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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2015AP000073-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHARLES DAVID SISLO,

Defendant-Appellant.

On Notice of Appeal From a Judgment of Conviction
Entered in Douglas County, the Honorable
George L. Glonek, Presiding

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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ISSUE PRESENTED

Did the police have probable cause to arrest Sislo based on a “banner” alert from 2010 and information that the 2010 matter had not been resolved?

The trial court answered: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case will be decided by one judge. Therefore, publication is not warranted. Sislo does not request oral argument.

STATEMENT OF THE CASE

This case is on appeal from a judgment of conviction entered in Douglas County, the Honorable George L. Glonek, presiding.

The state charged Charles David Sislo with stalking and telephone harassment in a criminal complaint filed on September 7, 2012. (4). On February 12, 2013, Sislo filed a motion to suppress the fruits of his illegal arrest. (12; App. 131-34). The court held a hearing on the motion, and denied it.¹ The parties reached a plea agreement, and on

¹ In reviewing the record located in the court of appeals, counsel saw a note in the file stating that the transcript of the suppression hearing, conducted on February 27, 2013, is located at R:46 in another appeal involving Mr. Sislo, Case No. 2015AP000072-CRNM. The hearing involved both appeals. A copy of the transcript is reproduced in the appendix for the court’s convenience.

May 20, 2013, Sislo pleaded no contest to unlawful phone use contrary to Wis. Stat. § 947.012(1)(c). That plea agreement provided for a deferred sentencing agreement. (20). Sislo complied with the deferred sentencing agreement, and ultimately was ordered to pay a fine. (21).

Sislo subsequently filed a notice of appeal. (30).

STATEMENT OF FACTS

On August 19, 2012, patrol sergeant William Lear conducted a traffic stop of Charles Sislo. (46:6; App. 106).² During the traffic stop, Sislo told Lear that he knew where Lear's mother lived. (46:7; App. 107). Sislo was upset during the traffic stop, and Lear took Sislo's comment about Lear's mother as threatening. (46:7; App. 107).

Lear called dispatch to determine whether there were any active warrants for Sislo, and he was told there were no warrants. (46:13-14; App. 113-14). Lear allowed Sislo to drive away. (46:7; App. 107).

A few minutes later, Lear received a phone call from his mother. (46:7; App. 107). Lear testified at the suppression hearing that:

I received a phone call from my mother, saying she just got a call from a person who wouldn't identify themselves and said that they knew that her son and daughter were police officers with the police department, he couldn't go after them, he or she, and that he was going to go after my mother instead.

² As previously noted, this transcript is located in another appeal, Case No. 2015AP000072-CRNM. The record cite notes the record number in that file; the transcript is reproduced in the appendix.

(46:8; App. 108). Lear suspected that it was Sislo who called his mother. (46:14; App. 114). Accordingly, when he returned to the station, Lear looked up Sislo's cell phone number on the police record system. (46:14-15; App. 114-115). The record Lear referenced had a "big, red banner at the top" which said "Probable cause." (46:15; App. 115). Lear said the banner pertained to an unrelated incident in 2010, although he did not describe that incident. (46:8; App. 108).

At the suppression hearing, Sislo's counsel asked Lear about the banner he saw, presumably on a computer screen:

Q: Did you know anything about that incident from 2010 at the time that you saw that red banner?

A: At the time? No.

Q: Do you know who conducted that investigation?

A: I believe Officer Felton was the initial officer and Detective Jaszczak.

Q: And did you consult with either Detective Felton or Investigator Jaszczak after you—at any point after you saw that big, red banner?

A: Neither one of them were working.

Q: So you did not?

A: So I did not.

Q: Did you do anything to independently verify that, in fact, there was probable cause to arrest Mr. Sislo on that incident?

A: Yes.

Q: What did you do?

A: I looked up the incident report and looked at the supplemental reports, and I could not find anything that showed that it was resolved.

Q: And you're referring to an incident report where Detective Jaszczak says that's [sic] he's forwarding this to the District Attorney's officer and requesting a warrant; correct?

A: Correct.

Q: And that was in 2010; correct?

A: Correct.

Q: It was nearly two years—well, between a year-and-a-half and two years from when that report was forwarded until your traffic stop; correct?

A: I believe so, yes.

