STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2011AP002956CR

Circuit Court Case No. 2010CF003377

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GARY MONROE SCULL,

Defendant-Appellant-Petitioner.

An Appeal From an Order Denying Motion to Suppress Evidence and a Judgment of Conviction entered by Branch 12 of the Milwaukee County Circuit Court, the Honorable David Borowski, Presiding

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BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Court already has set oral argument. The reasons for granting review also counsel publication, which rightly is this Court's usual practice.

ISSUE PRESENTED FOR REVIEW

1. As the act of bringing a drug-sniffing dog to the front door of Scull's residence was a Fourth Amendment violation, should the evidence found from the execution of a search warrant, which was heavily based on the illegal dog sniff, be suppressed?

Circuit Court did not answer this question.

Court of Appeals answered: No.

STATEMENT OF FACTS

The facts are undisputed. A confidential informant advised City of Milwaukee police that Gary Monroe Scull was selling cocaine out of Scull's vehicle at various locations in Milwaukee. (COA op. at ¶3). Based on this information, the police took a drug detecting canine to the front entry door of Scull's residence. (Id. at ¶4-5). The dog made an "alert" – a positive indication that controlled substances were contained in the residence. (Id. at ¶5). The police then applied for and received a search warrant to search Scull's residence. (Id. at ¶6). The police executed the search warrant and found drugs and drug-trafficking paraphernalia. (2:2-4).

Armed with this physical evidence, the State charged Scull with Possession With Intent to Deliver Cocaine, Possession With Intent to Deliver THC and Keeping a Drug House. (2).

Scull filed a motion to suppress the items found during the search (5) and the circuit court held an evidentiary hearing to help determine whether there was an unlawful invasion of

the cartilage of Scull's home when the officer deployed the drug-sniffing dog at Scull's residence. (24:4).

The officer testified that he went by the property on two occasions (24:11). The first time he went by the property he did nothing because people were around. (24:12). On the second occasion, the officer initially went to the side door and the front door and the K-9 alerted to the door (24:12). The officer conceded that he did not want anyone to know what he was doing (24:17). His only intention was to bring the dog to the house to see what the dog was going to do. (24:17).

The circuit court ruled that the use of the K-9 dog was valid and denied Scull's motion to suppress. (26:2-3). Scull pled guilty, was sentence and appealed.

While the appeal was pending, the United States Supreme Court issued its decision in ***Florida v. Jardines***, 133 S.Ct. 1409, 185 L.Ed. 495 (2013). ***Jardines*** involved a "dog sniff" of the front door of a suspect's home, without a warrant and without any pretext of going to the home to contact the suspect or anyone else at the property. The Florida Supreme Court held that this constituted a Fourth Amendment violation and the United States Supreme Court affirmed. The court held that although there is a customary invitation allowing visitors to approach a home and knock on the front door, this invitation does not permit law enforcement officers to physically invade the curtilage of a home solely to investigate suspicions of a marijuana grow operation. Therefore, the dog sniff on the defendant's front porch was an invasion of the defendant's curtilage for the purposes of obtaining information and was a trespass which violated the Fourth Amendment.

The Court of Appeals, in a divided opinion, affirmed the circuit court's denial of Scull's motion to suppress evidence. The Court of Appeals' majority held that while the dog sniff was a violation of Scull's Fourth Amendment rights, pursuant to ***Jardines***, the evidence found pursuant to the illegal search should not be suppressed due to the good-faith exception to the exclusionary rule. Scull petitioned the Supreme Court to review the Court of Appeals' opinion and this court agreed to hear the case.

ARGUMENT

I. THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE DOES NOT APPLY AS THE WARRANT WAS NOT OBTAINED THROUGH A SUBSTANTIAL INVESTIGATION AND AS AT THE TIME OF THE ILLEGAL SEARCH THERE WAS NO BINDING PRECENT THAT LAW ENFORCEMENT COULD HAVE REASONABLY RELIED ON.

The exclusionary rule is a judicially-created concept premised on suppressing evidence that "is *in some sense* the product of illegal governmental activity." ***State v. Knapp***, 2005 WI 127, ¶22, 285 Wis. 2d 86, 700 N.W.2d 899 (emphasis in original; citation omitted). The rule's primary purpose is deterring lawless police conduct, along with preserving judicial integrity. ***Terry v. Ohio***, 392 U.S. 1, 12-13 (1968). The rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates. ***United States v. Leon***, 468 U.S. 897, 913-17 (1984).

