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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

ROBERTO F. OROZCO-ANGULO,
Defendant-Appellant.

Appeal No. 2014-AP-1744-CR

Waukesha County Circuit Court
Case Nos. 13-CT-1173

ON NOTICE OF APPEAL TO REVIEW JUDGMENT OF CONVICTION AND ORDER DENYING DEFENDANT'S MOTIONS TO SUPPRESS EVIDENCE ENTERED IN THE CIRCUIT COURT FOR WAUKESHA COUNTY, THE HONORABLE JENNIFER DOROW, PRESIDING

DEFENDANT-APPELLANT'S REPLY BRIEF

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I. MR. OROZCO-ANGULO'S BRIEF ESTABLISHES MULTIPLE FAILURES ON THE PART OF LAW ENFORCEMENT TO COMPORT WITH WARRANT REQUIREMENTS

The State responds to Mr. Orozco-Angulo's brief with an erroneous assertion that the Mr. Orozco-Angulo did not "reference any procedures for securing a warrant which the State allegedly did not follow." State's Brief at 7-8. Mr. Orozco-Angulo cited to numerous failures on the part of law enforcement to comport with statutory authority when obtaining the compulsory warrant leading to the discovery of evidence that ought to have been suppressed.

In fact, Mr. Orozco-Angulo's brief asserted all of the following violations of statutory and constitutional protections that ought to have resulted in suppression of evidence.

1) Deputy Stenulson never saw the warrant application, and, therefore, lacked personal knowledge as to its contents when he swore it was his own statement

Mr. Orozco-Angulo quoted his own suppression motion in his appellate brief in stating that "[b]ecause that [application] was prepared by Deputy Thompson on his squad car's computer and sent to Judge Carter from the address 'mthompson@waukeshacounty.gov', it is not clear when Deputy Stenulson would have even seen a copy of the document, in paper format or otherwise, let alone sworn to it upon oath or affirmation." R.10:4; AB:7.

As Mr. Orozco-Angulo argued extensively, a basic requirement of the warrant process is that it be supported by oath or affirmation. *State v. Tye*, 2001 WI 124, 248 Wis. 2d 530, 538, 636 N.W.2d 473, 477; AB:7.[1] Deputy Stenulson could not swear to the contents of a document he never saw and never read. AB:5-7. Wisconsin statutes clearly require that all parties contributing to the warrant application be sworn in order for the application to be supported by oath or affirmation. AB:6; Wis. Stat. § 968.12(3)(d). Therefore, there was no valid oath supporting the issuance of a warrant, and the motion requesting suppression of evidence ought to have been granted. AB:5.

This argument is never addressed by the State in its brief at all. The State has never rebutted Mr. Orozco-Angulo's assertion that Deputy Stenulson never read the document he swore to. The State's own characterization of the process admits that Deputy Stenulson never read the completed document that he later swore was his own statement.

> 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.

State's Brief at 11 n.1.

Deputy Stenulson did not swear to a "blank" application being his statement. He swore to the application that Deputy Thomson prepared and submitted without Deputy Stenulson ever seeing or reading it. A person cannot

[1] [1] AB:5-7 is a reference to "Defendant-Appellant's Brief and Appendix" where AB reference the appellate brief and the number 7 references the page number in that brief

swear to a statement they have no knowledge of, even if he or she gave information to the drafter of the document in hopes that the end product reflected what he or she would have stated if the product were his or her own.

The State just ignores this fatal problem in its case and, seemingly, hopes that the Court will generate an argument on the State's behalf. However, this Court "cannot serve as both advocate and judge." *State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992). "The problem with this approach is not only that it steps out of the courts' modest and limited role in a democratic society; but that by repeatedly doing what it thinks the political branches ought to do it encourages their lassitude and saps the vitality of government by the people." *Hamdi v. Rumsfeld*, 542 U.S. 507, 577, 124 S. Ct. 2633, 2673, 159 L. Ed. 2d 578 (2004), Scalia, J. dissenting, joined by Stevens, J. The Court should decline to create an argument for the State in this matter.

