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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REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

Wisconsin Supreme Court Cases

Wisconsin Court of Appeals Cases

REPLY ARGUMENT

I. APPLYING THE GOOD FAITH EXCEPTION HERE WOULD RENDER THE EXCLUSIONARY RULE MEANINGLESS AND WILL NOT ACT TO DETER ILLEGAL POLICE CONDUCT IN THE FUTURE.

A. *Jardines*

The State concedes that in light of ***Jardines***, the dog sniff at Scull's front door was a Fourth Amendment "search" and violated Scull's Fourth Amendment rights. (State Br. at 4). The State further acknowledges that the ***Jardines*** decision represented a "significant and novel development in the law regarding the government's use of drug detecting dogs." (State Br. at 4). The State hits the nail on the head – there was absolutely no binding precedent that the police could have relied on when they brought their drug sniffing dog to sniff Scull's front door.

B. Pre-***Jardines***.

The State outlines the state of the law regarding dog sniffs before ***Jardines***. While the outline provided is commendable and is an accurate summary of the case law, the State misses the point: the law in Wisconsin did not permit the sniff at the time of the dog sniff.

Moreover, the cases cited by the State are distinguishable from the facts in ***Jardines*** and the facts here, which are nearly identical.

The dog sniff in ***United States v. Place***, 462 U.S. 696 (1983) involving sniffing luggage at an airport. The court authorized the sniff as an alternative to an officer rummaging through the contents of one bag and potentially exposing the owner to embarrassment and inconvenience. Additionally, the sniff did not involve a sniff at someone's private residence which is subject to greater Fourth Amendment scrutiny. Similarly, ***Illinois v. Caballes***, 543 U.S. 405 (2005) and ***State v. Arias***, 2008 WI 84, 311 Wis. 2d 358, 752 N.W.2d 748 involved a dog sniff around a vehicle, not a private residence.

Courts will employ a different scrutiny when reviewing a dog sniff at an airport of an individual's automobile as opposed to a person's private residence. This is exactly why the United States Supreme Court reviewed and issued its decision in the ***Jardines*** case. The pre-***Jardines*** cases that hold that dog sniffs are not searches under the Fourth Amendment do not justify the police action in the case and do not support the application of the good faith exception.

Moreover, ***State v. Edgeberg*** does not bolster the State's position. In that case, police travelled to Edgeberg's home to investigate a complaint about a barking dog. ***State v. Edgeberg***, 188 Wis. 2d 339, 343, 524 N.W.2d 911 (Ct. App. 1994). As the officer knocked on the door, the officer observed marijuana plants growing in the living room. ***Id***. at 344. Based on this observation, the officer obtained a search warrant. ***Id***. The court held that the officer's conduct was not a search because a person has no reasonable expectation of privacy in an item which is in plain view. ***Id***. at 345 (citation omitted). Similarly, that which is knowingly exposed to the public is not subject to Fourth Amendment protection. ***Katz v. United States***, 389 U.S. 347, 351 (1967). Scull's case does not involve any contraband in plain view. ***Edgeberg*** did not involve a drug sniffing dog and involved an officer investigating a specific complaint.

C. The Good-Faith Exception.

The State and everyone else involved in this case acknowledges that the ***Jardines*** opinion constituted a novel ruling in the law regarding dog sniffs. The pre-***Jardines*** cases do not show that a dog sniff conducted at a private residence would pass constitutional muster. ***State v. Edgeberg*** does not suggest that a dog sniff at a front door of an individual's residence would pass constitutional muster. As such, the police were not reasonably acting based on past binding precedent and the good faith exception does not apply.

Furthermore, the State fails to recognize that this case is not about an officer's objective reliance on a facially valid search warrant (see ***Leon, Ward***), or an officer's reasonable reliance on a statute (see ***Krull***), or an officer's objective

reliance on well settled law (see ***Dearborn***). As such, the good faith exception does not apply.

Scull recognizes that exclusion of evidence is a remedy of last resort. But it is a resort that is needed here in order to deter future Fourth Amendment violations in fact scenarios where the law is not settled. The officers in Scull did not and could not have been relying on established precedent when they took their drug sniffing dog to Scull's front door without a warrant. They could not have reasonably believed that their conduct was lawful. Simply put, they were not acting in good faith. Their Fourth Amendment violation should not be swallowed up by the good-exception.

D. Alternatively, an evidentiary hearing is required.

If this court is inclined to adopt the State's argument, Scull contends that the matter should be remanded for an evidentiary hearing to establish a record regarding the police officer's attempts at obtaining a search warrant so that this court may then be able to properly apply the test for the good faith exception. At the remand hearing, the police officer should offer testimony regarding significant investigation and review by a knowledgeable police officer or government attorney. The State argues that Scull has not made certain arguments regarding the commissioner who issued the search warrant or the prosecutor who reviewed and approved the warrant affidavit. (State Br. at 11). Scull is not in a position to make these arguments – as previously discussed the good-faith exception was never discussed before the circuit court. Scull maintains his argument that the good-faith exception does not apply due to the fact that the ***Jardines*** ruling was novel and that none of the other factors necessary for application of the exception are present. If this court is inclined to apply the exception, the case should first be remanded for further fact-finding regarding the circumstances surrounding the warrant application.

CONCLUSION

Based upon the above argument and authorities and on the argument and authorities provided in his initial brief, 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 July, 2014.

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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 brief described in WIS. STAT. § 809.19(1)(d), (e) and (f) is 1,018 words. *See* WIS. STAT.§ 809.19(8)(c)1.

I hereby certify that an electronic copy of this reply 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 reply brief is identical to the text of the paper copy of the reply brief.

Basil M. Loeb