STATE OF WISCONSIN

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

DISTRICT III

Case No. 2014AP2238-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MASTELLA L. JACKSON,

Defendant-Respondent.

ON APPEAL FROM AN ORDER SUPPRESSING EVIDENCE ENTERED IN THE OUTAGAMIE COUNTY CIRCUIT COURT, THE HONORABLE MARK J. MCGINNIS, PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT

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SUPPLEMENTAL STATEMENT ON ORAL ARGUMENT AND PUBLICATION

In its opening brief, the State did not request oral argument or publication, as it believed that this case could be resolved by applying well-established legal principles to the facts of this case. However, Jackson's response brief raises an issue not discussed in the State's brief: whether the inevitable discovery doctrine

may be applied "in cases of intentional constitutional violations." Jackson's brief at 13. That issue has been addressed in Wisconsin only in an unciteable decision of the court of appeals. In light of Jackson's argument, the State now believes that publication of the court's decision is warranted.

ARGUMENT

The State argued in its opening brief that the untainted portions of the search warrant affidavit – that is, the portions of the affidavit other than Jackson's custodial statements – established probable cause to search her home. *See* State's brief at 8-15. Jackson's brief does not challenge the State's argument on this point. She has conceded, therefore, that the warrant affidavit, stripped of her statements, established probable cause to search her house. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (arguments of appellant not addressed by respondent are deemed conceded).

Jackson does challenge the State's argument that the physical evidence found in her home is admissible under established principles governing the inevitable discovery doctrine. *See* Jackson's brief 8-13. She also asks the court to establish a new legal principle that the inevitable discovery doctrine should not be applied in cases of "intentional constitutional violations." *Id.* at 13. Because neither of Jackson's objections to the application of the inevitable discovery doctrine has merit, this court should reverse that part of the circuit court's order that suppressed the physical evidence found during the search of her home.

I. THE EVIDENCE FOUND IN JACKSON'S HOME IS ADMISSIBLE UNDER THE INEVITABLE DISCOVERY DOCTRINE.

Jackson argues that the State has failed to meet its burden with respect to the first and third requirements of the inevitable discovery doctrine. *See* Jackson's brief at 8-13. Because Jackson does not argue that the State has failed to meet its burden with respect to the second requirement, the State will limit its reply to the first and third requirements.

A. The first prong of the inevitable discovery doctrine has been satisfied.

The first prong of the inquiry requires the State to show that there is a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct. *See State v. Lopez,* 207 Wis. 2d 413, 427-28, 559 N.W.2d 264 (Ct. App. 1996). Jackson argues that the State has not satisfied that requirement because it has not shown that the police would have sought the search warrant without Jackson's inculpatory statements. *See* Jackson's brief at 9-11.

Jackson's argument is based entirely on her assertion that the State cannot show that the police decided to seek a search warrant before 7:25 p.m., the point at which the trial court determined the violation of Jackson's *Miranda* rights began. *See id*. There are two flaws in that argument.

First, and most importantly, the first prong of the inevitable discovery doctrine does not require the State to show that the *Miranda* violation had no influence on the decision to seek the warrant. Rather, the question is whether there is "a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct." *Lopez*, 207 Wis. 2d at 427-28. As described in the State's opening brief, the answer to that question is "yes" because there was ample evidence that would have led the police to seek a search warrant for Jackson's home even if Jackson had not said a word to the police.

- At 1:25 p.m., officers discovered the body of Derrick Whitlow in a hotel room. Whitlow had significant cut wounds and there was substantial blood and blood splatter on the wall, bed and floor of the hotel room. Based on the amount of blood, the officers believed that anyone who had been in the room with Whitlow when he was injured likely would have a significant amount of blood on their clothing or shoes (4:2; A-Ap. 158).

- A hotel employee told the police that Whitlow had been having problems with his wife (*id.*).

- Another employee reported that at about 1:00 to 1:30 p.m., she saw someone knock on the door of Whitlow's room and be admitted. She then heard a man screaming for help and what she thought was someone getting hit. (4:2-3; A-Ap. 158-59).