The only effort the State's response brief offers regarding Deputy Stenulson's failure to read what he swore to is the State's characterization of one portion that was unread as "boiler-plate" language. State's Brief at 10. The problem with even this defense of Deputy Stenulson's failure to read that which he swore to is, even if he had the knowledge of its contents at the time he swore to it, he could not have known he had such knowledge at the time he swore to it without first reading it to make sure that it was, in fact, the language he was familiar with. Therefore, his admission that he did not read that material still demonstrates the

reckless disregard for the truth that Deputy Stenulson engaged in when swearing, further demonstrating that a *Franks* hearing should have been held.

The question when determining whether the oath was valid is not whether the information Deputy Stenulson swore to ended up being accurate, or ended up being an accurate reflection of his knowledge, but whether he actually had personal knowledge of the statement at the time he swore to it, and whether he swore truthfully.

The State's assertion that Mr. Orozco-Angulo made no reference to any procedure that the State did not follow is erroneous. Mr. Orozco-Angulo argued that the warrant was not granted based upon oath or affirmation because the application was not sworn to by "each person" contributing to it, as required by the statute cited. An oath or affirmation is "an essential prerequisite to obtaining a valid search warrant under the state constitution." *Tye*, 248 Wis. 2d at 538. The State makes no argument in response. Therefore, the Court should grant Mr. Orozco-Angulo's appeal and suppress evidence that was the fruit of a warrant not supported by a valid oath as required by the Wisconsin Statutes.

2) The warrant and application was never read to the warrant-granting court, the court did not enter "verbatim" what was read, and the warrant was not prepared by the person seeking it

As Mr. Orozco-Angulo argued in his appellate brief, none of the requirements in Wis. Stat. § 968.12(3)(b) were met in this warrant application.

> "Application. The person who is requesting the warrant shall prepare a duplicate original warrant and read the duplicate original warrant, verbatim, to the judge. The judge shall enter, verbatim, what is read

> on the original warrant. The judge may direct that the warrant be modified." Wis. Stat. § 968.12(3)(b). These requirements are unambiguous, and "[w]here statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history." *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, 271 Wis. 2d 633, 663, 681 N.W.2d 110, 124. The use of the term "shall" indicates that these requirements are not optional. "The general rule is that the word 'shall' is presumed mandatory when it appears in a statute." *Karow v. Milwaukee Cnty. Civil Serv. Comm'n*, 82 Wis. 2d 565, 570, 263 N.W.2d 214, 217 (1978) (citing to *Scanlon v. Menasha*, 16 Wis.2d 437, 443, 114 N.W.2d 791 (1962)).

AB:10.

As Mr. Orozco-Angulo's brief makes clear, nearly every portion of the above statute was violated. Therefore, the State's contention that Mr. Orozco-Angulo did not reference any procedures for securing a warrant that the State allegedly did not follow is erroneous.

"Deputy Stenulson did not recite any of the information in the document to Judge Carter" as explicitly required by the statute. R.10:5; AB:10. Because there was nothing "read" to the warrant-granting court, the court granting the warrant did not, and could not, "enter, verbatim, what [was] read on the original warrant" as the statute also requires. While the judge may "direct" that the warrant be modified," no such direction was ever given, and the ability to direct a modification should not be interpreted as a license for a warrant-granting court to ignore the entire procedure stated before that. Therefore, Deputy Stenulson, and the warrant-granting court, did not follow the clear statutory procedure for obtaining a telephonic search warrant and the evidence should be suppressed.

II. THE GOOD FAITH EXCEPTION DOES NOT APPLY

1) The State's complete failure to adhere to the law was not objectively reasonable

The State seeks to use the "good faith exception" to render moot all the violations of the Wisconsin warrant statute. However, it was not objectively reasonable for the deputy to just ignore the statutory requirements placed upon him, as the State argues (nor reasonable for the Court to similarly ignore its statutory requirement to only issue a verbatim warrant).

The State cites the Court of Appeals decision in *State v. Hess*, rather than the Wisconsin Supreme Court's decision on the same case. Therefore, the State ultimately relies on bad law for its proposition that the good faith exception applies, after not raising the issue of good faith at the trial court at all.

