STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2012AP837-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JACK E. JOHNSON,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR WAUKESHA COUNTY, THE HONORABLE JAMES R. KIEFFER, PRESIDING

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication because the issues in this case can be resolved by applying established legal principles to the facts.

SUPPLEMENTAL STATEMENT OF FACTS

Defendant-appellant Jack E. Johnson appeals from his conviction by a jury for first-degree criminal homicide

as a party to a crime (79). The charge stemmed from Johnson's involvement in the murder of Kimberly Smith in Oconomowoc on October 1, 2009 (1:1; A-Ap. 1).[1] Smith's body was discovered in her home with multiple stab wounds (1:1; A-Ap. 1).

Based on DNA and fingerprint evidence collected at the scene, Justin Welch was identified as the person who stabbed Smith (1:2; A-Ap. 2). Further police investigation identified two additional men as being involved in Smith's murder: (1) Darren Wold, Smith's ex-boyfriend with whom she had been having a "highly acrimonious" custody dispute over their four-year-old son; and (2) Johnson, who was close friends with Wold and who lived with Welch in Rosarito, Baja California, Mexico, at the time leading up to Smith's murder (1:1-4; A-Ap. 1-4). Specifically, based on phone and other records obtained by police, a pattern of fund transfers, phone calls, and flights indicated that Wold paid Welch through Johnson to travel to Wisconsin to kill Smith. According to the complaint, police believed that Johnson assisted the arrangement by purchasing Welch's plane tickets to Wisconsin, transporting Welch between Mexico and San Diego for his flights to and from Wisconsin, communicating with Welch and Wold during the days Welch was in Wisconsin, and sending money to Welch via wire transfer while he was in Wisconsin (1:3-4; A-Ap. 3-4).

Johnson filed a motion to suppress evidence seized during a warrantless search of his residence in Mexico by United States and Mexican law enforcement (27:1-4).[2] The circuit court held an evidentiary hearing on the motion (99). Detective Robert Wepfer of the Waukesha

[1] Johnson's appendix to his brief is not paginated. The State cites to portions of the appendix as if they had been consecutively paginated beginning with 1 and ending with 43.

[2] Waukesha police had the computer physically transported to Wisconsin, where they obtained a search warrant to review its contents (99:11-13).

County Sheriff's Department testified that as of November 18, 2009, Wepfer learned that Johnson had been detained at the California-Mexico border (99:5). Wepfer testified that at that point in the investigation, police had identified Johnson as a suspect in the Smith homicide based in part on phone records of numerous calls between Johnson and Wisconsin motels where Welch appeared to be staying at the time of the murder (99:8). Wepfer obtained an arrest warrant for Johnson (99:6).

After he secured Johnson's arrest on November 18, Wepfer contacted FBI special agent Michael Eckel to inquire about steps the Waukesha Sheriff's Department would need to take to search Johnson's Mexico residence and to seek Eckel's assistance in effectuating the search (99:13-14, 17-18).

Special Agent Eckel testified that as of November 18, 2009, he was the border liaison officer with the San Diego FBI office (99:21). As border liaison officer, Eckel was responsible for coordinating law enforcement matters between state and local authorities and Mexican authorities for a range of matters including fugitives (99:21-22). Eckel confirmed that he received a call on November 18 or 19 from Waukesha law enforcement regarding their interest in searching Johnson's rental house in Rosarito (99:23-24).

Eckel contacted the liaison officer for the Baja California Attorney General, Jesus Quinones (99:24-25). Eckel explained that it was standard operating procedure for him to contact the state attorney general's liaison officer regarding Mexican state legal issues (99:30-33). Eckel told Quinones that United States law enforcement wanted to search Johnson's rental home in Rosarito, Mexico. Eckel further emphasized to Quinones the search needed to comply with Mexican law because United States authorities wanted to use any evidence obtained from the search in United States court (99:25, 40; A-Ap. 5, 15). According to Eckel, Quinones told him he would

confer with the Attorney General about whether a search warrant was necessary and would call him back (99:26, 40; A-Ap. 6, 15). Through his experience, Eckel described the process of getting a search warrant for a residence in Mexico to be a time-consuming and difficult one that could take as little as four months but normally took six to twelve months or longer (99:22-23, 36-37; A-Ap. 11-12).

Quinones called Eckel back a few hours later and told him that, according to the Attorney General, if the landlord gave consent, law enforcement could search Johnson's residence without a warrant (99:26; A-Ap. 6). Quinones then arranged for local law enforcement to contact Johnson's landlord (99:27; A-Ap. 7). A few hours later, Quinones called Eckel to tell him the landlord consented to the search and that it could happen the following day, November 20, 2009 (99:28-29; A-Ap. 8-9). Eckel contacted the Waukesha County Sheriff's Department and relayed that information to them (99:29; A-Ap. 9).

