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

---

REPLY BRIEF OF DEFENDANT-APPELLANT

MARTHA K. ASKINS
Assistant State Public Defender
State Bar No. 1008032

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2879
askinsm@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

OTHER AUTHORITIES CITED

ARGUMENT

Sislo's Arrest Was Unlawful Because the Information the Police Relied Upon to Arrest Him Did Not Constitute Probable Cause.

The parties agree on much in this appeal. Sislo has argued that "while a police officer may rely on information possessed by another, that source information must constitute probable cause." (Sislo's brief at 11). The collective knowledge of the officers must add up to probable cause. (*Id.*). The state appears to agree. It argues that an arrest made in reasonable reliance on police communication is valid if the officer's underlying assumption of probable cause is correct. (State's brief at 10). It correctly states that the issue in this case is whether the Superior Police Department, which issued the "banner" alert, "actually had probable cause." (State's brief at 12).

Thus, the issue in dispute is whether probable cause existed for the banner alert issued in 2010.

The state argues that "probable cause [was] established through reports by Officer Felton and Detective Jaszczak," and that Detective Jaszczak "felt there was probable cause to request a warrant." (State's brief at 12). Whether Jaszczak "felt" there was probable cause is irrelevant. 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. The focus thus is not on what Jaszczak felt, but rather whether the knowledge reflected in his police report would

lead a reasonable officer to believe that Sislo probably committed a crime.

The state failed to prove that Jaszczak's knowledge, at the time of his writing of his report, would lead a reasonable police officer to believe Sislo had committed a crime.[1] As argued in Sislo's brief-in-chief, Jaszczak's report does not amount to probable cause because it fails to state that Sislo did not have permission to pay his utility bill through Elna Lund's account, assuming it was truly Sislo who made the call. (Sislo's brief at 10). In addition, the report states the Detective is *requesting* a warrant, but there is no information shown that a warrant was ever issued. As LaFave states: "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).

Further, while the state asserts, without citation to the record, that requests for charges are referred to the District Attorney's office, and also lead to "putting a 'banner' alert in the records system," the state failed to prove this assertion at the suppression hearing. (State's brief at 13). There is no proof in the record as to how the "banner" alert was put into the police communication system, and what information led to that banner. Without that proof, the state has failed to meet its burden of proving whether there is probable cause to justify the arrest.

[1] The state's reference to Officer Felton does not add anything to the probable cause analysis. Detective Lear simply noted that Felton was the "initial officer," but there are no details as to his investigation, if any. (46:15).

The state relies on ***State v. Collins***, 122 Wis. 2d 320, 363 N.W.2d 229 (Ct. App. 1984) in support of its argument that the banner alert was supported by probable cause. That reliance is misplaced because the issues before the court were different. Unlike Sislo's case, the defendant in ***Collins*** did not argue there was no probable cause to arrest him. ***Id.*** at 323, n.4. Rather, the issue in ***Collins*** was the admissibility of his confession made as a result of an arrest where the officers acted in objectively reasonable reliance on an arrest warrant later determined to be invalid. ***Id.*** at 326. In ***Collins***, the arrest warrant was invalid because it had already been executed, not because it was unsupported by probable cause. ***Id.***

It appears the parties also agree that a police officer may rely on the collective knowledge of the department when making an arrest. (State's brief at 14; Sislo's brief at 11). However, the state errs when it cites to ***Schaffer v. State,*** 75 Wis. 2d 673, 250 N.W.2d 326 (1977), and ***State v. Taylor***, 60 Wis. 2d 506, 210 N.W.2d 873 (1973), in support of its claim that probable cause existed for the arrest here. Those cases do not support the state's claim that Detective Jaszczak had probable cause. They only emphasize Sislo's point that the trial court could not simply rely on the good faith of the officer making the arrest. The court must look to whether probable cause existed at the source, which in this case is the one police report in the record generated by Jaszczak, which presumably led to the banner alert.

The court in ***Schaffer*** said that a police officer is "legally justified" to make an arrest based on collective information. But, the court immediately went on to say that "[s]uch legal justification, however, cannot alone constitute probable cause for such an arrest, *for it is necessary that the*

officer's underlying assumption of probable cause be correct." ***Schaffer***, 75 Wis. 2d at 677 (emphasis added). And in ***Taylor***, the court said that an officer may act on the basis of a police dispatch, but that if the underlying assumption of the existence of probable cause proves to be incorrect, "the arrest is illegal and any search made incident thereto is invalid and the fruits of the search are inadmissible." ***Taylor***, 60 Wis. 2d 515-516.

In the same vein, the state's reliance on ***United States v. Hensley***, 469 U.S. 221 (1985), is misplaced. (State's brief at 15-16). Again, Sislo does not argue that Deputy *Howe* personally had to have probable cause to arrest. He could rely on collective knowledge to make an arrest. However, if it was later determined that Detective *Jaszczak* lacked probable cause, then the arrest was unlawful, and the fruits of the arrest must be suppressed.

In sum, the state concedes that the only way for Sislo's arrest to be valid in this case is if the banner alert was supported by probable cause. The state has failed to show that the two-year-old police report generated by Detective Jaszczak amounted to probable cause in light of the fact that the report says nothing about whether Sislo had consent to pay his bill through Elna Lund's account, or what the outcome was of the request for a warrant. Nor did the state present evidence as to how the banner alert came to be on the computer. For example, there is no information as to what investigation occurs before such a banner is posted. All that is known here is the state's assertion in its brief, without citation to authority, that the police would have put this banner in the records system. (State's brief at 13).

CONCLUSION

For the reasons argued above and in his brief-in-chief, Charles David Sislo respectfully requests that the court reverse the circuit court's denial of his motion to suppress, and vacate his conviction.

Dated this 30th day of November, 2015.

Respectfully submitted,

MARTHA K. ASKINS
Assistant State Public Defender
State Bar No. 1008032

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2879
askinsm@opd.wi.gov

Attorney for Defendant-Appellant

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 1,195 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.

Dated this 30th day of November, 2015.

Signed:

MARTHA K. ASKINS
Assistant State Public Defender
State Bar No. 1008032

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2879
askinsm@opd.wi.gov

Attorney for Defendant-Appellant