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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2013 AP 634-CR

JIMMIE G. MINETT,

Defendant-Appellant.

ON NOTICE OF APPEAL TO REVIEW A JUDGMENT OF CONVICTION AND THE DENIAL OF A POSTCONVICTION MOTION, ENTERED AND DECIDED IN THE CIRCUIT COURT OF WALWORTH COUNTY, THE HONOROBLE JAMES L. CARLSON, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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Argument

I. Failure to Comply with the Strip Search Statute in Wis. Stat. § 968.25 Can and Should Result in Suppression of Illegally Obtained Evidence

First of all, the determination that Detective Uhl participated in the strip search was clearly erroneous. Specifically, upon testifying at the motion hearing at the trial level, Sergeant Michael Ciardo confirmed that the strip search report only detailed two people conducting the search: Sgt.

Timothy Swartz and Sgt. Ciardo, and detailed Det. Uhl as simply a witness. R66:48. Thus, there was credible evidence adduced at the motion hearing that Det. Uhl was a witness to and not a participant in the strip search as documented in the report.

Secondly, in this case, even the State concedes there was a failure to reduce to writing the police chief's authorization allowing Sergeant Ciardo to approve strip searches and a failure of the officers to timely supply Mr. Minett with a copy of the strip search report. (See Plaintiff-Respondent's Brief [Resp. Br.] at p. 5.) Therefore, Wis. Stat. § 968.255 was not complied with, the parties agree on that.

Where the Plaintiff-Respondent and Mr. Minett differ, however, is in the opinion that suppression of evidence found as a result of the strip search is not a valid remedy for this police conduct. The purpose of the exclusionary rule is to deter unlawful police conduct. *Hudson v. Michigan*, 547 U.S. 586, 608, 126 S. Ct. 2159, 2173, 165 L. Ed. 2d 56 (2006), *State v. Hochman,* 2 Wis. 2d 410, 419, 86 N.W.2d 446, 451 (1957). Here, the police explicitly violated the prescriptions of the statute, as detailed in Mr. Minett's appellant brief. The statute provides for *criminal prosecution* of the officers for failure to comply with the statute, (Wis. Stat. § 968.255(4)), Despite this, the respondent argues that "suppression of the drugs found in the search is too drastic a remedy under these circumstances." (Resp. Br. at p. 7).

If the statute allows for *criminal prosecution* of the officers, it seems that, on the contrary, suppression of the evidence is a more temperate resolution of the failure to comply. Additionally, it remains Mr. Minett's position that this statute is to be abided by with strict compliance, as argued in the appellant's brief.

The respondent cites a few out of state cases in support of its premise that the exclusionary rule should not apply. Specifically, in *Jenkins v. State*, 978 So. 2d 116, 130 (2008), the Florida Supreme Court found that since its strip search

statute listed other remedies as an appropriate remedy for noncompliance but not suppression, that suppression was inappropriate unless a constitutional violation had also occurred. *Id.* The court in Florida determined that while it had held that the exclusionary rule applied to some statutes that were silent as to a remedy for a violation, the strip search statute in question in Florida, §901.211(6) had specific civil and injunctive remedies that the legislature chose and so, "we must assume that the Legislature intended to exclude all other remedies." 978 So. 2d at 130, fn. 14.

In Wisconsin law, *Popenhagen,* the Wisconsin Supreme Court clearly explained that prior precedent did "not require the legislature expressly to require or allow suppression of unlawfully obtained evidence in order for a circuit court to grant a motion to suppress." 2008 WI 55, ¶68. The court never stated that there must be a prerequisite that legislature be silent as to ALL remedies in order for suppression to be available. *Id.*

The court in *Popenhagen* decided that it is unreasonable to allow the State to use incriminating evidence obtained in violation of the subpoena issuance statute. *Id.* at ¶87. In the same vein, here it would be unreasonable for the court to allow evidence obtained in violation of the strip search statute which clearly proscribes that searches should not be completed unless its prescriptions are met.

II. Failure to Suppress Was Not a Harmless Error

The standard for harmless error is whether the error contributed to the conviction. The court must be convinced that the failure to suppress that evidence played a significant role in the defendant's decision to plead. *State v. Semrau*, 2000 WI App 54, ¶22, 233 Wis.2d 508, 608 N.W.2d 376. (without the error, defendant would have not pleaded guilty

and instead went to trial.) *Semrau* notes that in answering this question, the court examines (1) the relative strength and weakness of the State's case and the defendant's case, (2) the persuasiveness of the challenged evidence, (3) the reasons, if any, the defendant gave for choosing to plead guilty, (4) the benefits the defendant obtained in exchange for the plea and (5) the thoroughness of the plea colloquy. *Id.* The State notes that the first and second factors of the *Semrau* analysis should be geared towards an analysis of how strong the State's case was overall relating to all counts charged. (Resp. Br. at p. 13).

