STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2015AP00997 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRADLEY L. KILGORE,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

Appealed from a Judgment of Conviction Entered in the Circuit Court for Sheboygan County, the Honorable Terence T. Bourke Presiding
Trial Court Case No. 13 CF 475

Respectfully Submitted:

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STATEMENT OF THE ISSUES

I. WHETHER OFFICERS UNLAWFULLY INTERROGATED THE DEFENDANT WHILE EXECUTING A SEARCH WARRANT WITHOUT ADVISING THE DEFENDANT OF HIS MIRANDA RIGHTS?

Trial Court Answered: No.

II. WHETHER PROBABLE CAUSE EXISTED TO ISSUE THE SEARCH WARRANT FOR THE DEFENDANT'S DNA?

Trial Court Answered: Yes.

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant (hereinafter Kilgore) believes oral argument is unnecessary in this case. Pursuant to Rule 809.22(2)(b), stats., the briefs will fully develop and explain the issues. Therefore, oral argument would be of only marginal value and would not justify the expense of court time.

STATEMENT ON PUBLICATION

Kilgore believes publication of this case is also unnecessary. Pursuant to Rule 809.23(1)(b), stats., this case involves the application of well-settled rules of law to a common fact situation.

STATEMENT OF FACTS AND CASE

On April 12, 2013, Sheboygan Police Officer Dustin Fickett met with K.A.B. (D.O.B. 12/16/1988) at Sheboygan Memorial Medical Center to investigate a reported sexual assault.(R1 at 3, Appendix at 103). K.A.B. informed Officer Fickett that the night before she ran into an old friend, "David Peters" (hereinafter Peters) at the Skipper Inn bar in Sheboygan, Wisconsin. (R1 at 4, Appendix at 104). K.A.B. stated that Peters was with his "roommate Brad" that night, whom K.A.B. did not know. "Brad" was later identified Kilgore. K.A.B. gave Peters her cell phone number, and at approximately 1:45 AM, Peters called K.A.B. and

invited her to his house. (Id). Peters was waiting outside for K.A.B. when she arrived.

Once inside, K.A.B. asked Peters for Tylenol which K.A.B. took without examining. (Id). K.A.B. also drank a beverage made by Kilgore. Peters showed K.A.B. "needles for H", referring to heroin, in his dresser drawer. (R1 at 6, Appendix at 106). The last thing that K.A.B. claims to remember was sitting in a blue chair with Peters. (R1 at 4, Appendix at 104).

At approximately 1:00 PM the following day, K.A.B. reported waking up in Peters' bed, clothed only in an undershirt. (Id). She began vomiting, left the residence and drove to work. Later that day, K.A.B. went to the hospital, where she met Officer Fickett.

On April 16, 2013, Sheboygan Police Detective Tamara Remington provided an Affidavit in Support of a Search Warrant that included a request to obtain a

buccal swab from Kilgore. (R1 at 7, Appendix at 107). It further stated,

> "Your Affiant is aware, from her training and experience, that a buccal swab taken from an individual can be provided to the State Crime Lab to be used asa standard sample for the purpose of matching DNA seized at a crime scene to a person's DNA profile...
>
> Your affiant believes that the DNA obtained from Peters and Kilgore could be compared to any DNA obtained from the rape examination that was conducted on Victim [K.A.B.] at the SMMC.

Court Commissioner Rebecca Persick authorized the search warrant on April 16, 2015.

On the same day, at approximately 1:49 PM, the SWAT team executed the search warrant at 1117A S. 16th Street, in Sheboygan, Wisconsin. (R90 at 6, Appendix at 136). The SWAT team was equipped with bulletproof vests, helmets, and weapons (Id). There were twelve officers involved in the execution of the search warrant. (R28 at 2, Appendix at 112). Officers Brandon Kehoe and Matthew Braesch handcuffed

Kilgore and forced him, face down, to the ground with an M-4 rifle pointed at his head in the kitchen as the rest of the residence was cleared. (Id).

After the house was cleared, Kilgore was uncuffed and moved from the floor but ordered to remain seated and was not free to leave. (R90 at 10-11, Appendix at 140-41). Detective Remington engaged in direct questioning in relation to the sexual assault allegation. (R90 at 14, Appendix at 144). Kilgore was never read his Miranda rights and was not told that he was not under arrest. During the interrogation, Detectives Paul Olsen and Matthew Walsh and Officer Charlet Endsley were present in the residence and Captain James Veeser remained in the same room as Kilgore.