Wisconsin's courts have a long-standing commitment to excluding illegally seized evidence from use at trial. Indeed, this Court was one of the earliest state courts to recognize the exclusionary rule. The exclusionary rule's application dates back to 1923, "when this Court held that for 'the Bill of Rights as embodied in constitutions to be of substance rather than mere tinsel,' a conviction may not rest on unlawfully seized evidence." ***State v. Hess***, 2010 WI 82, ¶ 46, 327 Wis.2d 524, 785 N.W.2d 568. Moreover, Wisconsin has a long history of treating the exclusionary rule as a substantive protection with constitutional, rather than judicial, underpinnings. ***State v. Orta***, 2000 WI 4, 231 Wis. 2d 782, 786-791, 604 N.W.2d 543 (Prosser, J., concurring).

Courts have established a good-faith exception to the exclusionary rule. There are two "varieties" of good-faith exception involved here. The first and longest-standing exception involves police reliance on a search warrant. In Wisconsin, to avail itself of this good-faith exception the state must prove that the process by which the warrant was

obtained included "significant investigation." ***State v. Eason***, 2001 WI 98, 74, 245 Wis. 2d 206, 629 N.W.2d 625. Thus, one question in the case is whether the "significant investigation" requirement was met.

The second, more recently minted good-faith exception involves police reliance on "clear and settled Wisconsin precedent," ***State v. Dearborn***, 2010 WI 84, ¶51, 327 Wis. 2d 252, 786 N.W.2d 97. This exception arises because, as part of their investigation, the police took a drug-detection dog on to Scull's front porch, an act now clearly unlawful under ***Jardines***. The court of appeals applied this exception to excuse the unlawful dog-sniff search, thus allowing the dog's "alert" to count as part of the "significant investigation" supporting the warrant.

For the reasons that follow, neither ***Eason*** nor ***Dearborn***, nor any of the other applicable case law, justify application of the good faith exception to the exclusionary rule here and the Court of Appeals decision must be reversed.

A. ANALYSIS OF EASON, LEON & KRULL.

Wisconsin has adopted a good faith exception to the exclusionary rule. ***See State v. Eason***, 2001 WI 98, 245 Wis. 2d 206, 629 N.W.2d 625 ¶74. Wisconsin's exception is modeled after the federal good faith exception: "where police officers act in objectively reasonable reliance upon the warrant, which had been issued by a detached and neutral magistrate, a good faith exception to the exclusionary rule applies." ***Id.*** The Wisconsin Supreme Court has also followed the United States Supreme Court in concluding that the application of the exclusionary rule is not absolute, but rather is connected to the public interest, which requires a balancing of the relevant interests. ***Id.*** at ¶43. Said another way, the good faith exception carves out an exception to the exclusionary rule allowing the admission of evidence when law enforcement officers did what they were supposed to—they followed through in objective good faith, but someone made an accidental clerical or technical error or the judge erred in concluding that the law enforcement's application fulfilled the requirements for a warrant.

This is not a case in which there is a trivial clerical or technical error in the law enforcement's application for the warrant. This is not a case where the police simply reasonably relied on a facially valid search warrant and where the police did not engage in any misconduct. This case involved law enforcement's willful violation of Scull's Fourth Amendment rights by bringing the drug sniffing dog to his residence and having the drug sniffing dog sniff the inside of the residence. Since a law enforcement act invalidated the search warrant, the good faith exception cannot apply. The purpose behind the exclusionary rule – deterring police from making illegal searches and seizures – is furthered by excluding the evidence found during and after the execution of the tainted search warrant.

In ***Leon*** and ***Eason***, the court applied the good faith exception because the State showed that the police officers acted in objective reasonable reliance on a search warrant that had been issued by a detached and neutral magistrate. However, the exception operates only in those close cases where a reviewing court finds that the issuing magistrate erroneously concluded that there was probable cause of reasonable suspicion. ***Eason***, 2001 WI 98 at ¶ 55. The rationale behind applying the good faith exception in these cases was that excluding the evidence would punish the officers, and society, for an error of the magistrate and no deterrence would result. ***Id***. at ¶73.

In ***Krull***, the officers acted in objectively reasonable reliance upon a statute authorizing warrantless administrative searches but the statute was ultimately found unconstitutional. ***Illinois v. Krull***, 480 U.S. 340, 342 (1987).

