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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2011AP002956CR

Circuit Court Case No. 2010CF003377

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GARY MONROE SCULL,

Defendant-Appellant.

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 the Defendant-Appellant

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REPLY ARGUMENT

Scull incorporates herein by reference all of the arguments made in his initial brief. Scull further responds to the arguments made by the State to the extent such arguments were not covered in his initial brief.

I. THE DOG SNIFF AT THE FRONT DOOR WAS AN UNREASONABLE SEARCH.

A. The Primary Cases Cited by the State, ***Arias*** and ***Edgeberg***, are Distinguishable.

Arias concluded that a dog sniff of the exterior of a vehicle located in a public place does not constitute a search under the Wisconsin Constitution. ***State v. Arias***, 2008 WI 84, ¶3, 752 N.W.2d 748. (***See also Illinois v. Caballes***, 543 U.S. 405 (2005) (holding that a dog sniff of the exterior of a vehicle is not a search within the meaning of the Fourth Amendment). Scull's case involves neither a vehicle nor a public place. The dog in Scull's case sniffed the inside of Scull's home where his privacy rights are paramount. This is contrary to the occupant of a vehicle who has no reasonable expectation of privacy in the air space surrounding a vehicle that he is occupying in a public place. ***State v. Garcia***, 195 Wis. 2d 68, 74-75, 535 N.W.2d 124 (Ct. App. 1995). Therefore, neither ***Arias*** (or ***Caballes*** for that matter) are controlling on this issue.

Edgeberg is also not controlling. 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. ***Edgeberg*** is not controlling.

B. If Bringing a Drug Sniffing Dog to a Person's Residence and Having the Dog Sniff the Inside of the Residence (Without Having Neither a Warrant Nor Probable Cause) is not a Search, Such Police Conduct Will Completely Escape Fourth Amendment Review.

The State argues that dog sniffs do not generally implicate legitimate privacy interests because they only reveal contraband. (State Brief at 7). This argument is fallible for two main reasons. First, the argument assumes that trained sniffing dogs do not err. Second, if a sniff is not a search and is not preceded by a seizure subject to Fourth Amendment notice, it escapes Fourth Amendment review entirely.

As noted in Justice Souter's dissent in ***Illinois v. Caballes***, "the infallible dog…is a creature of legal fiction…their supposed infallibility is belied by judicial opinions describing well-trained animals sniffing and altering with less than perfect accuracy, whether owing to errors by their handlers, the limitations of the dogs themselves, or even the pervasive contamination of currency by cocaine." ***Illinois v. Caballes***, 543 U.S. 405, 410-12 (2005).

It makes sense then to treat a dog sniff of someone's home as a search and to determine whether such a search is reasonable. To rule otherwise will allow police, in a case that does not involve a seizure (like with Scull), to conduct suspicionless intrusions on people's homes. If Fourth Amendment protections are to have meaning in the face of superhuman, yet fallible, techniques like the use of trained dogs, those techniques must be justified on the basis of their reasonableness, lest everything be deemed in plain view. ***Id***. at 417 n. 6.

II. IN THE EVENT THAT THE DOG SNIFF IS DETERMINED TO BE AN ILLEGAL SEARCH, THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE DOES NOT APPLY.

A. The State Waived Their Right to Argue that the Good Faith Exception Applies.

The State claims for the first time on appeal that this case can be decided without resolving the dog sniff issue by arguing that the good faith exception would allow the evidence seized during the execution of the warrant to be admissible even if a Fourth Amendment violation occurred. Because the State did not present this argument to the circuit court, this court should not address it. ***See State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 492, 611 N.W.2d 727 (holding that this court does not consider issues raised for the first time on appeal).

Additionally, the issue before the circuit court was clearly understood by the parties. The circuit court recognized the defense's primary argument: that without the results of the dog sniff, the affidavit for the warrant lacked probable cause:

> "In a nutshell, you're alleging that there was an unlawful search that occurred prior to asking for a warrant, and the information gained as a result of the unlawful search provided some of the information for the warrant which was then executed by Commissioner Slagle, signed off on it and the executed by the officers, correct?" (23:9).

