RECEIVED
01-02-2015
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN

Plaintiff-Respondent,

v. Appeal No.: 2014-AP-1744-CR

ROBERTO F. OROZCO-ANGULO,

Defendant-Appellant.

AN APPEAL FROM WAUKESHA COUNTY CIRCUIT COURT TRIAL COURT
CASE NO. 13-CT-1173
HONORABLE JENNIFFER DOROW, PRESIDING

REPLY BRIEF OF PLAINTIFF–RESPONDENT

Timothy A. Suha
Assistant District Attorney
State Bar No. 1056437
Waukesha District Attorney's Office
Waukesha County Courthouse
515 West Moreland Boulevard
Waukesha, Wisconsin 53188

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Wisconsin Statutes

Wisconsin Cases

United Sates Supreme Court Cases

ISSUES

I. WHETHER A WARRANT IS VALID WHEN THE OFFICER REQUESTING THE WARRANT DICTATES THE CONTENT OF THE WARRANT DICTATES THE CONTENT OF THE WARRANT TO ANOTHER OFFICER.

II. WHETHER EVIDENCE DISCOVERED PURSUANT TO THE WARRANT MAY BE ADMITTED WHEN AN OFFICER USES THE CONTENT OF AN AFFIDAVIT AS A BASIS FOR HIS SEARCH WARRANT.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral arguments are unnecessary in this case according to Wisconsin Statute § 809.22. Wis. Stat. § 809.22. The Appellant's arguments fall within the realm of section 809.22(2)(a)(2) since many of his arguments are made without merit and without any supporting authority. Wis. Stat. § 809.22(2)(a)(2). In addition, the Appellant's concerns regard only questions of fact that are clearly supported by sufficient evidence in the record. Wis. Stat. § 809.22(2)(a)(3). As a result, oral arguments on the matter would be of marginal value, thereby not justifying court time or cost to the litigant. Wis. Stat. § 809.22(2)(b).

ARGUMENTS

There is great deference to the probable cause determination of a Judge granting a search warrant. Searches made pursuant to a warrant are constitutional if they comply with the Fourth Amendment, which requires "(1) prior authorization by a neutral, detached magistrate; (2) a demonstration upon oath or affirmation that there is probable cause to believe that evidence sought will aid in a particular conviction for a particular offense; and (3) a particularized description of the place to be searched and items to be seized." *State v. Tate*, 2014 WI 89, ¶ 28, 849 N.W.2d 798.

Moreover, a circuit court's decision denying a motion to suppress evidence is only overturned if the court's findings of fact are clearly erroneous. *State v. Grady*, 2009 WI 47, ¶ 13, 317 Wis. 2d 344.

I. THE TELEPHONIC SEARCH WARRANT IS VALID SINCE ALL PROCEDURAL REQUIREMENTS WERE FOLLOWED.

The defendant argues that the State did not follow proper procedures for securing a telephonic search warrant, thereby making the warrant defective; however, the defendant fails to reference any

procedures for securing a warrant that the State allegedly did not follow. Def.'s Br. 4. Arguments unsupported by references to legal authority should not be considered by this court. *State v. Verhagen*, 2013 WI App 16, ¶ 38, 346 Wis. 2d 196. Since the defendant has not provided a legal basis for his claim, this claim should be denied.

a. *THE EVIDENCE RELIED UPON BY THE WARRANT-GRANTING JUDGE WAS SUPPORTED BY AN OATH OR AFFIRMATION FROM THE APPROPRIATE PARTY.*

The defendant is incorrect in stating that the warrant application was not supported by oath or affirmation. Def.'s Br. 5. In making this argument, the defendant sets forth numerous allegations that the State does not believe warrant reversing the Circuit Court's decision in this case.

First, the defendant's argument that Deputy Stenulson did not read the warrant application before sending it to the Judge, making the warrant defective, is misguided. Def.'s Br. 5. While Deputy Stenulson stated that he did not read a paragraph on page 3 of the warrant application, he did testify that this information was standardized language that he had read and understood during training sessions. Tr. 48:10-14, 16-21. There is no law or procedure

in Wisconsin requiring a search warrant applicant to have *re-read* boilerplate language on an application when the applicant knows and understands the content of the form based on training and experience. As a result, the defendant's claim that the warrant is invalid since the Deputy did not re-read boilerplate language before swearing to it under oath is invalid.