In response to Detective Remington's questions, Kilgore made statements that confirmed a "nice white girl" came over on the evening of the alleged assault,

that he made her a drink, that drugs were used in the residence that evening, that the girl was in Peters' room that evening, and that Kilgore's DNA would not be found on her because he did not touch her. (R90 at 12-16, Appendix at 142-46). After showing Kilgore the warrant, Detective Remington then required Kilgore to submit to a buccal swab for the purpose of collecting his DNA. (R90 at 23, Appendix at 153).

At a suppression hearing on April 21, 2014, Detective Remington testified that Kilgore was only someone that must be ruled out; he was not a suspect. (R90 at 19-20, Appendix at 149-50). Detective Remington acknowledged that there was no probable cause to believe that Kilgore committed a crime. (R90 at 20, Appendix at 150). Detective Remington further claimed that she had not "even thought of Bradley personally" when she went to obtain the search warrant. (Id). When asked to confirm that she didn't

view him as a suspect, Detective Remington responded, "I thought that DNA would clear him". (R90 at 22, Appendix at 152). Detective Remington stated that Peters was a very dangerous, frequent criminal suspect. (R90 at 18, Appendix at 148). The Sheboygan Police Department did not have those concerns with Kilgore. (Id).

With this new information, Kilgore filed an additional suppression motion, challenging the probable cause of the search warrant that allowed the Sheboygan Police Department to collect his DNA.

During the hearing on April 23, 2014, the Court held that Kilgore was not in custody when he was questioned by Detective Remington. The Court relied on the following factors to explain its holding: (1) the time of day was neutral to both parties; (2) Kilgore was released from handcuffs after the initial raid; (3) Kilgore was allowed to sit in a chair in the living room;

(4) Kilgore no longer had the gun pointed at his head at the time of questioning; (5) the police did not threaten Kilgore; (6) the questioning primarily concerned Peters; and (7) according to Detective Remington, Kilgore was cooperative. (R91 at 9-10, Appendix at 200-01).

In regards to the motion challenging the warrant, the Court held that "there was a fair probability that evidence would be located" and denied the motion. The State introduced the DNA results at trial through Analyst Ronald Witucki (R93, R94). Analyst Witucki testified to a reasonable degree of scientific certainty that the DNA sample taken from Kilgore was consistent with the male DNA found on the cervical swabs, vaginal swabs, rectal swabs, and the gauze taken from K.A.B. during the sexual assault examination. (R93 at 262). Additionally, the State introduced the statements made by Kilgore at trial through Detective Remington. (R95). On November 6, 2014, the jury returned a verdict

of guilty and Kilgore was sentenced to ten year prison sentence. (R80).

This appeal follows.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DETERMINED THAT KILGORE WAS NOT IN CUSTODY WHEN POLICE INTERROGATED HIM WHILE EXECUTING THE SEARCH WARRANT

A. Standard of Review

Whether a person is in custody for Miranda purposes is a question of law this court reviews independently. State v. Mosher, 221 Wis. 2d 203, 211, 584 N.W.2d 553 (Ct. App. 1998). This court reviews with deference the circuit court's factual findings. Id. at 211-12, 584 N.W.2d 553. However, this court independently determines whether under the facts, Kilgore was in custody at the time she made her statements. See id.

B. Kilgore was Interrogated by Law Enforcement

Interrogation, so as to trigger the right to counsel means direct questioning by the police, as well as any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect. United States v. Briggs, 273 F.3d 737, 740 (7th Cir. 2001)

Unless law enforcement officers give certain specified warnings before questioning a person in custody, and follow certain specified procedures during the course of a subsequent interrogation, any statement made by the person in custody over his objection be admitted in evidence against him as a defendant at trial, even though the statement may be in fact be wholly voluntary. Michigan v. Tucker, 417 U.S. 433, 443, 94 S. Ct. 2357 (1974).

Detective Remington admitted asking Kilgore direct questions that related to the sexual assault investigation. That fact that Kilgore appeared cooperative does not negate the fact that law enforcement questioned him without advising him of his rights. And although questions primarily concerned Kilgore's knowledge of Peters', Kilgore's responses concerning his knowledge of K.A.B. and his activity on the night of the alleged assault clearly could be incriminating in nature. In fact, Kilgore's statements were used against him during the fourth day of his jury trial. It is objectively unreasonable to suggest that although the detectives were directly questioning Kilgore, his statements given were not wholly voluntarily offered, but in fact responsive.