> [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 supposed to*—they followed through in objective good faith, but someone made an accidental clerical or technical error or the judge erred in concluding that the law enforcement's application fulfilled the requirements for a warrant.

State v. Hess, 2009 WI App 105, ¶ 21, 320 Wis. 2d 600, 613-14, 770 N.W.2d 769, 776.

In affirming the decision in *State v. Hess*, 2009 WI App 105, the Wisconsin Supreme Court, in *State v. Hess*, 2010 WI 82, 327 Wis. 2d 524, 785 N.W.2d 568 clarified that the question is whether the officer's conduct was "objectively reasonable," rather than the more ambiguous language cited by the State of officers doing "what they were supposed to do." *Hess*, 2009 WI APP at ¶ 21.

The deputies did not do the things they were supposed to do in this case and their conduct was, therefore, not objectively reasonable. Because only one of the two deputies that contributed to the application actually swore to it, it is impossible to know what, if any part of the application relied on by the warrant-granting court was the product of Deputy Stenulson's knowledge. As defense counsel brought to the attention of the Circuit Court, the document that Stenulson testified was his testimony "wasn't even necessarily viewed by the deputy" prior to being sworn, and he later testified that he did not read the entire collaborative document. R.26:43; AB:14. No deputy read the warrant aloud, verbatim, as required by the statute. Deputy Stenulson, the person who was seeking the warrant, did not prepare a duplicate original as required, or prepare any warrant at all. As the State admits, Deputy Stenulson just looked at a "blank" document. State's Brief, *Supra.* Deputy Stenulson then testified falsely that the information in the document he did not read was his own statement, even though he was aware he hadn't read it. Because nothing was actually read aloud, the court then did not "enter, verbatim, what [was] read, on the original warrant" as the statute required.

This list of errors is not "objectively reasonable." It is not deputies doing what they were "supposed to do." The false swearing on the part of Deputy Stenulson defeats any notion that he was acting in good faith. "[W]hen the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a *truthful* showing." *State v. Mann*, 123 Wis. 2d 375, 386 n.3, 367 N.W.2d 209, 214 n.3 (1985) (quoting *Franks v.*

Delaware, 438 U.S. 154, 164-65 (1978)) (emphasis in original). In this case, Deputy Stenulson testified that he'd been trained how to obtain a valid, telephonic search warrant, and the evidence shows he then decided not to do any of that. These were not clerical errors, but demonstrated a reckless disregard for truth and the statutory procedures adopted by the legislature.

"Responsible law-enforcement officers will take care to learn 'what is required of them' under Fourth Amendment precedent and will conform their conduct to these rules." *Davis v. United States*, 131 S. Ct. 2419, 2429, 180 L. Ed. 2d 285 (2011) (quoting *Hudson v. Michigan*, 547 U.S. 586, 599, 126 S. Ct. 2159, 2168, 165 L. Ed. 2d 56 (2006)). The United States Supreme Court has noted that "[n]umerous sources are now available to teach officers and their supervisors what is required of them under this Court's cases, how to respect constitutional guarantees in various situations, and how to craft an effective regime for internal discipline." *Hudson*, 547 U.S. at 599.

The State has not carried its burden of proof that there was "review by a government attorney or police officer trained in and knowledgeable of probable cause requirements." *State v. Hess*, 2010 WI 82, ¶ 51, 327 Wis. 2d 524, 549, 785 N.W.2d 568, 581. No government attorney was involved. Either law enforcement took no care to learn the rules while being trained, or law enforcement utterly disregarded the rules when tasked with putting that training into action. If the deputies failed to learn, they were not "knowledgeable." If they simply ignored the law, they were not objectively reasonable in doing what they were "supposed

to do." In fact, the government could not carry this burden of proof at the trial court because it never raised the good faith exception at that time.