Next, the defendant incorrectly alleges that both Deputy Stenulson *and* Deputy Thomson were required to swear under oath to the information in the warrant application for the warrant to be valid; however, the defendant again did not provide a legal basis to support this assertion. Def.'s Br. 5-6. Wisconsin law pertaining to search warrants clearly states that, "[w]hen a caller informs the judge that the purpose of the call is to request a warrant, the judge shall place under oath each person *whose testimony forms a basis of the application* and each person *applying* for the warrant." Wis. Stat. § 968.12(3)(a) (emphasis added). It is clear from Deputy Stenulson's testimony that he was the only person providing the information contained in the application, *and* he was the only person applying for the warrant. Consequently, there was no need for Deputy Thomson

to have sworn to the veracity of the information contained in the application. Therefore, the defendant's Fourth Amendment right to privacy was not violated since Deputy Stenulson swore to the truthfulness of the content in the search warrant application pursuant to Wisconsin Statute § 968.12(3)(a). *See* Wis. Stat. § 968.12(3)(a).

Subsequently, the defendant relies on the *Baltes* decision in stating that there was *no* oath or affirmation taken by either Deputy Stenulson or Deputy Thomson in the application for this search warrant. Def.'s Br. 7 (citing *State v. Tye*, 2001 WI 124, 248 Wis. 2d 530, 538 (referencing *State v. Baltes*, 183 Wis. 545, 198 N.W. 282 (1924))). *Baltes* stated that the requirements for a search warrant to be valid are: (1) taking testimony from *the applicant* and/or witness, and (2) that this person(s) swear to their testimony. *Tye*, 2001 WI 124, ¶ 13 (referencing *Baltes*, 183 Wis. 545). In the abovementioned paragraph, the State has provided information that there was no reason for Deputy Thomson to have sworn to the information in the application. Rather, Deputy Stenulson applied for the search warrant, and as such, he was placed under oath regarding the veracity of the application. Thus, it is clear that the *Baltes*

standards have been complied with in this case and as such, the defendant's argument that the search warrant is invalid based on a lack of oath or affirmation should be denied.

Finally, there is no evidence to support the defendant's remaining arguments that: (1) the Judge did not know Deputy Stenulson was the person applying for the warrant, (2) Deputy Stenulson had personal knowledge for the substance of the warrant, and (3) Deputy Thomson and Deputy Stenulson were viewing the same warrant document while composing the application. Def.'s Br. 8. The State believes that there is evidence to negate all of these concerns based on the testimony by Deputy Stenulson.[1] Therefore, these arguments should be disregarded since they have already been addressed. *See* Def.'s Br. 8.

[1] Deputy Stenulson provided testimony at the evidentiary hearing on January 24, 2014 that Judge Carter was looking at an e-mailed copy of his application at the time the Deputy called to obtain the search warrant. Tr. 45:23-46:8; Tr. 49:2-8. In addition, Deputy Stenulson stated that he met and identified the defendant, had the defendant perform field sobriety tests (all of which he failed), transported the defendant to the hospital after he was arrested for driving under the influence, and called for a telephonic search warrant after the defendant refused to submit to a blood draw. Tr. 21:17-22:5; Tr. 23:12-26:11; Tr. 27:3-28:23; Tr. 29:12-18. Lastly, Deputy Stenulson testified that he was looking at a blank copy of the search warrant application that was the same document as Deputy Thomson was looking at on his computer while he filled out the application electronically. Tr. 30:4-17. Also, Deputy Garcia did not do the field tests for the defendant, and only stopped the defendant. Tr. 6:7-19; Tr. 8:16-9:2; Tr. 10:3-4.

Overall, the series of arguments the defendant provides regarding the validity of the search warrant should be disregarded based on the aforementioned analyses; namely, that many of the defendant's arguments are unsupported by the law and are negated by testimony. Consequently, the search warrant is valid and the defendant's argument to the contrary should be dismissed.