The principal conclusion from ***Leon*** and its progeny is that there is no benefit in applying the exclusionary rule where it will have no deterrent effect. To the contrary, if exclusion of evidence obtained pursuant to a subsequently invalidated warrant is to have any deterrent effect it must alter the behavior of individual law enforcement officers or the policies of their departments. ***United States v. Leon***, 468 U.S. 897, 918 (1984).

The police deliberately brought the drug-sniffing dog to Scull's front door. The police misconduct in bringing the drug sniffing dog to Scull's property without a warrant or probable cause resulted in the quashing of the warrant (assuming that the dog sniff is declared an unreasonable search). As such, suppression of the evidence acquired during and after the execution of the warrant serves to deter police misconduct. The rationale behind the good faith exception – basically that suppression would not deter police misconduct – is not present and the good faith exception does not apply. The Supreme Court must uphold the exclusionary rule in this case.

Moreover, the information provided by the confidential informant alone, as outlined in the search warrant affidavit, did not establish probable cause for issuance of the warrant. If it did, the police would not have brought their drug-sniffing dog to Scull's home; they would have simply obtained a warrant. The State needed the dog sniff because the confidential informant had no personal knowledge of Scull keeping contraband in his home.

When an affidavit in support of a search warrant includes information from a confidential informant, "the sufficiency of the affidavit and, specifically, the sufficiency of the allegations of reliability of an informant, should be assessed by evaluating the totality of the circumstances in indicating the informant's information is reliable." ***U.S. v. Hendrix***, 752 F.2d 1226, 1233 (7th Cir. 1985). When an assertion of probable cause is based on a confidential informant's tip, a court's totality of the circumstances inquiry "focuses on the informant's reliability, veracity, and basis of knowledge." ***U.S. v. Dismuke***, 593 F.3d 582, 586 (7th Cir. 2010). The five factors that inform the analysis include: (1) the degree to which the informant has acquired knowledge of the events through firsthand observation; (2) the amount of detail provided in the informant's statement; (3) the interval between the date of the events and the police officer's application for the search warrant; (4) the extent to which the police have corroborated the informant's statements; and (5) whether the informant appeared before the magistrate who issued the warrant. ***U.S. v. Hollingsworth***, 495 F.3d 795, 804 (7th Cir. 2007).

The informant did not establish a date and/or time during which he or she observed Scull selling cocaine. The search warrant affidavit makes it impossible to know whether the informant's knowledge was stale or fresh. The affidavit does not specify that the informant purchased drugs directly from Scull. The affidavit does not state how the informant received firsthand knowledge of Scull selling drugs out of Scull's truck, does not state whether he was riding with Scull at the time of the deals or who Scull sold the drugs to. The informant does not provide the location of the drug deals or whether there were any drugs in Scull's truck. Finally, the informant provides no basis to support a search of Scull's home. In fact, the only piece of evidence linking drugs to Scull's home is the supposed alert from the drug sniffing dog.

The lack of credibility of the confidential informant coupled with the fact that it was an act of the police that caused the Fourth Amendment violation prove that the good faith exception should not apply. Unlike ***Leon*** and ***Eason***, this case did not involve a mistake by a magistrate. Unlike ***Krull***, this case did not involve an officer reasonably relying on a statute that is later ruled unconstitutional.

B. DEARBORN.

In ***Dearborn***, the court applied the good faith exception where officers conducted a search in objectively reasonable reliance upon clear and settled Wisconsin precedent which was later deemed unconstitutional by the United States Supreme Court. ***State v. Dearborn***, 2010 WI 84 ¶4, 327 Wis. 2d 252, 786 N.W.2d 97. In particular, the Dearborn court noted that their holding did not affect the vast majority of cases where neither this court nor the United States Supreme Court have spoken with specificity in a particular fact situation. ***Id***. at ¶46.

Unlike ***Dearborn***, this case did not involve a police officer reasonably relying on clear and settled Wisconsin precedent. There was *no* precedent, let alone established precedent, that covered the legality of dog sniffs on doors of residences. Therefore, contrary to the Court of Appeals'

majority, the good faith exception does not apply to counsel against suppression of evidence in this case.

The parties acknowledged to the Court of Appeals that the Scull case was a case of first impression in Wisconsin and that the Scull case would be governed by the United States Supreme Court ruling in ***Jardines***. At one point the State even asked for a briefing stay. The Court of Appeals acknowledged this in their opinion:

"At the time the court commissioner signed the search warrant in this case, there was no case directly addressing this issue in the state courts of Wisconsin". (COA op at ¶21 n.5).