(46:15-16; App. 115-116).

Deputy Howe with the Sheriff's Department happened to be in the squad room when Lear was looking up Sislo's information. (46:9; App. 109). Lear told Howe that "there was probable cause for Charlie Sislo in our system," and that Sislo lived out of town. (46: 9; App. 109). Lear told Howe that if Howe had contact with Sislo, he could arrest Sislo based on that probable cause in the system. (46:9; App. 109). Lear testified: "I made [Howe] aware of the probable cause and said if he locates Charlie Sislo, we have valid probable cause. I did not order him to go out there." (46:18; App. 118).

Lear testified he let Howe know what the charge was in the Sislo case, that it was a felony charge, and that it had not yet been resolved. He said the crime was using someone's identity to misappropriate money. (46:20;

App. 120). Lear also told Howe that if he located Sislo's cell phone, he should seize it. (46:20; App. 120). Lear did not believe that the cell phone would be related to the 2010 incident, but it might be related to the phone call to Lear's mother. (46:23; App. 123).

Howe went to Sislo's home and arrested him, and also seized Sislo's phone. (46:11-12; App. 111-112).

On August 22, 2012, the state applied for a search warrant for Sislo's phone, which was granted. (1:3-5). According to the criminal complaint, an analysis of the phone showed that Sislo's phone was used to call Rosemary Lear, Lear's mother, at 7:06 p.m., which was only a few minutes after Lear's traffic stop of Sislo. (4:2).

Sislo subsequently filed a "Motion to Suppress Fruits of Illegal Arrest." He sought to exclude information obtained from his cell phone and any statements he made after his arrest, contending that the arrest was unlawful. (12:1; App. 131). Counsel argued, *inter alia*, that there was no probable cause to arrest Sislo for the 2010 incident, and therefore, the arrest was illegal. (12:3; App. 133).

Patrol sergeant Lear was the only witness called by the state to testify at the suppression hearing, and he testified as described above. The state argued that Deputy Howe had probable cause to arrest Sislo based on the 2010 incident as well as the "veiled threat" to Lear and the threatening call to Lear's mother. (46:25; App. 125).

The court denied Sislo's motion to suppress evidence obtained as a result of the arrest, ruling that the arrest was lawful. The court said in pertinent part:

...a law enforcement officer may arrest a person when there are reasonable grounds to believe that the person is committing or has committed a crime.

Case annotations indicate that some of that information certainly can be based on hearsay. Need not necessarily be within the personal knowledge of the individual, arresting officer.

In this particular case, the witness indicated that his search of the records indicated that there was a felony probable cause on file for the arrest of Mr. Sislo.

You've actually provided me with a copy of the report marked as Exhibit A to your motion. A report prepared by Detective Jaszczak, specifically setting forth the probable cause, specifically requesting that a warrant be issued for violation of Wisconsin Statute 943.201.

So Officer Lear becomes aware of the felony probable cause.

He's indicated he also did some independent looking into it, determined that this matter had not been resolved, passes along that information to Deputy Howe, and subsequently the arrest occurs.

So I don't see anything illegal about the arrest.

It appears to be consistent with Wisconsin Statute 968.07, where reasonable grounds were existing to believe that Mr. Sislo had, in fact, committed a prior felony offense in 2010.

(46:27-28; App. 127-128).

As described above, Sislo reached a plea agreement with the state, and was ultimately convicted of unlawful phone use for which he paid a fine.

Sislo appeals.

ARGUMENT

The Police Lacked Probable Cause to Arrest Sislo Based on a “Banner” Alert from 2010 and Information that the 2010 matter had not been resolved.

The Fourth Amendment to the United States Constitution requires that a person may be lawfully arrested only upon probable cause. *Beck v. Ohio*, 379 U.S. 89, 91 (1964). A police officer has probable cause to arrest when “the totality of the circumstances within that officer’s knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime.” *State v. Sykes*, 2005 WI 48, ¶18, 279 Wis. 2d 742, 695 N.W.2d 277. In this case, Deputy Howe did not have knowledge sufficient to conclude that Sislo probably committed a crime. Therefore, Howe’s arrest of Sislo was unlawful.