b. *A WARRANT NEED NOT BE ISSUED PURSUANT TO A LEGAL AFFIDAVIT.*

The defendant's claim that a warrant application needs to be notarized (making it an affidavit) prior to being sent to the warrant-granting Judge is not applicable in this case. *See* Def.'s Br. 9; *see also* Wis. Stat. § 968.12. Under Wisconsin Statute § 968.12 pertaining to the issuance of search warrants, there are three options or means by which a person may apply for a warrant. *See* Wis. Stat. § 968.12. Subsection (2) states that one option is to obtain a warrant upon affidavit while subsection (3) allows for a warrant upon oral testimony. Wis. Stat. § 968.12(2)-(3). The defendant seems to be applying subsection (2) to this case; however, this situation calls for the applicant to follow the procedure outlined in subsection (3) since Deputy Stenulson applied for the warrant telephonically. While the

defendant correctly pointed out that the parties at the evidentiary hearing referred to the search warrant application as an affidavit several times, the Circuit Court Judge corrected the mistake and noted on the record (per the defendant's request) that the warrant application was not actually an affidavit.[2] Tr. 47:15-48:1; *see also* Def.'s Br. 9. Since this was clearly not an application upon affidavit, there was no need for Deputy Stenulson to have obtained a notarized copy of his application before sending it to the Judge. Therefore, the defendant's argument should be denied.

c. *DEPUTY STENULSON RELIED IN GOOD FAITH ON THE FACT THAT HE DID NOT THINK HE HAD TO READ HIS WARRANT APPLICATION VERBATIM TO THE WARRANT-GRANTING JUDGE.*

Next, the defendant alleges that the warrant is invalid since Deputy Stenulson did not read the application to the Judge verbatim over the phone. Def.'s Br. 10. Wisconsin Statute § 968.12(3)(b) states that "[t]he person who is requesting the warrant shall prepare a duplicate original warrant and read the duplicate original warrant,

[2] On cross of Deputy Stenulson, the defense referred to the warrant application as being a telephonic search warrant. Tr. 29:12-14.

verbatim, to the judge." Wis. Stat. § 968.12(3)(b).[3] Deputy Stenulson provided the warrant-granting Judge with an e-mailed copy of his search warrant application. Tr. 30:15-17. While the application was not read to the Judge over the phone verbatim, the State believes that the Deputy relied in good faith on the fact that he did not have to read the application aloud since the Judge was reading an identical copy of the warrant on his own computer via e-mail as they were on the phone. The good faith exception to the exclusionary rule is applied when officers act "in the objectively reasonable belief that their conduct did not violate the Fourth Amendment." *State v. Dearborn*, 2010 WI 84, ¶ 33, 327 Wis. 2d 252 (quoting *U.S. v. Leon*, 468 U.S. 897, 918, 104 S.Ct. 3405 (1984)); *State v. Eason*, 2001 WI 98, ¶ 55, 245 Wis. 2d 206 (stating that the Good Faith exception may be used when there is no benefit to the exclusionary rule, such as there being no deterrent effect or substantial rights affected). "[T]he good faith exception carves out an exception to the exclusionary rule allowing the admission of evidence when law enforcement officers did what they were

[3] An aside, the fact that the defendant is making this argument nullifies section I(a) of his brief since it implies that he agrees Deputy Stenulson is *the* person requesting the warrant.

supposed to . . . but someone made an accidental clerical or technical error or" judicial error regarding the statutory requirements of the warrant. *State v. Hess*, 2009 WI App 105, ¶¶ 21-22, 320 Wis. 2d 600 (Ct. App.) (stating that this exception is connected to public interest).

There are many cases setting forth conduct that falls within and outside the scope of the good faith exception regarding telephonic search warrants. *See, e.g.*, *Tye*, 2001 WI 124, ¶ 24 (stating that a lack of oath or affirmation does not fall within the good faith exception); *State v. Raflik*, 2001 WI 129, ¶¶ 30-31, 248 Wis. 2d 593 (stating that failure to record a warrant application falls within the exception if a functionally-equivalent substitute of the transcript is provided); *State v. DeLeon*, 127 Wis. 2d 74, 377 N.W.2d 635 (Ct. App. 1985) (stating that losing fifteen minutes of trial testimony that was not properly reconstructed does not fall within the exception).

The intent of the "verbatim" requirement in the statute is so that the defendant maintains his right to meaningful judicial review of the warrant, as well as his right to a meaningful appeal. *Raflik*,

2001 WI 129, ¶ 30. The *Raflik* Court stated that this right to appeal is maintained if reconstruction of the record is possible (through a stipulation, for example). *Id.* at ¶ 36.

In this case, the State believes that not having read the warrant application aloud to the Judge over the phone is a technical error that does not deny the defendant of his right to appeal. The record is easily maintained since there is an electronic version of the search warrant application available to the parties. As such, the State does not believe any of the defendant's substantial rights are affected from this good faith inaction by Deputy Stenulson.

Based on the aforementioned analyses contesting the defendant's arguments, the State requests that the defendant's requests be denied.

