d 412 (Ct. App. 1999), *aff'd*, 2000 WI 23, 233 Wis. 2d 278, 607 N.W.2d 620; ***U.S. v. Miller***, 146 F.3d 274, 279 (5th Cir. 1998); ***U.S. v. Lopez-Soto***, 205 F.3d 1101, 1106 (9th Cir. 2000); ***U.S. v. Chanthasouxat***, 342 F.3d 1271, 1276 (11th Cir.2003).

Though it is unable to cite a single case applying the apparent authority doctrine in the way it proposes, the state nevertheless asserts that the contrary authorities Mr. Sobczak relies upon "make no sense."[3] (Respondent's Brief at 20). The state is in error; there are three very good reasons for limiting apparent authority to an officer's mistakes of fact.

First, Fourth Amendment reasonableness is an objective standard, and does not concern itself with the subjective motives or beliefs of the individual police officer.

---

[3] Mr. Sobczak initially cited relatively few authorities on this point because he did not think it was open to serious dispute. In light of the state's position, however, what follows is a small sample of the many cases in support: ***United States v. Whitfield***, 939 F.2d 1071, 1073-74 (D.C. Cir. 1991) (agreeing that ***Rodriguez*** held only that "the Fourth Amendment does not invalidate warrantless searches based on a reasonable mistake of fact, as distinguished from a mistake of law"); ***United States v. Salinas-Cano***, 959 F.2d 861, 865 (10th Cir. 1992); ***United States v. Brown***, 961 F.2d 1039, 1041 (2d Cir. 1992); ***United States v. Howe***, 414 F. App'x 579, 581 (4th Cir. 2011); ***Petersen v. People***, 939 P.2d 824, 831 (Colo. 1997) ("the apparent authority rule applies to mistakes of fact, but cannot apply to mistakes of law without eviscerating the Fourth Amendment"; collecting cases); ***State v. Frank***, 650 N.W.2d 213, 219 (Minn. Ct. App. 2002) ("even a reasonable mistake of law will not support a finding of apparent authority"); ***Evans v. State***, 989 So. 2d 1219, 1222 (Fla. Dist. Ct. App. 2008).

An officer's misapprehension of the applicable law is irrelevant to whether the circumstances render the officer's actions reasonable. *See* ***Miller***, 146 F.3d at 279. Second, as the state acknowledges, the exclusionary rule exists to deter unlawful police conduct. It will fail in this task if it may be circumvented by an officer's declaration that he did not properly understand the law. *See* ***Lopez-Soto***, 205 F.3d at 1106. Third, the state's rule would usurp the role of the courts, by effectively allowing the police to decide what is legal. *See* ***Petersen v. People***, 939 P.2d 824, 831 (Colo. 1997) (if an officer's mistake of law could support apparent authority, "the protections of the Fourth Amendment would be effectively limited to what the average police officer believed was reasonable").

The state's argument is also incompatible with ***Rodriguez***, the seminal case on apparent authority. Over and over, the ***Rodriguez*** Court describes the issue as involving a misjudgment about the *facts* of the situation – specifically, whether the consenting party actually lived in the apartment. 497 U.S. at 184 (describing issue as whether an officer's judgment must be correct "regarding the facts"; analogizing to "factually inaccurate information" in warrant applications), 185 (analogizing to officer's factual mistakes about premises covered by warrant and factual mistake about identity of arrestee, noting that generally "factual determinations" need not "always be correct" but must "always be reasonable"), 186 (again describing issue as "facts bearing upon the authority to consent" and whether Fourth Amendment is violated when officers "reasonably (though erroneously) believe that the person who has consented to their entry is a resident of the premises").

The state ignores all of this and seizes on one sentence in the opinion, which is simply a quotation from ***Terry v. Ohio***, 392 U.S. 1, 21-22 (1968). (Respondent's Brief at 18-19, 21). In context, that sentence simply explains that, in some circumstances, there may not be enough facts to "warrant a man of reasonable caution in the belief" that actual authority exists, and additional inquiry will be necessary. ***Rodriguez***, 497 U.S. at 188. The state improbably treats it as a disavowal of the entire preceding discussion.

The state goes on to cite several foreign cases, none of which suggest that the apparent authority doctrine excuses anything other than an officer's reasonable mistakes of fact. (Respondent's Brief at 22-27). Because the premise on which the state proceeds – that courts must admit evidence that the police, rather than the courts, reasonably believe to be admissible – is false, its argument is without substance and must be rejected.

II. This Court Should Reject the State's Request for a New Suppression Hearing.

For the fourth time in the course of this proceeding, the state seeks to be freed of the record it made at the suppression hearing. This time, it requests a remand so that it may submit further evidence and try out a different legal claim. (Respondent's Brief at 28-29). It presents no legal authority for this procedure, nor does it provide any reasonable explanation for having failed to present its evidence and assert its claim at the original hearing, when it had every opportunity to do so. This is reason enough to deny the request.

Further, the state provides a cursory and inaccurate argument on the merits of its claim. In fact, the inevitable discovery doctrine applies only where disputed evidence is *actually obtained* pursuant to a warrant. *See, e.g.*, ***Murray v. United States***, 487 U.S. 533, 535-36 (1988) (marijuana seized pursuant to warrant after unlawful search); ***State v. Lange***, 158 Wis. 2d 609, 614, 463 N.W.2d 390 (Ct. App. 1990) (same); ***Nix v. Williams***, 467 U.S. 431, 443 (1984) (independent source doctrine applies only where evidence "discovered by means wholly independent of any constitutional violation"). Mr. Sobczak's computer was not obtained by execution of the search warrant for his home; the computer was already at the police station when this second search occurred. (8:20). The second, warranted search is thus not even a "source" of the computer, much less an "independent" one.

Perhaps the state means to invoke the inevitable discovery doctrine, which under certain circumstances allows the admission of evidence not actually discovered by lawful means. That doctrine, however, requires more than a showing of probable cause at the time of the illegal action. The state must be able to show that "prior to the unlawful search the government also was actively pursuing some alternate line of investigation." ***State v. Schwegler***, 170 Wis. 2d 487, 500, 490 N.W.2d 292 (Ct. App. 1992). It cannot do so here.

The application of the inevitable discovery doctrine in this case would also undermine the warrant requirement. To accept it would be to hold that because Officer Dorn *could have* gotten a warrant before going into the house, the evidence he discovered during his warrantless search is admissible. As the court of appeals noted in ***State v. Pickens***,

this would render the warrant requirement a nullity. 2010 WI App 5, ¶49, 323 Wis. 2d 226, 779 N.W.2d 1 ("If the existence of probable cause for a warrant excused the failure to obtain a warrant, the protection afforded by the warrant requirement would be much diminished.") *See also* ***United States v. Cherry***, 759 F.2d 1196, 1205-06 (5th Cir. 1985) (explaining that application of the inevitable discovery doctrine where agents "could have obtained a warrant but had made no effort to do so" undercuts the warrant requirement).

CONCLUSION

Because Ms. Podella lacked actual or apparent authority to consent to Officer Dorn's search of Mr. Sobczak's house, and because a second suppression hearing is not merited, Mr. Sobczak respectfully requests that this court vacate his conviction and remand to the circuit court with directions that all evidence derived from the search be suppressed.

Dated this 7th day of November, 2012.

Respectfully submitted,

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,862 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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

Dated this 7th day of November, 2012.

Signed:

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@opd.wi.gov @

Attorney for Defendant-Appellant-Petitioner