STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2011AP002956-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GARY MONROE SCULL,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals
Affirming a Judgment of the
Circuit Court for Milwaukee County,
Judge David L. Borowski, Presiding

AMICUS CURIAE BRIEF OF WISCONSIN STATE PUBLIC DEFENDER

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INTRODUCTION

The police executed a search warrant at Gary Scull's house and seized drugs and drug-trafficking paraphernalia. ***State v. Scull***, 2014 WI App 17, ¶6, 352 Wis. 2d 733, 843 N.W.2d 859. The warrant was based in part on the "alert" of a drug dog at the front door of Scull's house. ***Id.***, ¶¶5-6. Scull argued the warrant was invalid because the use of the dog was an unlawful warrantless search, but the circuit court rejected his claim. ***Id.***, ¶8.

While Scull's appeal was pending, ***Florida v. Jardines***, 569 U.S. ___, 133 S. Ct. 1409 (2013) was decided. The court of appeals recognized that the use of the drug detection dog in this case was unlawful under ***Jardines***, but held the evidence seized from Scull's house was saved by the good-faith exception to the exclusionary rule under ***United States v. Leon***, 468 U.S. 897 (1984), and ***State v. Eason***, 2001 WI 98, 245 Wis. 2d 206, 629 N.W.2d 625. ***Scull***, 352 Wis. 2d 733, ¶¶1, 10-13, 21-22.

The court of appeals did not analyze the effect on the warrant of the officers' use of the drug dog. It did, however, say that at the time of the search "[r]elevant caselaw" from Wisconsin and other jurisdictions arguably allowed the police officers' conduct and that between the search warrant and the case law the police "'acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment[.]'" ***Id.***, ¶22, *quoting* ***State v. Dearborn***, 2010 WI 84, ¶33, 327 Wis. 2d 252, 786 N.W.2d 97.

The court of appeals' application of the good-faith exception to the exclusionary rule is flawed. The exception under ***Leon*** and ***Eason*** does not apply when a predicate

illegality provides part of the probable cause for the warrant. Further, the exception based on the officers' reliance on case law cannot save the search because under ***Dearborn*** the case law must be clear and settled Wisconsin precedent, and there was no such precedent allowing police to act as they did here. Thus, the evidence obtained by the use of the dog is not saved by a good-faith exception and cannot be part of the probable cause determination.

ARGUMENT

The Good-Faith Exception to the Exclusionary Rule Adopted in ***Leon*** and ***Eason*** Does Not Apply to Warrants Based in Part on Unlawful Conduct by the Police.

A. The good-faith exceptions to the exclusionary rule are limited to police reliance on the legal authority of a third party.

The cases adopting good-faith exceptions to the exclusionary rule make clear that the exceptions are applicable only when the police relied on an apparently authoritative assurance of an official other than a police officer that the conduct would be lawful.

Leon held that the exclusionary rule is not applicable where an officer obtains evidence relying on a search warrant that is ultimately found to be unsupported by probable cause. 468 U.S. at 900. This holding was premised on the exclusionary rule's deterrence function, which is meant to "deter police misconduct rather than to punish the errors of judges and magistrates." ***Id.*** at 916. Exclusion deters police from conducting unconstitutional searches only when police are responsible for the constitutional error. ***Id.*** at 920–21.

Because penalizing the officer for the magistrate's error does not deter constitutional violations by the police, exclusion is inappropriate when the magistrate is responsible for the error. ***Id.*** at 921–22.

Eason adopted ***Leon*** for purposes of Wisconsin law, though it added the requirement that the process for obtaining the search warrant include a significant investigation and a review by a police officer or government attorney knowledgeable about the requirements of probable cause and reasonable suspicion. 245 Wis. 2d 206, ¶¶28-52, 63.

Illinois v. Krull, 480 U.S. 340 (1986), permitted the admission of evidence obtained during a search conducted by a police officer in reliance on a statute that was later declared unconstitutional. As in ***Leon***, the Court found there would be no appreciable deterrent effect in suppressing the evidence because the Fourth Amendment violation was due not to the officer's mistake, but to the legislature's erroneous enactment of the unconstitutional statute. ***Id.*** at 349-53.