- A hotel guest heard a woman yelling and then heard a man yelling "help me, help me" (4:3; A-Ap. 159).

- Jackson and Whitlow's son, R.L.D.J., told police that his dad had moved to the hotel because he and his mom had been having issues that included loud "adult conversations" (*id.*).

- R.L.D.J. told police said that in the early afternoon of the day Whitlow was killed, Jackson became angry because Whitlow had destroyed some family keepsakes. R.L.D.J. told police that Jackson left the house and was gone for about fifteen to twenty minutes (*id.*). When she returned home, R.L.D.J. told police, she went directly to the bathroom and took a shower. When she got out of the shower, she was wearing different clothing. R.L.D.J. said that after Jackson got out of the shower, she told him not to tell anyone that she had left the house that day (*id.*).

It beggars belief to suggest that, possessing all of that information, none of which was the product of Jackson's custodial questioning, the police would not have sought a warrant to search Jackson's home. The record demonstrates, therefore, that "there is a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct." *Lopez*, 207 Wis. 2d at 427-28.

Second, even if Jackson were correct that the State had to show that the police decided to seek a search warrant before they received any relevant information from Jackson, the record demonstrates that the State met that burden. Jackson identifies 7:25 p.m. as the crucial moment because that is the point at which the trial court determined that Jackson was in custody (87:22; A-Ap. 123). But the record demonstrates that Jackson did not make any inculpatory statements until 8:35 p.m. (64-1:Exhibit 1:29). Before that

time, Jackson had said only that she may have spoken by phone with Whitlow that day and denied going to the hotel (*id*. at 24-29).

Even if Jackson's understanding of the inevitable discovery doctrine were correct, therefore, the relevant time before which the police would have had to have decided to seek a search warrant was 8:35 p.m. because nothing Jackson said before then added anything to probable cause for a search. But Detective Renkas testified that the approximate time that he began working on the warrant application was 6:00 p.m. (80:87). He could not give an exact time, he testified, but it was "early" (*id*.).

Jackson places great weight on Renkas's response to a question on cross-examination at a later hearing, when Renkas, after testifying that he could not recall the exact time, was asked whether it could have been "[h]ours later" than when he returned to the station at 5:20 p.m. (85:7). Renkas responded, "I don't recall," but stood by his prior response that it was approximately 6:00 p.m. when he began work on the warrant application (85:8).

Jackson interprets Renkas's "I don't recall" answer to mean that it could have been "hours later" than 5:20 p.m. when he began work on the warrant application. *See* Jackson's brief at 11. But read in the context, Renkas's testimony confirmed that he began working on the warrant request at approximately 6:00 p.m. Thus, even if Jackson were correct that the State had to show that the police decided to seek a search warrant before Jackson provided any relevant information, the record demonstrates that they did.

B. The third prong of the inevitable discovery doctrine has been satisfied.

Jackson argues that the State failed to satisfy the third prong of the inevitable discovery doctrine because it has not shown that the police were actively pursuing the leads making discovery inevitable "prior to the misconduct." Jackson's brief at 11. He says that the State's "fram[ing] the question as whether the police were conducting the search of the house when Ms. Jackson pointed out the evidence" is "nonsensical" because her unlawful interrogation began before the search of the house began. *Id*. at 11-12.

There are two flaws in that argument. First, the third prong of the inevitable doctrine requires that "prior to the unlawful search the government also was actively pursuing some alternate line of investigation." *Lopez*, 207 Wis. 2d at 428. That requirement was satisfied because, before Jackson was brought to the house and showed the police where she had hid the items, the police were conducting a search pursuant to a valid warrant. *See State v. Carroll*, 2010 WI 8, ¶44, 322 Wis. 2d 299, 778 N.W.2d 1 ("where an application for a warrant contains both tainted and untainted evidence, the issued warrant is valid if the untainted evidence is sufficient to support a finding of probable cause to issue the warrant").