Mr. Minett differs from the State's analysis as to the strength of the State's case. The State argues that it had "strong evidence incriminating Minett in three controlled buys, as well as evidence seized from his cell phone." *Id.* at 14. Mr, Minett argues that neither the police nor the confidential informant testified at a preliminary hearing. Therefore, credibility of the police officers and the confidential informant were not tested with cross examination. Specifically, upon being accused of a controlled buy, the State must have the officers testify as to the search of the confidential informant ahead of the controlled buy, what location they were conducting surveillance on, the chain of custody of the drugs that were allegedly obtained, the search of the confidential informant upon return from the alleged buy, and the officers must account for somebody having watched and/or recorded the confidential informant throughout the alleged buy. In other words, simply because a controlled buy is alleged does not mean that there is no defense to it and that the State automatically had a strong case. Chain of custody, credibility, reliability, surveillance are all at issue.

As far as the text messages that were on the cell phone, multiple people use cell phones. Just because text messages

are on a particular phone does not mean that Mr. Minett was the one who sent them. Somebody else could have been using the phone. This could have been an issue at trial as well.

Mr. Minett was facing 11.5 years initial confinement and five years extended supervision on each of the three heroin charges (counts 1-3) for a total of 34.5 years initial confinement and 15 years extended supervision. R2. Mr. Minett faced five and a half years initial confinement and two years of extended supervision on count five possession of narcotic drugs. *Id.* On count four, the possession with intent to deliver cocaine, which could have arguably been dismissed, Mr. Minett was also facing 11.5 years initial confinement and five years extended supervision. Thus, with the cocaine charge Mr. Minett was facing a total of 51.5 years initial confinement and 22 years extended supervision if he would have gone to trial and lost on all counts. R7.

Arguably, however, Mr. Minett would not have had to go to trial on the cocaine charge, as the argument is he would have gone to trial because, in part, the cocaine had been suppressed. Therefore, Mr. Minett would have only been facing 40 years initial confinement and 17 years extended supervision had he gone to trial.

The deal that Mr. Minett struck was to plead to one heroin and one cocaine charge and dismiss and read in the rest. R69:2, R35. The maximum penalty he faced was 23 years initial confinement and 10 years extended supervision. *Id.* The other potential charges that the State raised in its brief were allegedly referred by the Whitewater Police Department and the Walworth County Sheriff's Department (Resp. Br. at 15), but they never got as far as to establish probable cause. In Mr. Minett's calculus, these "referred" charges should not be included in any calculation as to whether Mr. Minett received a break by pleading guilty and

would have pleaded guilty regardless of the suppression error by the trial court.

As to the agreement not to charge additional referred allegations, first of all, these allegations were not proven or even established as to probable cause, secondly, a sentencing court can consider a broad range of information at sentencing including uncharged crimes, dismissed charges, and acquitted charges. *United States v. Redmond*, 667 F.3d 863, 875 (7th Cir. 2012). In this case, the court considered the uncharged offenses when the court stated, "this behavior pattern is one that is just so serious that a lengthy period of incarceration is required for the protection of the public…" R70:67. In fact, the trial court stated that "if you talk about all of the deals where people are giving talks about, well, we purchased 3 times from him, I counted up…9 felonies and a misdemeanor actually." *Id.* at 65. Therefore, the uncharged offenses were not completely abandoned in relation to Mr. Minett's sentence simply because he pleaded guilty.

Mr. Minett's understanding that the court could consider uncharged offenses at sentencing is relevant to a decision to go to trial as (1) there might not have been probable cause for the uncharged offenses and (2) the court could consider them anyways at sentencing.

In sum, upon accepting the plea, Mr. Minett was only looking at a reduction of 17 years initial confinement and seven years of extended supervision by accepting the plea as opposed to taking the case to trial. It is true that the offer allowed for the State to remain silent as to length of prison and to recommend Earned Release Program as mentioned in Respondent's Brief at 15. However, it is also true that when one goes to trial, one has the possibility of acquittal on any or all counts, and when one pleads guilty one waives the right to make the State prove one guilty beyond a reasonable

doubt as to each element of each offense. *Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977).

Given all these factors, especially the ultimately non-significantly lessened penalty by pleading guilty, the fact that controlled buy cases do have defenses, and the fact that Mr. Minett never stated on the record that he would have pleaded guilty regardless of whether the cocaine was suppressed, the question does exist: would Mr. Minett have taken the case as a whole to trial if the trial court had suppressed the strip search discovered cocaine? It is Mr. Minett's position that the situation is not as concrete as the State claims, and that, yes, he would have gone to trial. Therefore, the failure to suppress the cocaine was not a harmless error.

Conclusion

This Court therefore should reverse the decision of the trial court denying the suppression motion. The evidence discovered in the strip search should be suppressed for failure to abide by Wis. Stats. § 968.255 and the failure to suppress was not a harmless error.

Dated at Milwaukee, Wisconsin, this 22nd of December, 2013.

Respectfully submitted,

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CERTIFICATION

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. The length of the brief is 1,848 words.

_____
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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).

I further certify that:

This electronic brief, excluding the appendix, 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, excluding the appendix, filed with the court and served on all opposing parties.

Dated this 22nd day of December, 2013.

_____
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