Arizona v. Evans, 514 U.S. 1 (1995), declined to exclude evidence obtained after an officer relied on the state's computer system, which erroneously indicated the defendant had an outstanding arrest warrant. Once again, the Court reasoned there would be no deterrent effect to exclusion because the error was made by court employees rather than police. ***Id.*** at 14-16. Similarly, ***Herring v. United States***, 555 U.S. 135 (2009), allowed admission of evidence seized by an officer who relied on a police clerk's mistaken report that there was an arrest warrant for the defendant. Since the error would only marginally deter future mistakes by officers themselves, suppression was not justified. ***Id.*** at 140, 145-47.

Finally, there is a good-faith exception based on police reliance on binding case law that is subsequently overruled. ***Dearborn***, 327 Wis. 2d 252, ¶4; ***State v. Ward***, 2000 WI 3, 231 Wis. 2d 732, 604 N.W.2d 517; ***United States v. Davis***, 564 U.S. ___, 131 S. Ct. 2419 (2011). These cases also rely on the lack of deterrent value of exclusion given that the police are relying on governing appellate decision, for "this is exactly what officers *should* do." ***Dearborn***, 327 Wis. 2d 252, ¶44. *See also* ***Ward***, 231 Wis. 2d 732, ¶49; ***Davis***, 131 S. Ct. at 2429.

Because the good-faith exceptions are premised on the conclusion that exclusion is inappropriate where there is no police misconduct to deter, it follows there cannot be a good-faith exception based on police officers' reliance on their *own* error. That in turn means the good-faith exception based on officers' reliance on a warrant does not apply where the warrant itself is based on an unlawful search that police conducted based on their own misapplication of the law, without relying on some other legal authority.

B. The good faith exception based on police reliance on a search warrant does not apply where the warrant is based on evidence from an unlawful search.

While the search of Scull's *home* was conducted pursuant to a warrant, the police used the dog on Scull's property *without* a warrant and *before* the involvement of the warrant-issuing magistrate. Because the use of the dog was not undertaken in reliance on a magistrate's assurance of legality, it was exactly the kind of police-initiated conduct that exclusion is intended to deter. Thus, contrary to the court of appeals' conclusion, the good-faith exception based on the *subsequently* issued warrant does not apply.

The Supreme Court has not addressed this issue, but other courts have. One leading case on the issue is ***United States v. Vasey,*** 834 F.2d 782, 788 (9th Cir. 1987), where a police officer conducted an unlawful warrantless search and later used evidence from that search in support of an application for a search warrant. ***Id.*** at 788-89. The court held ***Leon*** was inapplicable because the initial unlawful search "precludes any reliance on the good faith exception." ***Id.*** at 788. Unlike ***Leon***, where the officer presented *lawfully* obtained evidence to a magistrate, and the magistrate erred in finding that the evidence established probable cause, the evidence in Vasey's case that was included in the affidavit was *unlawfully* obtained:

> The constitutional error was made by the officer in this case, not by the magistrate as in ***Leon***. The ***Leon*** Court made it very clear that the exclusionary rule should apply (i.e. the good faith exception should not apply) if the exclusion of evidence would alter the behavior of individual law enforcement officers or the policies of their department.

Id. at 789. Many (though not all) other courts have reached the same conclusion. *See* ***United States v. McClain***, 444 F.3d 537, 543-51 (6th Cir. 2006) (Martin, J., dissenting from denial of rehearing *en banc*) (collecting cases).

Nor does it matter that two other actors reviewed the warrant in this case. The first review, by the court commissioner who signed the warrant, does not reduce the deterrent effect of exclusion of the evidence obtained by the officers' use of the dog *before* they obtained a warrant. Nor does it matter that the court commissioner apparently did not question the legality of the use of the dog. As ***Vasey*** persuasively explains, the limited nature of the judge's review of a search warrant cannot sanitize the initial unlawful search:

> A magistrate's role when presented with evidence to support a search warrant is to weigh the evidence to determine whether it gives rise to probable cause. *A magistrate evaluating a warrant application based in part on evidence seized in a warrantless search is simply not in a position to evaluate the legality of that search.* Typically, warrant applications are requested and authorized under severe time constraints. Moreover, warrant applications are considered without the benefit of an adversarial hearing in which the evidentiary basis of the application might be challenged. Although we encourage magistrates to make all possible attempts to ensure that a warrantless search was legal before relying on the fruits of that search, we are mindful of the limitations on a magistrate's fact-finding ability in this context. We therefore conclude that a magistrate's consideration does not protect from exclusion evidence seized during a search under a warrant if that warrant was based on evidence seized in an unconstitutional search.