In reviewing a denial of a motion to suppress evidence, this court will uphold a circuit court’s findings of fact unless they are clearly erroneous. *Id.* at ¶12. However, this court reviews the circuit court’s application of constitutional principles to those facts de novo. *Id.* The circuit court here failed to correctly apply the law to the facts. As a result, this court should reverse the circuit court’s denial of Sislo’s motion to suppress.

The circuit court here determined Deputy Howe had probable cause to arrest Sislo based on three factors. First, the court noted that a police officer may rely on hearsay to conclude probable cause exists to arrest. (46:27; App. 127). Second, the court noted that officer Lear had relied on the

“felony probable cause on file.” (46:27; App. 127). And third, the court relied on Exhibit A, which the defense had introduced into evidence at the suppression hearing. (46:27; App. 127).

These factors do not amount to probable cause to arrest Sislo, as demonstrated by *Whiteley v. Warden*, 401 U.S. 560 (1971).

Police in *Whiteley* arrested the defendant based on a radio alert. *Id.* at 563. As in this case, the patrolman who arrested Whiteley did not have a warrant. *Id.* Following the arrest, officers searched Whiteley’s car, discovering incriminating evidence. *Id.* Whiteley challenged the arrest, and the Supreme Court concluded that the arrest was unlawful because it was not supported by probable cause.

The Court first rejected the state’s argument that a reviewing court should use “less stringent standards for reviewing a police officer’s assessment of probable cause” when making a warrantless arrest than the court would use when reviewing a magistrate’s assessment of probable cause. *Id.* at 565-66. The Court stated that it is both “fundamental and obvious” that the “standards applicable to the factual basis supporting the officer’s probable-cause assessment at the time of the challenged arrest and search are at least as stringent as the standards applied with respect to the magistrate’s assessment.” *Id.* at 566. As such, Deputy Howe’s warrantless arrest must have been supported by at least the same level of information as would cause an impartial magistrate to issue an arrest warrant.

In *Whiteley*, the police arrested the defendant based on the radio alert, personal observations consistent with the radio alert, and the knowledge that Whiteley gave a false name when stopped. *Id.* at 566-67. The Court concluded that this

information did not constitute probable cause because the information upon which the radio alert was based did not demonstrate probable cause. *Id.* at 567. In other words, as LaFave explains, “probable cause for arrest is not conclusively established by a police communication asking that the arrest be made.” W. LaFave *Search and Seizure: A Treatise on the Fourth Amendment*, Vol. 2, § 3.5(b), p. 349 (5th Ed, 2012). A reviewing court must look beneath the police bulletin to the actual source of the information. If the source does not supply probable cause, the warrantless arrest violates the Fourth Amendment.

Here, Deputy Howe arrested Sislo based on a communication from officer Lear. Lear, in turn, based his direction to Howe on the following information: a “banner” which indicated felony probable cause to arrest from 2010; and further investigation which indicated to Lear that the matter had not been resolved. The “banner” is akin to the radio bulletin in *Whiteley*. Neither Lear nor Howe had personal knowledge that Sislo probably committed a crime. In order for the state to prevail in a challenge to the arrest, it had to prove the “banner” was supported by probable cause. The state failed to meet its burden in this case.

At the suppression hearing, Lear did not testify about pertinent details of the crime Sislo allegedly committed back in 2010, or what investigation was done at that time to form probable cause. On cross-examination, Lear testified he read reports, presumably including Exhibit A, but he did not articulate details about the investigation which purportedly occurred. The most detail about the 2010 incident was provided by the defense when it offered Exhibit A into evidence. Nevertheless, Exhibit A does not supply probable cause.

Exhibit A is a case activity report prepared by Detective Michael Jaszczak of the Superior Police Department. (13:2-3; App. 135-136). The report states that Jaszczak spoke with someone at Superior Water, Light and Power who reported that someone calling from Charlie Sislo's phone called Western Union Speedpay to pay his utility bill. (*Id.*). The utility payments were from a bank account belonging to another individual, Elna Lund. (*Id.*).

Exhibit A does not support probable cause to arrest Sislo, however, because it fails to say anything about whether Lund approved of the payment. (*Id.*). Assuming Sislo in fact used Lund's account to pay his utility bill, the report fails to state that Lund did not give permission to pay that bill from her account. The crime of unauthorized use of an individual's personal identifying information requires a lack of "authorization or consent" of the individual. *See* Wis. Stat. § 943.201(2). Without information in this report that Lund did not authorize the payment, the report fails to show a crime even occurred.