Eckel said that the next morning, a large group of law enforcement—including Eckel, Rosarito police, San Diego police officers, two liaison officers, and two Waukesha County detectives—met the landlord at Johnson's rental residence (99:24). Detective Michael Toole, one of the two Waukesha County officers involved in the search, said that the landlord unlocked the door to the residence, which was a two-story freestanding house (99:43, 49). According to Toole, the Rosarito officers entered first to secure the house (99:43-44). They then allowed the others to enter (99:44).

Toole stated that at the Rosarito police commander's request, he and his partner first made a list of the items during the search that they wished to seize for the commander's approval (99:45-46). Toole said that the commander ultimately permitted the Waukesha officers to seize everything on the list, which included Johnson's "computer, some photo albums, some pieces of paper with

different names on them, [and] some money grams" (99:44-46).

The circuit court denied the motion (125:52-53; A-Ap. 42-43). It concluded that even if the search violated Mexican law, the evidence was nevertheless admissible based on the good-faith exception to the exclusionary rule (125:52-53; A-Ap. 42-43).

Additional facts will be discussed in the argument section of this brief.

SUMMARY OF PARTIES' POSITIONS ON APPEAL

On appeal, Johnson argues that the circuit court erred in admitting the evidence obtained from the search of his rental home in Mexico (Johnson's br. at 7). In his view the State failed to satisfy its burden of demonstrating that the search was legal under Mexican law and thus was obtained in violation of his Fourth Amendment rights (Johnson's br. at 12). He further asserts that the reliance by the Waukesha police on Eckel's statements that the search was legal was not objectively reasonable and thus did not compel application of the good-faith exception to the exclusionary rule (Johnson's br. at 12-14).

Johnson is not entitled to relief. Even if the search of Johnson's residence was not legal under Mexican law, the State satisfied its burden of demonstrating that the Waukesha police had an objectively reasonable reliance on other officials' assurances that the search was legal. Accordingly, the good-faith exception to the exclusionary rule applied, and suppression was not appropriate in this case.

STANDARD OF REVIEW

Appellate courts reviewing the denial of a motion to suppress will uphold the circuit court's findings of historical fact unless they are clearly erroneous. *State v.*

Eason, 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625. However, this court reviews the application of constitutional principles to those facts for errors of law. *Id.*

ARGUMENT

THE CIRCUIT COURT DID NOT ERR IN DENYING JOHNSON'S MOTION TO SUPPRESS.

A. Relevant law.

1. The exclusionary rule does not always apply to evidence obtained in violation of the Fourth Amendment.

The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution protect against unreasonable searches and seizures. *Eason*, 245 Wis. 2d 206, ¶16. "Subject to a few well-delineated exceptions, warrantless searches are deemed per se unreasonable under the Fourth Amendment." *State v. Faust*, 2004 WI 99, ¶11, 274 Wis. 2d 183, 682 N.W.2d 371.

Simply because a Fourth Amendment violation occurs, however, courts are not compelled to apply the exclusionary rule to suppress the evidence. *Herring v. United States*, 555 U.S. 135, 141 (2009). Indeed, exclusion is an appropriate remedy only where it "'result[s] in appreciable deterrence.'" *United States v. Leon*, 468 U.S. 897, 909 (1984) (quoted source omitted). Thus, the focus of whether to apply the exclusionary rule is on its effectiveness in deterring subsequent Fourth Amendment violations. *Herring*, 555 U.S. at 141; *State v. Dearborn*, 2010 WI 84, ¶35, 327 Wis. 2d 252, 786 N.W.2d 97.

In addition, merely marginal deterrence is not sufficient to justify application of the exclusionary rule. *Herring*, 555 U.S. at 141. Rather, courts must ensure that the benefits of the deterrence outweigh the often substantial costs of releasing possibly dangerous defendants, limiting the court's truth-seeking function, and curtailing law enforcement objectives. *Id.* Accordingly, that substantial cost "presents a high obstacle for those urging [the exclusionary rule's] application." *Id.* (internal quotation marks and source omitted).

2. The good faith exception permits the use of evidence from a foreign search when domestic law enforcement reasonably relies on foreign representations of compliance with their law.