C. Kilgore was in Custody When the Police Interrogated Him

In order to protect a citizen's right against self-incrimination guaranteed by the Fifth Amendment, the United States Supreme Court held in Miranda that suspects must be read certain warnings before they are questioned. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602 (1966). A suspect must be in custody to trigger the Miranda requirements. Id. A person is in custody for purposes of Miranda if the person is either formally arrested or has suffered a restraint on freedom of movement of the degree associated with a formal arrest. California v. Beheler, 463 U.S.1121, 1125, 103 S. Ct. 3517 (1983).

In determining whether an individual is in custody for the purpose of Miranda warnings, the circuit court should consider the totality of the circumstances, including such factors as: the

defendant's freedom to leave, the purpose, place and length of the interrogation, and the degree of restraint. State v. Gruen, 218 Wis. 2d 581, 594, 582 N.W.2d 728, 733 (1998). In exploring the degree of restraint, courts have considered as relevant factors: (1) whether the defendant was handcuffed; (2) whether a gun was drawn on the defendant; (3) whether a Terry frisk was performed; (4) the manner in which the defendant was restrained; (5) whether the defendant was moved to another location; (7) the number of police officers involved. State v. Pounds, 176 Wis. 2d 315, 322, 500 N.W.2d 373, 377 (1993).

In this case, the trial court erred when it determined that Kilgore was not in custody. The trial court analogized this case to State v. Goetz. In that case, the court found that Goetz was not in custody, although she was present and questioned during the execution of a search warrant. 249, Wis. 2d 380, 638

N.W.2d 386 (2001). However, this case is readily distinguishable. In Goetz, police informed Goetz that she was not under arrest and did not intend her unless she obstructed and Goetz verbally acknowledged that she understood. Goetz, 249 Wis. 2d at 382. Goetz was never placed in handcuffs prior to or during interrogation, and never had a gun drawn on her person.

In this case, twelve officers fully equipped with SWAT gear stormed the residence. Two police officers forced Kilgore to the ground by pointing an M-4 assault rifle at his head. Although the officers later holstered their weapons, Kilgore was ordered to remain seated in the chair, surrounded by no less than four law enforcement officers at any time. When Kilgore attempted to leave the seat, officers again ordered that he remain seated. Kilgore was never read his Miranda rights and was never told that he was not under arrest.

In fact, Detective Remington admitted under oath that Kilgore was not free to leave. Given the totality of the circumstances, an objective person would not have felt free to leave in Kilgore's situation.

In State v. Reed, 280 Wis. 2d 68, 695 N.W.2d 315, the Wisconsin Supreme Court depicted the Fifth Amendment as providing a shield that protects against compelled self-incrimination. By its very nature, the Miranda warnings secure the integrity of that shield- and to be sure, that shield is made of substance, not tinsel. Hoyer v. State, 180 Wis. 407, 413, 193 N.W. 89 (1923). The trial court erred in determining that Kilgore was not in custody. Because the officers interrogated Kilgore while he was in custody without reading him his Miranda warnings, Kilgore's statements made during the course of the interrogation should have been suppressed and not allowed into evidence at trial.

II. PROBABLE CAUSE DID NOT EXIST FOR THE SEARCH WARRANT TO OBTAIN KILGORE'S DNA

A. Standard of Review

This court gives great deference to a court's determination of probable cause to issue a warrant, and the defendant bears the burden of challenging probable cause. State v. Multaler, 252 Wis. 2d 54, 643 N.W.2d 437 (2002). The court may draw reasonable inferences from the evidence presented and must make a practical, commonsense determination whether, based on that evidence and under all the circumstances, a fair probability exists that contraband or evidence of a crime will be found at the place to be searched. 252 Wis. 2d at 62.

B. Probable Cause Did Not Exist to Issue a Search Warrant to Obtain Kilgore's DNA

The duty of the court issuing the warrant is to make a practical, common-sense decision whether, given all the

circumstances set forth in the affidavit before it, there is a probability that contraband or evidence of a crime will be found in a particular place. State v. Higginbotham, 162 Wis. 2d 978, 990, 471 N.W.2d 24 (1991). The warrant judge may draw reasonable inferences from the evidence presented in the affidavit. State v. Benoit, 83 Wis.2d 389, 399, 265 N.W.2d 298 (1978).

