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STATE OF WISCONSIN COURT OF APPEALS DISTRICT II

04-29-2013

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

JACK E. JOHNSON,

Defendant-Appellant

Appeal No. 12AP837-CR

ON APPEAL FROM THE CIRCUIT COURT FOR WAUKESHA COUNTY
THE HONORABLE JAMES R. KIEFFER, PRESIDING
Circuit Court Case No. 2009CF001348

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

There is no need for oral argument of this appeal because the arguments of the parties are adequately presented in the briefs.

The opinion should not be published because this case involves only the application of established legal principles to a particular factual standard.

STATEMENT OF THE ISSUES

I. WHETHER THE CIRCUIT COURT ERRED IN DENYING DEFENDANT'S MOTION FOR SUPPRESSION OF EVIDENCE RELATE TO THE ILLEGAL SEARCH OF HIS RESIDENCE IN MEXICO.

STATEMENT OF THE FACTS

On or about October 1 ,2009, Kimberly A. Smith was found murdered in her residence by her boyfriend, Timothy McMickle. R1:1. Through the course of the investigation surrounding the homicide, law enforcement authorities identified Smith's ex-husband, Darren Wold, Justin Welch and Johnson as suspects in the death of Smith. *Id.* at 2-4.

It was alleged that Johnson, who was living in Mexico at the time, assisted in the commission of the crime by coordinating funds, airline tickets and transportation for Welch. *Id.* at 3-4. Johnson was a long time friend of Wold, having known him for over twenty years. *Id.* at 3.

Specifically, it was alleged that Johnson purchased a plane ticket under the name of "Ricky Freeman" which was an alias used by Welch. *Id.* The purchased ticket was for a flight departing San Diego, California on September 28, 2009 and arriving in Milwaukee, Wisconsin with a change of plane in St. Louis, Missouri, on the evening of that same day. *Id.* An additional ticket was alleged to have been purchased by Johnson for a return flight leaving Milwaukee, Wisconsin on October 1, 2009, with a change of planes in Dallas-Fort Worth, Texas, and arriving in San Diego, California that same evening. *Id.*

It was also alleged that on September 28, 2009, Johnson along with an individual using the Freeman alias crossed the border from Mexico into the U.S. *Id.* During the time period of September 28, 2009 through October 1, 2009 multiple calls were made from the Lake County Inn, where the individual using the Freeman alias was staying, to Johnson's cell phone. *Id.* at 4.

Johnson was reported to have crossed the border from the U.S. back into Mexico on the afternoon of October 1, 2009.

STATEMENT OF THE CASE

Johnson was charged on November 19, 2009 in a single count complaint of First-Degree Intentional Homicide, as a Party to a Crime under Wis. Stats. §§ 940.01 (1)(a) and 939.05, respectively. R1.

Following a multiple day preliminary hearing, Johnson was bound over for trial on the above complaint. R94, 95, 97, 98. At the conclusion of the preliminary hearing the State filed the information pursuant to the above. R13.

Pertinent to this appeal, Johnson filed a motion to suppress challenging the search of his residence in Mexico on March 15, 2011. R27. On May 31, 2011 the circuit court held a hearing to receive evidence on Johnson's motion to suppress. R99. On July 1, 2011 the court held a hearing regarding the above motion but did not render a decision. R118. On August 8, 2011 the circuit court issued an oral ruling granting in part, and denying in part, Johnson's motion to suppress. R125.

Beginning on October 14, 2011 and ending on November 2, 2011 the circuit court held a jury trial, at the conclusion of which Johnson was found guilty. R110,111,115-117,120-124,126,127,129.

On December 2, 2011 Johnson was sentenced to life in prison without the possibility of extended supervision.
R128.

STANDARD OF REVIEW

The court applies a two step process in reviewing a motion to suppress. *State v. Pallone*, 2000 WI 77, ¶ 27, 236 Wis. 2d 162, 613 N.W.2d 568 (citing *State v. Martwick*, 2000 WI 5, ¶¶ 16-18, 231 Wis. 2d 801, 604 N.W.2d 552). The court will review the findings related to the facts of analyzed by the circuit court to determine if the circuit court's ruling was clearly erroneous. *Id.* at ¶ 27. The court will then review de novo the application of those facts to constitutional principles. *Id.*

Argument

I. WHETHER THE CIRCUIT COURT ERRED IN DENYING DEFENDANT'S MOTION FOR SUPPRESSION OF EVIDENCE RELATE TO THE ILLEGAL SEARCH OF HIS RESIDENCE IN MEXICO.

The suppression of evidence has an established history in the State of Wisconsin as well as in the federal courts.