Federal courts have recognized that, generally, Fourth Amendment principles do not extend to searches in a foreign country by that country's authorities, even when the target of the search is a United States citizen. *United States v. Peterson*, 812 F.2d 486, 490 (9th Cir. 1987). However, if United States law enforcement agents' involvement in the search "is so substantial that the action is a joint venture between United States and foreign officials, the law of the foreign country must be consulted at the outset as part of the determination whether or not the search was reasonable." *Id.*

Even though foreign law governs whether the search was reasonable, United States law governs whether evidence obtained illegally should be excluded. *Id.* at 491. Because the focus of that inquiry "is whether exclusion serves the rationale of deterring [state or federal law

enforcement] from unlawful conduct[,]" courts consider whether the good-faith exception to the exclusionary rule applies. *Id.* at 491-92.

First enunciated by the United States Supreme Court in *United States v. Leon*, the good faith exception to the exclusionary rule permits the admission of illegally obtained evidence pursuant to an invalid warrant when officers have an objectively reasonable belief that the warrant was issued properly. 468 U.S. at 922-23. The Ninth Circuit concluded that the rationale behind the good-faith exception—limiting the exclusion of evidence to situations where it is necessary to deter law enforcement misconduct—likewise applied to domestic law enforcement's reasonable reliance on representations of foreign officials regarding the interpretation of their foreign law:

> The good faith exception is grounded in the realization that the exclusionary rule does not function as a deterrent in cases in which the law enforcement officers acted on a reasonable belief that their conduct was legal. It is true . . . that *Leon* speaks only in terms of good faith reliance on a facially valid search warrant. That is not dispositive, however. We conclude that the reasoning applies as well to reliance on foreign law enforcement officers' representations that there has been compliance with their own law. American law enforcement officers were not in an advantageous position to judge whether the search was lawful, as would have been the case in a domestic setting. Holding them to a strict liability standard for failings of their foreign associates would be even more incongruous than holding law enforcement officials to a strict liability standard as to the adequacy of domestic warrants. . . .
>
> . . . [P]ermitting reasonable reliance on representations about foreign law is a rational accommodation to the exigencies of foreign investigations.

Peterson, 812 F.2d at 492 (citation omitted).

3. Wisconsin courts have likewise adopted the good-faith exception.

Wisconsin courts have also recognized the good-faith exception to the exclusionary rule. *See, e.g.*, *Eason*, 245 Wis. 2d 206, ¶52 (applied to search made pursuant to an invalid no-knock search warrant); *State v. Ward*, 2000 WI 3, ¶¶49-50, 231 Wis. 2d 723, 604 N.W.2d 517 (applied to warrantless search made in compliance with later-invalidated law). Although traditionally Wisconsin courts have interpreted the protections under article I, section 11 identically with federal Fourth Amendment law, the court in *Eason* concluded that the Wisconsin Constitution affords additional protections than the Fourth Amendment provides under the *Leon* good-faith exception as it applies to search warrants. 245 Wis. 2d 206, ¶60. Specifically, the *Eason* court held that "for the good faith exception to apply, the State must show that the process used attendant to obtaining the search warrant included a significant investigation and a review by a police officer trained in, or very knowledgeable of, the legal vagaries of probable cause and reasonable suspicion, or a knowledgeable government attorney." *Id.* ¶63.

Whether those enhanced protections announced in *Eason* apply to foreign searches where there is no warrant and where state law enforcement relies on foreign law enforcement assurances of compliance with foreign law is unclear, but seems unlikely. Wisconsin appellate courts have distinguished the *Eason* rule as being specific to cases involving a search warrant. *See, e.g.*, *Dearborn*, 327 Wis. 2d 252, ¶14 n.7 (noted that *Eason* was limited to situations involving a no-knock warrant); *State v. Loranger*, 2002 WI App 5, ¶16, 250 Wis. 2d 198, 640 N.W.2d 555 (stating that the *Eason* rule does not apply to warrantless searches involving law enforcement reliance on subsequently overruled law).

In summary, *Peterson* indicates that when a suppression issue stems from a foreign search, courts

consider three questions: (1) Was the investigation a "joint" effort involving United States law enforcement, thus bringing the search within the purview of the Fourth Amendment; if so, (2) was the search reasonable under foreign law; if not, (3) did domestic law enforcement objectively reasonably rely on representations by foreign officials that the search was legal? 812 F.2d at 490. In addition, to the extent that *Eason* applies to such a situation, for the good-faith exception to apply under article I, section 11 of the Wisconsin Constitution, law enforcement must have engaged in a significant investigation involving a knowledgeable government attorney. 245 Wis. 2d 206, ¶63.