In addition, Exhibit A closes by stating: "I am *requesting* a warrant be issued for Unauthorized Use of a Person's Personal Identification Material 943.201." (13:2-3; App. 135-136, emphasis added). This request for a warrant does not mean probable cause existed for an arrest. Rather, the report's *request* is for a warrant, which in turn means that probable cause would be determined by an impartial magistrate. Clearly, the request for a warrant is not the same as the existence of a warrant issued by a magistrate. As such, the record fails to demonstrate whether the request for a warrant was followed by an actual warrant which somehow did not make it to the right place, but rather, led to a "banner" elsewhere in the system. The absence of a link between the report which is Exhibit A and the "banner" is crucial. The

record simply fails to demonstrate facts which would lead a reasonable police officer to conclude that Sislo probably committed a crime.

The court also erred in relying on the “banner” indicating felony probable cause. As in *Whiteley*, police may rely on a radio bulletin or alert, but the bulletin or alert must be supported by probable cause. Here, Lear testified to the existence of this “banner,” but did not testify that the banner was based on an investigation. The record is devoid of facts which establish any connection at all between Exhibit A and the “banner.” The state did not present any evidence about the source information leading to this “banner.” The banner is not linked to an articulated investigation. Pursuant to *Whiteley*, the record accordingly fails to show probable cause to arrest.

Similarly, the circuit court’s observation that an arrest may be based on hearsay is inapposite. Assuming the court was relying on the idea of collective knowledge of the police force, probable cause still must be shown for the warrantless arrest. It is true that “the court’s assessment of whether the arrest was supported by probable cause is to be made on the collective knowledge of the police force.” *State v. Cheers*, 102 Wis. 2d 367, 388, 306 N.W.2d 676 (1981), *State v. Pickens*, 2010 WI App 5, ¶12, 323 Wis. 2d 226, 779 N.W.2d 1. However, that collective knowledge must add up to probable cause. “[I]t is necessary that the officer’s underlying assumption of probable cause be correct.” *Cheers*, 102 Wis. 2d at 389.

Thus, while a police officer may rely on information possessed by another, that source information must constitute probable cause. The facts supporting the arrest must exist within the department. *Id.* Otherwise, a police officer could

simply point to an unfounded tip upon which to base an arrest. As the Court stated in *Whiteley*, the standards to be applied to a warrantless arrest must be at least as stringent as the standards a magistrate would apply when deciding to issue a warrant. An otherwise illegal arrest “cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest.” *Whiteley*, 401 U.S. at 568.

Further, upon a challenge by the defendant, the state must prove the collective knowledge of the department. *Pickens*, 2010 WI App 5 at ¶¶13-14. “Proof is not supplied by the mere testimony of one officer that he relied on the unspecified knowledge of another officer.” *Id.* at ¶13. The record must demonstrate “specific, articulable facts” which would support a finding of probable cause. *Id.* Here, the state failed to prove that the underlying information—the banner—was based on probable cause. Having failed to meet its burden of proof, the court should have granted Sislo’s motion to suppress evidence obtained as a result of his unlawful arrest.

The remedy for the violation is exclusion of the evidence obtained as a result of the arrest, namely information gleaned from a search of Sislo’s phone and any statements he made. *Pickens*, 2010 WI App 5 at ¶50, *Whiteley*, 401 U.S. at 568. Exclusion is the appropriate remedy in order to deter police officers from relying on a two-year-old computer “banner,” combined with minimal investigation, to justify a warrantless arrest. Clearly, time was not of the essence given that the suspected crime occurred some two years earlier. Therefore, Lear could have sought a warrant. And, had he done so, a magistrate would have concluded that the information contained in this record was insufficient to constitute probable cause.

CONCLUSION

In sum, the warrantless arrest of Charles David Sislo was not justified by probable cause. Therefore, Mr. Sislo respectfully requests that the court reverse the circuit court's denial of his motion to suppress, and vacate his conviction.

Dated this 9th day of April, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

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 of body text. The length of the brief is 3,111 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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.

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A P P E N D I X

**I N D E X
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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(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(3)(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 preserve confidentiality and with appropriate references to the record.

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