"The exclusionary rule is a judicially created remedy, not a right, and its application is restricted to cases where its remedial objectives will be best served." *State v. Dearborn*, 2010 WI 84, ¶35, 327 Wis. 2d 252, 270-271, 786 N. W.2d 97, 107 (citing *Herring v. United States*, 555 U.S. 135, 129 S.Ct. 695, 700, 172 L.Ed.2d 496 (2009) and *Arizona v. Evans*, 514 U.S. 1, 10-11, 115 S.Ct. 1185, 131 L.Ed2d 34 (1995)). Violation of a Fourth Amendment right does not necessarily lead to exclusion. *Id.* In deciding to apply the exclusionary rule, courts should focus on deterring future violations of the Fourth Amendment by law enforcement and weigh the benefits against the costs of such. *Id.* "The exclusionary rule is a judge-made one in furtherance of conduct that courts have considered to be in the public interest and to suppress conduct that is not." *Conrad v. State*, 63 Wis. 2d 616, 636, 218 N.W.2d 252 (1974).

Courts must consider the actions of law enforcement in analyzing the totality of the circumstances and whether the

exclusionary rule should apply. "The test of whether the officers' reliance was reasonable is an objective one, querying 'whether a reasonably well trained officer would have known that the search was illegal' in light of 'all the circumstances.'" *Id.* at ¶ 36, 327 Wis. 2d at 271-272, 786 N.W.2d at 107 (citing *Herring*, 129 S. Ct. at 703 (quoting *United States v. Leon*, 468 U.S. 897, 922 n. 23, 104 S. Ct. 3405 (1984))).

The Wisconsin Supreme Court has adopted a good faith exception to the exclusionary rule as it applies to the validity and/or legality of a search warrant. "[T]he burden is upon the State to show that the process used in obtaining the search warrant included a significant investigation and review by either a police officer trained and knowledgeable in the requirements of probable cause and reasonable suspicion, or a knowledgeable government attorney." *State v. Eason*, 2001 WI 98, ¶ 74, 629 Wis. 2d 206, 267, 629 N.W.2d 625, 653. The Wisconsin Supreme Court also concluded that the above process is part of the protections afforded to individuals under the Wisconsin Constitution, Article I, Section 11 and set forth by the United States Supreme Court in *Leon*, 468 U.S. 897, 104 S. Ct. 3405.

"We see no reason in logic, justice, or in that innate sense of fair play which lies at the foundation of such guarantees, why a court of justice, rejecting as abhorrent the idea of the use of evidence extorted by violation of a defendant's right to be secure in person and exempt from self-incrimination though it may result in murder going unwhipt of justice, should yet approve of the use, in the same court of justice, by state officers, of that which has been obtained by other state officers through, and by, a plain violation of constitutional guarantees of equal standing and value, though thereby possibly a violation of the prohibition law may go unpunished."

Hoyer v. State, 180 Wis. 2d 407, 417, 193 N.W.2d 89 (1923).

"[E]ven where an officer has obtained a warrant and abided by its terms, exclusion may be appropriate." *Eason*, 2001 WI 98 at ¶ 36 (*citing Leon*, 468 U.S. at 922, 104 S. Ct. 3405). "The standard of objective reasonableness requires, among other things, that police officers have a reasonable knowledge of what the law prohibits." *Id.* (*citing Leon*, 468 U.S. at 919 n. 20, 104 S. Ct. 3405).

Furthermore, the Wisconsin Supreme Court has held that the Wisconsin Constitution, Article I, Section 11 requires the above process and that "the Wisconsin Constitution may afford greater protection than the United States Constitution." *State v. Hansford*, 219 Wis. 2d 226, 242, 580 N.W.2d 171 (1998).

The Ninth Circuit addressed the objective reasonableness issue in *United States v. Peterson*, 812 F.2d 486 (1987)¹. The *Peterson* court held that American officers could rely on foreign law enforcement as to whether foreign law has been complied with. *Id.* at 492. The court did not, however, find that an “objectively unreasonable reliance” on foreign law enforcement representations as to law granted American officers with immunity from the exclusionary rule. *Id.*

In *Peterson* the court determined that the search and seizure by American law enforcement was objectively reasonable because officers sought out and received assurances from high ranking law enforcement officials in the Philippines that the necessary authorizations had been received prior to the search and seizure. *Id.*

In the case at bar, the circuit court provided a detailed record of its reasoning in denying Johnson’s motion to suppress the evidence obtained through the search of his apartment in Mexico². A review of the detailed ruling of the circuit court shows that the court erred in not granting Johnson’s motion to suppress.

¹ The Circuit Court correctly determined that, under *Peterson*, the search of Johnson’s apartment in Mexico was a joint operation between the Mexican authorities and detectives from the Waukesha County Sheriff’s Department, The City of Oconomowoc and the San Diego Police Department.

² The circuit court granted Johnson’s motion to suppress in part by determining that exigent circumstances did not exist and could not be relied on by the State as a basis for justifying the search on Johnson’s residence in Mexico. R125:33-34.