Second, even accepting Jackson's erroneous premise that the police must have been pursuing the leads that made the discovery inevitable before the *Miranda* violation that occurred when police questioned her after 7:25 p.m., the record demonstrates that the police were doing so. The police spoke to the witnesses at the hotel and

learned about the relationship between Whitlow and Jackson when they initially responded to the call to the hotel at around 1:45 p.m. (77:23-27, 244). The police began questioning R.L.D.J. at about 5:00 or 5:30 p.m. (83:154). Even though R.L.D.J. did not disclose the inculpatory information about Jackson until sometime between 8:00 and 9:00 p.m., the police were "pursing the leads" that made discovery of the physical evidence in Jackson's home inevitable before the *Miranda* violation that began at 7:25 p.m. *See State v. Avery*, 2011 WI App 124, ¶¶32-35, 337 Wis. 2d 351, 804 N.W.2d 216.

II. THE INEVITABLE DISCOVERY DOCTRINE APPLIES REGARDLESS OF WHETHER THE POLICE ACTED IN BAD FAITH WHEN THEY VIOLATED A SUSPECT'S RIGHTS.

Jackson also argues that even if all of the requirements of the inevitable discovery doctrine have been met, the court should decline to apply the doctrine because the police intentionally violated her *Miranda* rights. The State takes issue with Jackson's assertion that "the State has conceded [that] the police in this case intentionally violated Ms. Jackson's *Miranda* rights." Jackson's brief at 14. Jackson cites to page seven of the State's opening brief, in which the State said that "[f]or purposes of this appeal, the State does not take issue with the portion of the court's order that suppressed Jackson's statements to the police." State's brief at 7. The State intended that statement to inform this court that its appeal did not seek reversal of the portion of the circuit court's order suppressing Jackson's statements; it

did not intend to suggest that the State agreed with the circuit court's rationale.

Nevertheless, the State acknowledges that the circuit court found that the police intentionally violated Jackson's rights when they questioned her after the time at which the court determined that she was in custody (87:30; A-Ap. 131). The State does not contend that that finding is clearly erroneous.

The question, then, is whether, assuming the police intentionally violated Jackson's rights during questioning, that precludes the admission of the physical evidence seized from her home under the inevitable discovery doctrine. Jackson argues that our supreme court's decision in *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899, "militates against applying the [inevitable discovery] doctrine to the intentional and flagrantly unlawful police conduct here." Jackson's brief at 15. But there is a significant difference between this case and *Knapp* that militates against applying *Knapp*'s rationale to preclude the application of the inevitable discovery doctrine when there has been an intentional *Miranda* violation.

The issue in *Knapp* was whether "physical evidence obtained as the direct result of a *Miranda* violation is inadmissible when the violation was an intentional attempt to prevent the suspect from exercising Fifth Amendment rights." *Knapp*, 285 Wis. 2d 86, ¶1 (footnote omitted). The Wisconsin Supreme Court initially concluded in *Knapp* that the physical evidence was inadmissible, but the United States Supreme Court vacated and remanded that decision in light of *United States v. Patane,* 542 U.S. 630 (2004), in

which a plurality of the Court concluded that the fruit of the poisonous tree doctrine does not extend to derivative evidence discovered as a result of a defendant's voluntary statements obtained without *Miranda* warnings. *See Knapp*, 285 Wis. 2d 86, ¶1.

On remand, the Wisconsin Supreme Court held that "the fruit of the poisonous tree doctrine applies under the circumstances of this case under Article I, Section 8 of the Wisconsin Constitution." *Id*., ¶2. "Where physical evidence is obtained as the direct result of an intentional *Miranda* violation, we conclude that our constitution requires that the evidence must be suppressed." *Id*. The court reasoned that "failing to suppress the physical fruits will result in police officers coming away with the wrong message: It is better to interrogate a suspect without the *Miranda* warnings than to use legitimate means to investigate crime. Permitting such interrogation would send an ominous signal to the police and prosecutors that citizens may be 'exploited for the information necessary to condemn them before the law.'" *Id*., ¶77 (quoting David A. Wollin, *Policing the Police: Should Miranda Violations Bear Fruit?,* 53 Ohio St. L.J. 805, 843 (1992)) (brackets omitted).