B. The circuit court correctly concluded that Waukesha law enforcement satisfied *Leon* and *Eason* by objectively relying on representations by appropriate foreign officials.

As for the first question under *Peterson*, there is no dispute that the search of Johnson's house was a joint effort involving various United States and Mexican authorities. Based on Eckel's testimony, the search involved both Mexican police and domestic law enforcement (99:24). Because of that, the Fourth Amendment applied to the search.

As for the second question, it is not clear on this record whether the warrantless search of Johnson's residence based on his landlord's consent was indeed legal under Mexican and Baja California law. In issuing its ruling, the circuit court assumed the search did not comply with Mexican law, given that the State did not provide it with any research or other documentation setting forth the exceptions to the warrant requirement under Mexican law (125:42; A-Ap. 32). Rather, the State and the court focused on the third question under *Peterson* and *Eason*—

whether there was reasonable reliance to permit the good-faith exception to apply (125:48-50, A-Ap. 38-40).[3]

Here, the circuit court correctly concluded that Waukesha police objectively reasonably relied on foreign official representations that they could search Johnson's residence with the landlord's consent. Waukesha police took objectively reasonable preliminary steps: They contacted Eckel, an FBI agent whose responsibility was to act as a liaison between state and Mexican law enforcement and over cross-border law-enforcement issues. As Eckel testified, he had several years' experience dealing with such issues and he had a degree in Spanish language translation and interpretation to assist him in his responsibilities (99:21-22).

Eckel also took objectively reasonable preliminary steps: Eckel indicated that when confronted with questions like the one from the Waukesha police, his standard procedure was to call his contact at the Attorney General's office in the relevant Mexican state (99:30-33). In this case, that contact was Quinones, a person that Eckel had worked with in the past and whom Eckel knew to have a

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[3] Johnson argues that the circuit court concluded or assumed that the search was valid based on the consent of the landlord, even though the State did not present any law supporting the theory that landlord consent was a valid exception in Mexico to the warrant requirement (Johnson's br. at 11-12, 14).

Johnson misreads the circuit court's opinion. In its decision, the circuit court laid out two potential alternative holdings that it could hold either: (1) that the search was legal under Mexican law and thus no Fourth Amendment violation occurred (125:42-44; A-Ap. 32-34); or (2) alternatively, assuming the search was illegal under Mexican law, that Waukesha officers objectively reasonably relied on foreign representations of their law in compliance with *Peterson* and *Eason*, and that suppression under the circumstances would not serve to deter future official misconduct (125:44-50; A-Ap. 34-40). After setting forth those holdings, the circuit court explained that it believed that the latter approach—i.e., that the search was *not* necessarily legal but that suppression was not warranted based on the good-faith exception in *Peterson* and *Eason*—was correct under the circumstances (125:52; A-Ap. 42).

close working relationship with the Baja California Attorney General (99:30-31). Eckel emphasized to Quinones the importance that the search of Johnson's residence comport with Mexican law so that U.S. authorities could safely use any evidence found there in U.S. courts (99:25, 40; A-Ap. 5, 15).

Further, Eckel reasonably relied on Quinones' next communication indicating that Quinones had talked directly to the Attorney General about the matter and that landlord consent was sufficient to allow the search of Johnson's residence. Eckel was a government lawyer with past experience working with Quinones and the Baja California Attorney General. Nothing in the record suggests that Eckel had reason to disbelieve Quinones' representations as to Mexican law, especially in light of the fact that Eckel emphasized to Quinones the importance that the search be legal under Mexican law.

Finally, there is nothing about the search itself that raised red flags to suggest that Quinones' explanation of the law or Eckel's understanding of it was incorrect. Eckel and Waukesha officers saw the landlord at the residence and saw him open the door for officers (99:30, 48). The Waukesha police, in conducting the search, acted pursuant to the Rosarito police commander's requests to allow his team to secure the building first and to allow the commander to pre-approve the items that they wished to seize (99:43-44, 45-46, 50). *Cf. United States v. Stokes*, 710 F. Supp. 2d 689, 703 (N.D. Ill. 2009) (in applying rule from *Peterson*, noting that U.S. officials did not engage in misconduct requiring suppression where they assisted in a search pursuant to a Thai warrant and under the instructions of Thai police).

In all, the record demonstrates that Waukesha officers—through appropriate federal channels—sought and obtained assurances from the high-ranking authorities in the Baja California Attorney General's office that searching Johnson's rental residence with the landlord's consent complied with Mexican law. Their reliance on

those authorities was objectively reasonable under the circumstances pursuant to *Leon* and *Peterson*. Accordingly, assuming that the search violated the Fourth Amendment, suppression of the evidence was not required to deter official misconduct.