To begin, the circuit court was unable to determine what the burden was on the State and the evidence/case law necessary to support the State's proposition that the search was legal and fell within any exceptions to the warrant requirement. R125:41-43. It is clear from the record that the State did not provide the court with any case law or documents that could have assisted the court in reaching its ruling. *Id.* In fact, the only documentation submitted to the court relative to this issue was submitted by Johnson's trial counsel. *Id.* The materials submitted by trial counsel stated that under the Mexican constitution a warrant was required to search Johnson's residence. *Id.* at 42. The State did not provide the court with any law to support the contention that the search of Johnson's residence was an exception recognized by Mexico or its constitution. *Id.* at 41-42.

Without being able to state with specificity that an exception existed under the Mexican constitution that allowed a warrantless search of Johnson's Mexican residence, the circuit court found that the search was valid based on consent of the landlord. *Id.* at 43-44. As a result of the State providing no documentation or law to support its contention that the consent of the landlord was a valid exception to the Mexican constitution the circuit

court was left with determining that officers involved relied on advice from other agencies based on hearsay evidence and testimony. *Id.* at 44-45.

The key in Johnson's case is whether the search of his residence in Mexico was based on an objectively reasonable belief of the officers that the search was valid under Mexican law.

From the testimony presented by the State in support of the search, it was brought forth that this was the first search of a residence in Mexico that the border liaison official had ever been involved in. R99:35-36. Furthermore, testimony showed that it could take six to twelve months to obtain a proper search warrant for the search of a residence in Mexico. *Id.* at 36-37. Additional testimony was that obtaining a warrant could take as little as four months or as long as two to three years. *Id.* at 36-37. The border liaison officer testified as to the proper procedure required for obtaining a warrant. *Id.* at 37-38. From the testimony, it is clear that there was no warrant issued for the search of Johnson's residence in Mexico. *Id.* at 38.

The statements made by the border liaison officer are telling in that they describe the difficulties in obtaining a warrant which is what most likely precipitated proceeding

without a warrant under the theory of landlord consent.

Specifically, the officer testified that:

"...It takes a long time to get through - to go through the process. There is always one change that someone wants. It goes back and forth.

It is a nightmare of a process, and that's why a lot of people think they can go to Mexico to hide, because it is - it is such a difficult administrative process to make all of this stuff happen, but we do it."

Id. at 36.

The basis for the circuit court's determination that the search was valid was based solely on the theory that the consent of the landlord was an exception to the warrant requirement under Mexican law. The officers from the U.S. did not speak directly to any officials in Mexico who were in a position to make such a determination. The closest U.S. authorities came to confirmation was multi-level hearsay that a non-attorney, liaison officer in Mexico spoke with the Mexican attorney general who stated that landlord consent was an exception. *Id.* at 25-29, 40-41. No documentation was provided to U.S. authorities to support this contention and no U.S. authorities spoke to the attorney general's office despite the fact that the U.S. authorities were familiar with the warrant process.

As previously stated, the case at bar differs from *Peterson* in that there was direct communication between U.S. authorities and "high ranking" officials in the Philippines. 812 F. 2d 486. The circuit court came to its ruling by assuming that landlord consent was a valid exception to the Mexican constitution's warrant requirement. This is also important because Johnson's residence was not an apartment located within an apartment complex; rather, it was a free-standing, two bedroom house. R99:49. Without the benefit of specific exceptions to the warrant requirement in Mexico, the circuit court could not have reached the conclusion it did in validating the search of Johnson's residence.

It is generally recognized in the U.S. that landlords are not able to give valid consent to the search of a residence rented out to a lessee. See *United States v. Impink*, 728 F. 2d 1228 (1984). Knowing this, the burden should have been on law enforcement initially to do more than rely on third party hearsay before proceeding with the search of Johnson's residence in Mexico. Especially after learning that there was in fact a procedure for obtaining a valid warrant for the search of a residence in Mexico.

CONCLUSION

Respectfully submitted this 26th day of April, 2013.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stats. §809.19(8)(b) and (c) for a brief produced using the following font:

Monospaced font: Courier New - 12, 10 characters per inch; double-spaced; a 1.5 inch margin on the left side and 1 inch margins on all other sides.

The length of this brief is 16 pages.

Dated this 26th day of April, 2013.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of 809.19(12) Wis. Stats.

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of 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 26th day of April, 2013.

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APPELLANT'S BRIEF APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with §809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the trial court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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 with appropriate references to the record.

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CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY

I certify that on April 26, 2013, this brief and appendix was delivered to a third-party commercial carrier for delivery to the Clerk of the Court of Appeals within 3 calendar days. I further certify that the brief or appendix was correctly addressed.

Dated: April 26, 2013.

Signature: _____ /s/ DM

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