A defendant has the right under the Fourth and Fourteenth Amendments to the United States Constitution to challenge the truthfulness or completeness of the factual statements made in an affidavit supporting a search warrant which is later executed. Franks v. Delaware, 438 U.S. 154 (1978). Where a defendant makes a substantial showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the search warrant affidavit, and if the allegedly false statement is necessary to the finding of

probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. Franks, supra, 438 U.S. at 155-56. This rule of law extends to necessary facts which are intentionally omitted by the affiant. State v. Mann, 123 Wis. 2d 375, 367 N.W.2d 209 (1985).

The seizure of a defendant's DNA by means of a buccal swab is a search under the Fourth Amendment, and therefore, the search requires a warrant supported by probable cause, or an exception to the warrant requirement must exist. Maryland v. King, 569 U.S. ___, 133 S. Ct. 1958 (2013). State v. Banks, 328 Wis. 2d 766, 778-79, 790 N.W.2d 526, 532 (2010).

Here, the unstated intent of Detective Remington was to "exclude" someone as a suspect. Her affidavit summarized the investigation up to that point, including information provided by K.A.B. The majority of the information related to K.A.B.'s knowledge of Peters, but

did reference some identifying information regarding Kilgore. The information included Kilgore's presence at the bar with Peters before K.A.B. went to the residence, and that Kilgore made a drink for her when she came to their residence after leaving the bar. The affidavit implies that Kilgore is a possible suspect, although the great weight of the evidence relates to the involvement of Peters.

According to the affidavit, the buccal swab obtained from Kilgore was for the purpose of matching that DNA to that found during the sexual assault exam of K.A.B. Nowhere in the affidavit did it state that the affiant's main purpose of collecting Kilgore's DNA was to exclude him because law enforcement did not view him as a suspect.

The circuit court erred when it found that there was a fair probability that contraband or evidence of a crime will be found in that particular place. Although it

stands to reason that Kilgore's DNA would be found in his own residence, it does not in turn rise to the level of a fair probability that Kilgore's DNA would be present on items related to the alleged sexual assault. K.A.B. remembered being in Peters' room with Peters', not Kilgore prior to losing her memory. K.A.B. woke up in Peters' room in a partially undressed state. She did not recall having any contact with Kilgore in Peters' room the previous night or that afternoon.

Kilgore did not consent to the buccal swab. He only complied after being shown the search warrant and being informed by Detective Remington that he was required to allow law enforcement to obtain a sample. Therefore, the search warrant was necessary to obtain the DNA sample. The purpose of that buccal swab was to compare Kilgore's DNA to the evidence collected for the sexual assault investigation. Detective Remington

testified that she believed DNA would clear Kilgore; she did not view him as a suspect.

At the time of the warrant issuance, the detective applying for the search warrant did not believe that probable cause existed to connect Kilgore with the criminal activity alleged by K.A.B. Had that information been shared with a reasonable magistrate the warrant would not have been issued. Because the sample was unlawfully obtained through an invalid search warrant, the physical evidence should have been suppressed. Had the evidence not been admitted at trial, there is a high probability that the trial would have had an alternative outcome.

CONCLUSION

For the foregoing reasons, Kilgore respectfully asserts that the trial court erred when it denied Kilgore's motion to suppress evidence based on a violation of his Miranda rights. Additionally, Kilgore respectfully asserts that the trial court erred when it denied his motion to suppress evidence based on a lack of probable cause to obtain a sample of his DNA. Therefore, Kilgore requests that this Court reverse the trial court's denial of the motions, and remand the case for a new jury trial.

Dated this 9th day of August, 2015.

Respectfully submitted,

KIRK OBEAR AND ASSOCIATES

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CERTIFICATION AS TO FORM AND LENGTH

I hereby 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. The text is 13 point type and the length of the brief is 3433 words.

Dated this 9th day of August, 2015.

Respectfully submitted,

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CERTIFICATION AS TO CONTENTS 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. 809.19(2)(a) and that contains, at a minimum:

(1) a table of contents;
(2) the findings or opinion of the circuit court; and
(3) 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 or 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.

Dated this 9th day of August, 2015.

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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 s. 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 10th day of August, 2015.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that this brief and appendix was delivered to the Clerk, Wisconsin Court of Appeals, 110 East Main Street, Suite 215, Madison, Wisconsin, by placing a copy of the same in the U.S. Mail with proper postage affixed on August 10, 2015.

Dated this 10th day of August, 2015.

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