The crucial difference between this case and *Knapp* is that in *Knapp*, the "physical evidence was obtained as the direct result of an intentional *Miranda* violation." *Id*., ¶82. In *Knapp*, therefore, the police *would not* have obtained the physical evidence but for the *Miranda* violation. But the inevitable discovery doctrine applies only when "the evidence in question *would* have been discovered by lawful means but for the police misconduct." *Lopez,* 207 Wis. 2d at 428 (emphasis

added). Here, the police used legitimate means of investigation to obtain evidence that supplied probable cause to search Jackson's home.

When, as in this case, the police inevitably would have discovered the physical evidence regardless of the *Miranda* violation, suppressing the physical evidence exacts a substantial price – the exclusion of important physical evidence – that outweighs the deterrent purpose of the exclusionary rule. *See Knapp*, 285 Wis. 2d 86, ¶23 ("the exclusionary rule is not absolute, but rather is connected to the public interest, which requires a balancing of the relevant interests"). Jackson has received a remedy for the *Miranda* violation in this case that addressed whether the physical evidence should be excluded: all of her custodial statements were excised from the search warrant affidavit to determine whether the affidavit established probable cause without them. No additional remedy is required.

Jackson also cites cases from several states that have held as a matter of state law that the inevitable discovery rule would not be applied when the police have intentionally violated a suspect's rights. *See* Jackson's brief at 15. But other courts have not embraced that view. The Sixth Circuit, for example, rejected the argument that a court must "consider the severity and intentionality of the government's constitutional violation in deciding whether the inevitable discovery rule applies." *United States v. Alexander*, 540 F.3d 494, 502 (6th Cir. 2008). The court explained that such a rule would run contrary to *Nix v. Williams,* 467 U.S. 431 (1984), the Supreme Court decision that recognized the inevitable discovery doctrine.

> [M]ost importantly, Alexander's argument gives short shrift to the *Nix* Court's determination that the inevitable discovery rule applies even if there were police misconduct. In evaluating whether exclusion is proper, courts must "evaluate the circumstances of th[e] case in the light of the policy served by the exclusionary rule." It is true that the "rule is calculated to prevent, not repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effective way—by removing the incentive to disregard it." However, the *Nix* Court was very clear that despite these purposes of the exclusionary rule, the government cannot be made worse off because of misconduct than it would have been if the misconduct had not occurred.

Alexander, 540 F.3d at 503-04; *see also* 6 Wayne R. LaFave, *Search and Seizure*, § 11.4(a), at 346 (5th ed. 2012) ("[I]n *Nix v. Williams*, the Supreme Court rejected the court of appeals' limitation that the prosecution must prove the absence of bad faith, explaining that it 'would place courts in the position of withholding from juries relevant and undoubted truth that would have been available to police absent any unlawful police activity' and 'would put the police in a *worse* position than they would have been in if no unlawful conduct had transpired.'") (footnotes omitted).

"Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial." *Nix*, 467 U.S. at 446. Even if the police had never spoken to Jackson and had never violated her rights under *Miranda* by continuing to question her after she was in custody, they would have obtained a search warrant and found the crucial physical evidence linking Jackson to the homicide. The court should conclude, therefore, that the

physical evidence is admissible under the inevitable discovery doctrine regardless of whether the police intentionally violated Jackson's *Miranda* rights when they questioned her.

CONCLUSION

For the reasons stated above and in the state's opening brief, the court should reverse that part of the circuit court's order that suppressed the physical evidence found during the search of Jackson's home.

Dated this 19th day of February, 2015.

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 reply brief produced with a proportional serif font. The length of this brief is 2,871 words.

_____
Jeffrey J. Kassel
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). 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 19th day of February, 2015.

_____
Jeffrey J. Kassel
Assistant Attorney General