The Court of Appeals confirmed there was no precedent. They then illogical applied the good faith exception and did not suppress the evidence. Moreover, instead of remanding the matter to develop a further record regarding the officer's beliefs at the time of the illegal search the Court of Appeals chose to make certain assumptions about those beliefs and concluded that the good-faith exception applied. The Court of Appeals' majority noted the existence of Wisconsin federal courts decisions permitting dog sniffs of vehicles as permissible searches as support for their conclusion that the officer in Scull acted reasonably. (COA op. ¶21 n.5). The Court of Appeals is wrong for three reasons. First, the dog sniff in this case occurred at a residence, not at a vehicle and courts generally conclude that a person's privacy interest is paramount in one's residence as opposed to in one's automobile. Second, the record developed at the motion hearing did not include testimony regarding the officer's thoughts and beliefs on the state of the law regarding dog sniffs at the time he approached Scull's house with the drug-sniffing dog. Third, the main case noted in the footnote described earlier, the ***Jones*** opinion from the Eastern District of Wisconsin, is a 2011 case. The Scull search warrant was signed in 2010 so Jones would not have been in effect at the time the officer brought the drug sniffing dog to Scull's residence and relied on the 2010 search warrant.

C. CONCERN ABOUT THE GOOD-FAITH EXCEPTION SWALLOWING THE EXCLUSIONARY RULE.

The Court of Appeals holding validates the fears of the dissent in ***Davis v. United States***, 564 U.S. ___, 131 S.Ct. 2419 (2011), the U.S. Supreme Court's counterpart to ***Dearborn***. The ***Davis*** majority held that the "sole purpose" of the exclusionary rule is deterrence and claimed the rule has never been applied "to suppress evidence obtained as a result of nonculpable, innocent police conduct." 131 S.Ct. at 2426, 2429. Thus, when an officer acts with an objectively reasonable good-faith belief that his or her conduct is lawful, exclusion is not justified because "suppression would do nothing to deter police misconduct in these circumstances." ***Id***. at 2423. When the police act with an objectively "reasonable good-faith belief" that their conduct is lawful, or when their conduct involves only simple, "isolated" negligence, the deterrence rationale loses much of its force and exclusion cannot "pay its way." ***Id***. at 2427-28 (quoted sources omitted). As the ***Davis*** dissent points out, however:

[A]n officer who conducts a search that he believes complies with the Constitution but which, it ultimately turns out, falls just outside the Fourth Amendment's bounds is no more culpable than an officer who follows erroneous "binding precedent." Nor is an officer more culpable where circuit precedent is simply suggestive rather than "binding," where it only describes how to treat roughly analogous instances, or where it just does not exist. Thus, if the Court means what it now says, if it would place determinative weight upon the culpability of an individual officer's conduct, and if it would apply the exclusionary rule only where a Fourth Amendment violation was "deliberate, reckless, or grossly negligent," then the "good faith" exception will swallow the exclusionary rule. Indeed, our broad dicta in Herring—dicta the Court repeats and expands upon today—may already be leading lower courts in this direction.

Davis, 131 S. Ct. at 2439 (Breyer, J., dissenting).

Scull strongly believes that deterrence would be achieved if the evidence recovered from the execution of the search warrant is suppressed. This is because the warrant was not obtained through significant investigation and the police officer who conducted the dog sniff did not rely on

established Wisconsin precedent to do so. Public policy also favors suppression of the evidence so that we do not continue on the road to the good-faith exception swallowing up the exclusionary rule and eroding Fourth Amendment protection.

CONCLUSION

The circuit court was wrong when it denied Scull's suppression motion. The Court of Appeals was wrong when it applied the good faith exception and refused to suppress the evidence found during the execution of the search warrant. Based upon the above argument and authorities, Gary Monroe Scull respectfully requests this Court to reverse the Court of Appeals decision and for this Court to remand the matter to the circuit court for proceedings consistent with their opinion.

Dated this ___ day of June, 2014.

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CERTIFICATION

I certify that this 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 brief described in WIS. STAT. § 809.19(1)(d), (e) and (f) is 3,050 words. *See* WIS. STAT.§ 809.19(8)(c)1.

I hereby certify that filed with this brief, as a separate document, is an appendix that complies with Wis. Stat. § 809.62(2)(f).

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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.

I hereby certify that an electronic copy of this brief was submitted, which conforms to the rules contained in Wis. Stat. § 809.62(4)(b)(c) and (d). I also certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

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