Id. at 789-90 (emphasis added). *Cf*. ***State v. Cummings***, 199 Wis. 2d 721, 739-40, 546 N.W.2d 406 (1996) (proceeding for issuing a search warrant is an *ex parte* proceeding, not an adversary one). Similarly, the review by a lawyer or supervisor required under ***Eason*** could not remove the taint of the initial unlawful search because that review is limited to "the legal vagaries of probable cause or reasonable suspicion." 245 Wis. 2d 206, ¶63. Thus, after-the-fact reviews of the warrant application do not allow the police to reasonably rely on a warrant that was itself based on unlawful conduct they engaged in before the granting of the warrant.

The government's law enforcement officers have a different stake and play a different role than judges, legislatures, and clerical employees of the state. That police are engaged in the "competitive enterprise of ferreting out

crime," ***Johnson v. United States***, 333 U.S. 10, 13-14 (1948), shows they should not be given the last word about the correct application of the Fourth Amendment. But that is the result of the court of appeals' application of the good-faith exception here, for its holding allows an initial illegality to be, in essence, "laundered" through a warrant, given that the warrant-issuing process provides neither an incentive nor a mechanism for litigating the legality of the initial evidence collection.

While police frequently and honestly believe they are complying with the Fourth Amendment, it does not follow that their determination should be given the benefit of the doubt by foreclosing exclusion when they turn out to be wrong. Exclusion, after all, provides the most meaningful deterrent for Fourth Amendment violations and has transformed American policing for the better by developing Fourth Amendment law. Failing to exclude evidence illegally obtained, especially if there was "relevant caselaw" that appears arguably to support the police conduct, will encourage police to push the limits of the law and stunt development of Fourth Amendment law. Albert Alschuler, **Herring v. United States:** ***A Minnow or a Shark?*** 7 Ohio St. Jr. Crim. L. 463, 500-12 (2009). It also disregards the clear directive in ***Leon*** and its progeny that if there is police misconduct that violates the Fourth Amendment and that may be meaningfully deterred, then exclusion is the proper remedy.

Because it was based on a previous illegal search, the warrant to search Scull's home cannot provide a basis for applying the good-faith exception under ***Leon*** and ***Eason***. This brings us to the second good-faith exception implicated in this case—namely, the exception based on police reliance on case law recognized in ***Dearborn***. The court of appeals did

not directly invoke this exception, but for the following reasons it does not apply in this case.

C. The good-faith exception recognized in ***Dearborn*** covers only conduct authorized by clear and settled Wisconsin law.

Dearborn explained its holding clearly: "the good faith exception precludes application of the exclusionary rule where officers conduct a search in objectively reasonable reliance upon *clear and settled Wisconsin precedent* that is later deemed unconstitutional by the United States Supreme Court." 327 Wis. 2d 252, ¶4 (emphasis added). The court made clear that:

> ...under our holding today, the exclusionary rule is inappropriate *only when the officer reasonably relies on clear and settled precedent*. Our holding does not affect the vast majority of cases where *neither this court nor the United States Supreme Court have* [sic] *spoken with specificity in a particular fact situation*. …

Id., ¶46 (emphasis added). The court made this comment when rejecting the claim that defendants will lack incentive to litigate Fourth Amendment issues if case law from any jurisdiction can serve as authority for police conduct. ***Id.***, ¶45. By limiting its holding to Wisconsin and U.S. Supreme Court precedent, ***Dearborn*** recognized there will be incentive to litigate except in the small number of cases where a similar search has already been held to be lawful, and that "[t]he vast majority of cases, particularly in the fact-intensive Fourth Amendment context, will not fall into this category." ***Id.***, ¶46.

Davis likewise limits its holding to binding precedent, for the Court refers repeatedly to "binding" precedent, not to "persuasive" precedent or some broader formulation.

