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State of Wisconsin
Court of Appeals
District 1
Appeal No. 2013AP1901-CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Eduardo Ivanez,

Defendant-Appellant.

On appeal from a judgment of the Milwaukee County Circuit Court, The Honorable Jeffrey Wagner, presiding

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Defendant-Appellant's Reply Brief and Appendix

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Argument

I. In deciding whether Ivanez's statement should be suppressed, the proper analysis is attenuation, not whether, prior to the interrogation in question, the police developed probable cause to arrest Ivanez. Nevertheless, the record fails to demonstrate that, at the time the police interrogated Ivanez, the police possessed probable cause to arrest him.

The state concedes that the evidence presented at the suppression hearing was insufficient to establish that there was probable cause to arrest Ivanez either at the scene or, later, in the sally port. (Respondent's brief p. 5) Nevertheless, the state attempts to salvage the conviction by inviting the court of appeals to find that, prior to the interrogation in question, the police developed probable cause to arrest Ivanez. In order to do so, the state invites the court to examine the allegations of the criminal complaint, and, from there, to conclude that by the time Ivanez was interrogated the following day, on April 21, 2012, the police had developed sufficient additional information to arrest Ivanez (i.e. statements made during the interrogations of Garcia and Santiago).

The state's attempt fails for several reasons: (1) the criminal complaint is not evidence and, therefore, the appellate court cannot consider it in determining whether the police had

probable cause to arrest Ivanez; (2) the criminal complaint does not establish that the content of the Garcia and Santiago interviews was ever *communicated* to the arresting officer prior to arrest[1]; and, (3) whether the exclusionary rule requires that Ivanez's statement be suppressed must be determined under the "attenuation rule" not under the special "Harris rule" suggested by the state..

A. The criminal complaint is not evidence.

While it is true that in reviewing an order denying a motion to suppress the appellate court is not confined to the record of the suppression hearing-- the court may look to the entire record-- here, the state invites the appellate court to consider the allegations of the criminal complaint. No court has ever extended this principle to the allegations of the criminal complaint.

The court has held that, "When reviewing an order on a motion to suppress evidence, an appellate court may take into account the *evidence* at the trial, as well as the *evidence* at the suppression hearing." (emphasis provided) *State v. Griffin*, 126 Wis. 2d 183, 198, 376 N.W.2d 62, 69 (Ct. App. 1985) *aff'd,* 131 Wis. 2d 41, 388 N.W.2d 535 (1986) *aff'd*, 483 U.S. 868, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987)

[1] In other words, the "collective knowledge" doctrine does not permit a warrantless arrest simply because, somewhere, at various places throughout the entire police department, there was sufficient information to establish probable cause even though the pieces of the puzzle, so to speak, where never put together by a single individual.

Fatal to the state's argument here, though, is that fact that, "A criminal complaint is not an exhibit or evidence; it is only a charging document. Its essential function is informative-to set forth sufficient facts from which a reasonable person could conclude that a crime was probably committed and that the defendant probably committed it." *State v. Gilles,* 173 Wis. 2d 101, 117, 496 N.W.2d 133, 140 (Ct. App. 1992)

Thus, in reviewing the circuit court's order denying the appellant's motion to suppress, the appellate court may not look to the allegations of the criminal complaint to determine whether probable cause existed to arrest Ivanez prior to the interrogation in question.

B. The allegations of the criminal complaint do not establish that the content of the Garcia and Santiago statements was ever communicated to the arresting officer.

Another reason that the state's argument fails is because it is based upon the false assumption that the "collective knowledge" doctrine does not require that the "knowledge" be in the possession of the arresting officer. In other words, the state seems to believe that if, among the various individuals who make up the entirety of the police department, it is later determined that between all of them they possessed enough information to establish probable cause-- even though no

individual ever put all the pieces together-- a warrantless arrest is reasonable. Such an interpretation of the collective knowledge doctrine warps it so badly that it is unrecognizable. Here is how the Wisconsin Supreme Court described the collective knowledge doctrine in *State v. Cheers*, 102 Wis. 2d 367, 388-89, 306 N.W.2d 676, 685-86 (1981):

> [W]here an arresting officer is given information through police channels such as roll call, this court's assessment of whether the arrest was supported by probable cause is to be made on the collective knowledge of the police force. This principle was explained in Schaffer v. State, 75 Wis.2d 673, 676-77, 250 N.W.2d 326 (1977), as follows:
>
> > "An arresting officer may rely on all collective information in the police department, and, acting in good faith on the basis of such information, may assume at the time of apprehension that probable cause has been established. [internal citations omitted] Thus, an officer, such as Vande Berge here, who in good faith relies upon such collective information, is legally justified to make an arrest.

Even if the court of appeals were permitted to consider the allegations of the criminal complaint, it is still insufficient to establish that the police had probable cause to arrest Ivanez prior to the time he was interrogated. The complaint contains no allegation that the content of the Garcia and Santiago interview was ever communicated to the officer who arrested Ivanez.

C. Attenuation is the proper analysis under the exclusionary rule, not the so-called Harris rule.

In what is in effect a sleight of hand, the State quotes Ivanez's opening brief where he wrote, "The question, then, is whether there was probable cause to arrest Ivanez at any time prior to the time he was interrogated." (state's brief p. 3). From there, the state pretends that Ivanez agrees that whether his statement should be suppressed must be determined under the so-called "Harris rule"[2] rather than under the attenuation rule. In his opening brief, Ivanez was unambiguous in his assertion that the application of the exclusionary rule in this case is determined under principles of attenuation. The state never made clear the significant difference between the Harris rule and the rule of attenuation.

The difference between the rules was explained by the Wisconsin Supreme Court in *State v. Felix*, 2012 WI 36, 339 Wis. 2d 670, 811 N.W.2d 775, the case cited by the state. The Harris rule applies only where the police possess probable cause to arrest the defendant, but then violate the Fourth Amendment by making a warrantless entry into the defendant's home to arrest him. *See, Payton v. New York,*

[2] *New York v. Harris*, 495 U.S. 14 (1990) where the Supreme Court held that where police had probable cause to arrest Harris prior to going to his home, but then conducted an illegal warrantless arrest within the confines of Harris' home, the exclusionary rule does not require the court to exclude an in-custody statement made by Harris while he was at the police station. The "Harris rule" is different than the "attenuation rule" urged by Ivanez in his brief. Where, as here, a defendant is arrested without probable cause, whether the statement should be suppressed is determined under the "attenuation rule" not the Harris rule.

445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). Under the Harris rule, only statements made by the defendant while in his home are subject to exclusion.

Where, as here, the defendant is arrested *without probable cause*, the Harris rule does not apply. Rather, as Ivanez argued in his opening brief, whether the statement is subject to the exclusionary rule is determined under principles of attenuation. As Ivanez pointed out, the state made no effort before the circuit court to address attenuation.

Dated at Milwaukee, Wisconsin, this _____ day of February, 2014.

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Jeffrey W. Jensen