As noted above, the enhanced protections set forth under *Eason* likely do not apply to this situation where the search occurred without a warrant. Wisconsin courts have limited *Eason*'s application to situations involving warrants. *See, e.g.*, *Dearborn*, 327 Wis. 2d 252, ¶14 n.7; *Loranger*, 250 Wis. 2d 198, ¶16. Further, the *Eason* standard is specific to situations involving warrants, a process in which law enforcement is involved and thus has the ability (and heightened responsibility) to ensure that the warrant is valid. *See State v. Hess*, 2010 WI 82, ¶57, 327 Wis. 2d 524, 785 N.W.2d 568 ("[T]he *Eason* requirements for the good-faith exception were crafted for search warrants and may not be applicable to all warrants for arrest, especially in situations where a law enforcement agency is not in the picture."). In contrast, when a foreign search is involved, domestic law enforcement is at a disadvantage to investigate or assess foreign officials' representations of foreign law. Accordingly, applying *Eason* to a foreign search is an awkward exercise at best.

That said, even if *Eason* did apply, the circuit court likewise correctly concluded that the steps taken here by the Waukesha police and Eckel satisfied *Eason* (125:51; A-Ap. 41). Here, Special Agent Eckel contacted Quinones, with whom he had worked in the past on his job as a liaison between domestic and Mexican law enforcement (99:24-25). The court found that Eckel, through his experience working with Mexican authorities as an FBI agent, was a knowledgeable government attorney and that his communications with Quinones involved a significant investigation into the legality of United States authorities searching Johnson's residence in Mexico (125:50-51; A-Ap. 41-42). There was no misconduct here; excluding the evidence under these

circumstances would do nothing to deter future misconduct. Accordingly, the good-faith exception to the exclusionary rule applies to the extent that a separate Wisconsin constitutional analysis under *Eason* is required here.

C. Johnson's arguments to the contrary are without merit.

Johnson argues that Eckel's description of the time-consuming process of obtaining a search warrant in Mexico "most likely precipitated proceeding without a warrant under the theory of landlord consent" (Johnson's br. at 12-13). The State is unsure what Johnson's precise point is. Eckel clearly described the lengthy warrant application process and essentially stated that he called the Attorney General's office in Baja California to learn if there was a legal way—other than getting a warrant—for police to search Johnson's rental home. There is nothing about that action by Eckel to suggest that he or Waukesha police unreasonably relied on the Attorney General's advice that landlord consent was a valid exception to the warrant requirement.

Johnson complains that domestic law enforcement did not speak directly to or receive documentation from Mexican officials who could make a determination as to the legality of landlord consent to search (Johnson's br. at 13). He says that this case is distinguishable from *Peterson* because in that case, United States authorities spoke "directly" to high-ranking officials in the Philippines (Johnson's br. at 14).

As an initial matter, the facts in *Peterson* indicate simply that U.S. officials contacted Philippine authorities to alert them that a ship allegedly carrying drugs was en route to the Philippines. 812 F.2d at 488. Philippine authorities conducted wire taps on one of the suspects who lived in the Philippines and provided U.S. officials with that information, which those officials later used to

intercept the ship. *Id.* at 488-89. Whether the United States officials in that case spoke "directly" to high-ranking officials—or through liaisons or assistants—is neither fleshed out nor a dispositive point in *Peterson*.

Furthermore, it is unclear how an attempt by the Waukesha Sheriff's Department—an office it is safe to assume rarely works directly, if at all, with foreign governments—to work directly with the Baja California Attorney General's Office would have produced more reasonably reliable results. Given that, the Waukesha Sheriff's Department's reliance on a federal agent whose job was to facilitate such interactions was objectively reasonable. Finally, obtaining documents or written confirmation is not a prerequisite under *Peterson* or *Eason* for a court to find that domestic officers reasonably relied on foreign representations interpreting foreign law.

In summary, even assuming the search of Johnson's Rosarito residence violated the Fourth Amendment and article I, section 11 of the Wisconsin constitution, domestic law enforcement involved in the investigation had an objectively reasonable reliance on the representations of high-ranking Mexican officials that the search was legal. Accordingly, the good-faith exception applies and the circuit court properly concluded that suppression was not warranted under the circumstances.

CONCLUSION

For the foregoing reasons, the State respectfully asks that this court affirm the judgment of conviction.

Dated this 26th day of June, 2013.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3991 words.

_____
Sarah L. Burgundy
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

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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 June, 2013.

_____
Sarah L. Burgundy
Assistant Attorney General