The circuit court's oral decision confirms that the sole issue before the circuit court was the legality of the dog sniff. In particular, the circuit court ruled that "the dog, the K-9 was brought to the door in this case in a valid manner, not in a manner that violated the Fourth Amendment." (26:3-4).

Thus, it is clear – the issue before the circuit court was the legality of the dog sniff and neither party nor the court raised the issue of the good faith exception to the exclusionary rule.

The State urges this Court to ignore their forefeiture on the issue because this Court may affirm a circuit court for reasons not stated by or argued below; that the issue would have only emerged had the circuit court ruled the dog sniff an unreasonable search; and because of this court's denial of the State's motion for stay. (State Br. at 13). The State's arguments are non-persuasive.

First, this Court should not affirm the circuit court based on the good faith exception to the exclusionary rule because that issue was not fully litigated in the circuit court. The exception was not argued by either side and not articulated by the circuit court as an alternative way to deny Scull's motion to suppress. Furthermore, the testimony elicited at the motion hearing was primarily geared toward the dog sniff and Scull would have tailored his cross-examination of the officer differently if he felt the good faith exception was an issue in the case. It would be fundamentally unfair to Scull for this Court to adopt the good faith exception at this stage of the proceedings.

Second, Scull doubts that the good faith exception would have come up had the circuit court ruled the dog sniff to be an unreasonable search because the prosecutor never presented any alternative argument in support of the State's request for the motion to be denied and the issue was never on anyone's radar.

Third, the fact that the motion for stay was denied (and that Scull objected to the motion) is irrelevant to whether the State forfeited their right to argue that the good faith exception serves as an alternative means to deny Scull's motion to suppress.

If this court is nonetheless inclined to review the merits of this issue and inclined to adopt the good faith exception despite Scull's analysis which follows, 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.

B. The Police Themselves Committed the Fourth Amendment Violation and the Good Faith Exception Does Not Counsel Against Suppression of the Evidence.

The State urges this Court to avoid the complications created by ***Jardines*** and to simply affirm the circuit court's order denying the suppression motion based on the good faith exception to the exclusionary rule. If the dog sniff at Scull's front door is determined to be an unreasonable search, quashing the search warrant and suppressing all the fruits of the search does advance the purposes behind the exclusionary rule. 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.

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 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.*** Our 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.

The line of cases cited by the State to support their assertion that the good faith exception should be applied are distinguished from Scull's case.

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).

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.

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 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.

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 without utilizing the dog. 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 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 would 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. And unlike ***Dearborn***, this case did not involve a police officer reasonably relying on clear and settled Wisconsin precedent. Therefore, contrary to the State's assertion, the good faith exception does not apply to counsel against suppression of

evidence should the dog sniff be ruled an unreasonable search.

CONCLUSION

Based on the argument and authorities presented herein and in his initial brief, the Defendant-Appellant respectfully requests this Court to reverse the circuit court's judgment and remand the case with directions to the circuit court to enter an order granting the suppression motion based on the unreasonable search.

The evidence should not be admitted notwithstanding the violation based on the good faith exception because the State waived their right to assert the exception. Alternatively, the exception should not apply because the violation was not due to a mistake of a magistrate or an officer's reasonable reliance on a statute or well settled Wisconsin precedent. Finally, if this Court is inclined to apply the good faith exception, this Court should remand the matter to the circuit court for an evidentiary hearing in order to establish a proper record before applying the good faith exception test.

Dated this ___ day of July, 2012.

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CERTIFICATION

I hereby certify that this reply brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b)&(c) for a reply brief produced with a proportional serif font. The length of this reply brief is 2,932 words.

I hereby certify that an electronic copy of this reply brief was submitted, which conforms to the rules contained in Wis. Stat. § 809.19(12). 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.

Dated this __ day of July, 2012.

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Basil M. Loeb