II. THE SEARCH WARRANT IS VALID SINCE THE CONTENT OF THE WARRANT CONTAINED TRUE AND ACCURATE STATEMENTS.

a. *THE WARRANT WAS NOT GRANTED UPON FALSE SWEARING BY DEPUTY STENULSON.*

As stated previously, Deputy Stenuslon did not provide false information in obtaining a search warrant in this case, contrary to the defendant's assertions.

First, Deputy Stenulson did not need to re-read the search warrant application before sending it to the Judge since he dictated the content of the entire application. Deputy Stenulson testified that he provided all of the information within the application to Deputy Thomson for Deputy Thomson to contemporaneously transcribe. Tr. 30:9-12.[4] Based on this scenario, it follows that Deputy Stenulson need not read what he orally stated for simultaneous transcription. Moreover, despite not having re-read page three[5] of the application immediately before sending it to the Duty Judge, Deputy Stenulson did indicate that he read this page (containing boilerplate language) during a training shortly before applying for this warrant. Tr. 48:7-21. As a result, Deputy Stenulson did not misrepresent information within the warrant application because the information contained in the application was of his own creation and knowledge. Lastly, Deputy Stenulson stated under oath to the warrant-granting Judge that the information he provided in support of the application was his own testimony to the best of his knowledge. Consequently, the

[4] With their own copies of the application, Deputy Stenulson dictated to Deputy Thomson the information to be written in the application. Tr. 30:9-17.
[5] Page three contains boilerplate language that the Deputy was trained on previously. Tr. 44:2-12.

defendant's argument that the application was based on a false oath is incorrect.

Next, the defendant's claim that Deputy Stenulson should have been sworn-in while creating the search warrant application is incorrect and not required under Wisconsin law. Wisconsin Statute § 968.12(3)(d) requires that the judge place "under oath each person whose testimony forms a basis of the application and each person applying for the warrant." Wis. Stat. § 969.12(3)(d). Based on the plain language of the statute, it is clear that Deputy Stenulson did not have to take an oath to information in the application *during* the creation of the application; rather, he must have only taken an oath to the search warrant application's content when speaking with the Judge (which he did). As a result, the defendant's argument that Deputy Stenulson falsely swore to the content of the application in order to obtain the search warrant in this case is erroneous.

b. *DEPUTY STENULSON DID NOT MISREPRESENT MATERIAL FACTS IN THE PROBABLE CAUSE SECTION OF THE SEARCH WARRANT APPLICATION.*

The defendant incorrectly claims that Deputy Stenulson misrepresented and omitted relevant information from the search

warrant application regarding the initial stop of the defendant. Def.'s Br. 17.

The defendant first claims that information in the warrant application regarding the person that the officers should have stopped conflicts with Deputy Garcia's testimony and the citizen witness's statements. Def.'s Br. 17. However, the record of the citizen witness's statements and Deputy Garcia's testimony indicate the same information as is contained in the warrant application—that a Chevy Trailblazer was called in by a citizen witness for potential drunk driving. Tr. 6:10-20; Warrant App. 4. The defendant believes that because the Deputy checked the box in the application that contains standardized language setting forth that the citizen witness "observed [*the defendant*] to drive/operate the vehicle," when the citizen witness said she saw *a person* driving the vehicle, that there was no reason to stop the defendant. As such, the defendant believes that the probable cause section of the warrant application was false and therefore invalid. The State, on the other hand, does not believe that checking this box on the application makes the search warrant application invalid. Regardless of whether the citizen witness saw

the defendant driving the TrailBlazer or someone else is a minute detail when taking into consideration the other identifying factors that officers relied on in stopping the vehicle (which were contained in the search warrant application's probable cause section). As a result, the Deputy did not recklessly or intentionally mislead the warrant-granting Judge by checking this box in the application. Warrant App. 4.