131 S. Ct. at 2423–24, 2428, 2429, 2432–34. Moreover, the officers in ***Davis*** acted "in strict compliance" with binding precedent and that the precedent "specifically authorize[d] a particular police practice." ***Id.*** at 2428, 2429. And like ***Dearborn***, ***Davis*** says that defendants in jurisdictions in which a Fourth Amendment question remains open have incentive to litigate the issue even if other courts have ruled on it, ***id.*** at 2433, which means merely persuasive or analogous authority not precisely addressing the search at issue is not determinative.

There are compelling reasons for limiting ***Dearborn*** and ***Davis*** to binding precedent. First, this limitation is in keeping with the deterrence rationale articulated by the good-faith exception cases. Under those cases, police action is objectively reasonable when there is legal authority for the action. Thus, the good-faith exceptions do not require an analysis of officer culpability, for police action undertaken with legal authority is obviously not culpable and requires no deterrence. But deterrence *does* matter when police lack clear legal authority. In that situation, police must guess at what the law might be rather than rely on what binding legal authority says it is. Exclusion has strong deterrence value in this situation, for it encourages police to respect the basic constitutional judgment that a citizen's privacy and security (especially of the home) can be breached only as allowed by clear legal authority.

In addition, allowing reliance on nonbinding precedent will limit the development of Fourth Amendment law. As ***Dearborn*** noted, the "vast majority" of Fourth Amendment cases will not be governed by binding precedent. 327 Wis. 2d 252, ¶46. But given the plethora of Fourth Amendment cases from across the country, there will often be nonbinding authority that supports a claim that police action was lawful.

If the state can successfully invoke a good-faith exception based this vast store of case law and thereby deprive defendants of the remedy of exclusion, defendants will have incentive to raise only issues for which there is no law at all, while issues that have been litigated but are not definitively settled will remain unsettled. *See* Orin Kerr, ***Fourth Amendment Remedies and Development of the Law: A Comment on* Camreta v. Greene *and* Davis v. United States**, 2011 Cato Sup. Ct. Rev. 237, 253-60. This in turn means the courts will engage in far less review of police conduct under the Fourth Amendment, effectively leaving the ultimate determination of complex Fourth Amendment questions to the police.

Lastly, the simplicity of the binding-precedent standard makes it easier for police officers to avoid violations and, thus, avoids the costs of exclusion. It also provides clarity for those providing officer training. By contrast, opening the door to nonbinding precedent creates difficult questions, such as how many courts have to authorize a practice, which level of court decisions matter, and how to deal with disagreement among persuasive opinions.

As the court of appeals acknowledged, at the time the police used the drug dog in this case there was no clear and settled Wisconsin or U.S. Supreme Court precedent holding that conduct was permissible under the Fourth Amendment. Instead, the court of appeals refers to cases from other jurisdictions that authorized this conduct, and analogized to two binding case allowing drug a dog sniff of the exterior of a car. 352 Wis. 2d 733, ¶21 & n.5 (citing ***State v. Arias***, 2008 WI 84, ¶14, 311 Wis. 2d 358, 752 N.W.2d 748, and ***Illinois v. Caballes***, 543 U.S. 405, 408-09 (2005)). This is in contrast to jurisdictions which before ***Jardines*** had binding precedent allowing the use of a dog on a person's property.

Appropriately, courts in those jurisdictions have held that police reliance on the pre-***Jardines*** precedent was objectively reasonable. *See* ***United States v. Gutierrez***, ___ F.3d. ___, 2014 WL 3728170 (7th Cir. 2014); ***United States v. Davis***, ___ F.3d ___, 2014 WL 3719097 (8th Cir. 2014); ***United States v. Thomas***, 726 F.3d 1086, 1094-95 (9th Cir. 2013).

Because there was no binding precedent permitting the use of the drug dog on Scull's property, the good-faith exception adopted in ***Dearborn*** does not save the evidence collected using the drug dog and that evidence cannot be used as part of the probable cause determination.

CONCLUSION

For the reasons given above, the court of appeals erroneously concluded that the police acted in the objectively reasonable belief their conduct did not violate the Fourth Amendment when they executed the search warrant and searched Scull's home. Therefore, the decision of the court of appeals should be reversed.

Dated this 22nd day of August, 2014.

Respectfully submitted,

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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 2,996 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 22nd day of August, 2014.

Signed:

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