Also, this not a case where the warrant itself was initially valid, and law enforcement proceeded in good faith thereafter, as was the case in *Hess*. "Case law on the good-faith exception generally proceeds from a warrant that was valid when issued, but later determined to be lacking in probable cause. As we have already noted, in this case the warrant was void *ab initio*. It had no basis in fact or law." *State v. Hess*, 2010 WI 82, ¶ 61, 327 Wis. 2d 524, 554, 785 N.W.2d 568, 583. In the case at bar, the law enforcement deputies were responsible for the failures in the warrant process and for the warrant not being based on oath or affirmation, and therefore, just as the *Hess* court did, this Court should refuse to extend the good faith exception to such circumstances. "While it is easy to understand why a clerk's failure to remove a warrant from the computer system does not threaten the integrity of our judicial system, a warrant issued *without statutory authority* in the complete absence of the basic constitutional requirement of oath or affirmation raises more serious questions." *State v. Hess*, 2010 WI 82, ¶ 67, 327 Wis. 2d 524, 557, 785 N.W.2d 568, 585(internal citation omitted) (emphasis added).

As noted in Mr. Orozco-Angulo's initial brief, and above, throughout, the State never argued that the good faith exception applied in this case, which could have been rebutted by factual evidence, and therefore, the argument should be

deemed waived. *Gruber v. Vill. of N. Fond du Lac*, 2003 WI App 217, 267 Wis. 2d 368, 384, 671 N.W.2d 692, 699.

For all these reasons, this Court should refuse to apply the good faith exception to the utter failure on the part of law enforcement to comply with the statutory procedure for telephonic search warrants.

III. DEPUTY STENULSON SWORE FALSELY AND CONVEYED FALSE INFORMATION TO THE WARRANT-GRANTING COURT

It is uncontested that Deputy Stenulson had no personal knowledge whether or not the document he was swearing to was actually an accurate accounting of his own statements. Therefore, his adoption of that document as his own statement was done with reckless or intentional disregard for the truth as he knew it to be.

The State has argued that there was no basis for a *Franks* hearing even though the State acknowledges that false facts were conveyed to the Court. Deputy Stenulson told the warrant-granting court that Mr. Orozco-Angulo had been seen driving a vehicle when that witness merely reported an unknown person driving recklessly. The State's brief says "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 [actually] said she saw a[n unknown] person driving the vehicle." State's Brief at 19. That law enforcement chooses to rely on "form language" is not an excuse for conveying false information to a magistrate, but should serve as notice to the State that it must take care, even when using shortcuts. The difference

between a report that says that a particular person was operating a vehicle recklessly, and a report that some unknown person was driving recklessly, is material. Therefore, Deputy Stenulson conveyed false evidence to the warrant-granting court with recklessness or intent.

Taken together with the false swearing, the lower court's decision not to hold a *Franks* hearing and suppress the evidence as requested was in error, and this Court should reverse that decision.

CONCLUSION

The State has offered no legal citation which permits a Deputy to obtain a search warrant by swearing an oath to a document he never read and adopting that document as his own statement. It is the State that ignored the principle argument that the warrant was not bound by oath or affirmation due to Deputy Stenulson's decision to swear falsely to a statement he never read. It is the State that has asserted that no violations were alleged by Mr. Orozco-Angulo even where the list of such alleged violations is extensive. And it is the State that at no point tenders a credible argument for permitting nearly the entirety of the telephonic search warrant statute to be violated in "good faith" without remedy.

For these reasons, and those discussed in Mr. Orozco-Angulo's initial brief, the Defendant respectfully requests that this Court reverse the Circuit Court's denial of his Motions to Suppress Evidence, and remand this case for further proceedings consistent with such an reversal.

Dated this 4th day of February, 2015.

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CERTIFICATION OF FORM, LENGTH, AND ELECTRONIC COPY

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this brief is 2967 words.

I further certify that I have submitted an electronic copy of this reply brief, which complies with the requirements of Wis. Stat. § 809.19 (12), and that the text of the electronic copy of this brief is identical to the text of the paper copy.

Dated this 4th day of February, 2015.

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CERTIFICATE OF MAILING

Pursuant to Wis. Stat. (Rule) 809.80(4), I hereby certify that on the 4th day of February, 2015, I caused 10 copies of the Defendant-Appellant's Reply Brief to be shipped, via FedEx, properly addressed and shipping costs prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin, 53701-1688.

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