Next, the defendant attempts to argue that Officer Garcia stopped a vehicle that was inconsistent with the citizen witness's description, which was contained in the search warrant application. Def.'s Br. 18. Deputy Garcia testified that a citizen witness "called to report [that] a TrailBlazer was driving erratically out on the freeway, *possibly* struck the median, and had exited the freeway" heading towards Waukesha. Tr. 6:8-14 (emphasis added). A couple of minutes after receiving this call, Deputy Garcia saw a TrailBlazer driving erratically in Waukesha. Tr. 6:14-25. Deputy Garcia never said that he relied on the year of the vehicle[6] or any potential damage

[6] The Court determined that the fact that the defendant's vehicle was a 2006 TrailBlazer when the citizen witness believed it was a 2007 TrailBlazer is not a substantial enough showing to show reckless or intentional disregard for the truth. Tr. 57:18-24.

to the TrailBlazer when he identified and stopped the defendant's TrailBlazer; rather, he relied on the description of the driving that was occurring in a TrailBlazer in deciding to stop the defendant.[7] Tr. 11:9-14. As a result, this is the information that was contained in the search warrant application. Thus, Deputy Stenulson never misrepresented material information in the probable cause section of the warrant application since the TrailBlazer and defendant's driving matched the descriptions provided by the citizen witness and Deputy Garcia. Tr. 6:8-20; 7:2-25; 8:1-9.

c. *THE DEFENDANT DID NOT PROVIDE SUFFICIENT EVIDENCE TO JUSTIFY GRANTING A* FRANKS *HEARING.*

The defendant did not meet his burden in order to obtain the benefit of having a *Franks* hearing. Tr. 57:18-25; 58:1-24. In order to obtain the benefit of a *Franks* hearing, the defendant must (1) make a substantial showing that the warrant application contains false statements that were made knowingly and intelligently, or with reckless disregard for the truth and (2) show that this false

[7] Deputy Garcia testified that he noticed the TrailBlazer was driving in the middle of two lanes, swerving between the two, and there were no other vehicles (besides the police car) that would have caused the defendant to drive this way. Tr. 7:10-8:9.

information was necessary to the Judge's finding of probable cause. *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674 (1978). Only if both criteria are met may a defendant receive an evidentiary hearing at his request pursuant to the Fourth Amendment. *Franks*, 438 U.S. at 156.

It is clear from the court transcript that the Circuit Court Judge correctly found that the defendant provided insufficient evidence to support holding an evidentiary hearing. While the defendant continues to argue that Deputy Stenulson omitted material information from the warrant application, he has not provided new or substantial information to corroborate his claim.[8] Tr. 57:18-25; 58:1-24. Instead, the defendant makes a semantic argument alleging that because the citizen witness saw a *person* driving the TrailBlazer, while the warrant application states that the citizen witness had seen the *defendant* driving, that Deputy Stenulson intentionally or recklessly made false statements within his warrant application. Def.'s Br. 20. The Circuit Court Judge, as well as the State, did not

[8] The Judge found that the omission of the year of the vehicle and lack of damage to the vehicle upon stopping the defendant from the warrant application was not intentionally or recklessly done, and as such the Judge's probable cause determination was not based on false information. Tr. 58:10-24.

find this to be a statement that likely formed the basis of the Judge's probable cause determination in light of the many other factors supporting Deputy Stenulson's warrant application. Tr. 57:18-25; 58:1-24. As a result, the defendant's assertions that Deputy Stenulson provided false information in his warrant application, leading to an invalid warrant, should be ignored.

CONCLUSION

For all the reasons stated above, the State respectfully requests that the Court affirm the Circuit Court's decisions.

Dated this _____ day of December 2014.

Respectfully,

_____

Timothy A. Suha
Assistant District Attorney
Waukesha County
Attorney for Plaintiff-Respondent
State Bar Number 1056437

CERTIFICATION OF BRIEF

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

Dated this _____ day of December, 2014.

_____

Timothy A. Suha
Assistant District Attorney
Waukesha County
Attorney for Plaintiff-Respondent
State Bar Number 1056437

CERTIFICATION OF BRIEF ELECTRONIC FILING

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. § 809.19(12).

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 _____ day of December, 2014.

_____

Timothy A. Suha
Assistant District Attorney
Waukesha County
Attorney for Plaintiff-Respondent
State Bar Number 1056437

TABLE OF CONTENTS OF APPENDIX

CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with s. 809(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit 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 preserved confidentiality and with appropriate

references to the record.

Dated this _____ day of December, 2014.

_____

Timothy A. Suha
Assistant District Attorney
Waukesha County
Attorney for Plaintiff-Respondent
State Bar Number 1056437

CERTIFICATION OF APPENDIX ELECTRONIC FILING

I hereby certify that: I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 809.19(13).

I further certify that the content of the electronic copy of the appendix is identical to the content of the paper copy of the appendix.

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 _____ day of December, 2014.

_____

Timothy A. Suha
Assistant District Attorney
Waukesha County
Attorney for Plaintiff-Respondent
State Bar Number 1056437