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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Court of Appeals Case No. 2015AP1255-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD J. SLAYTON,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

On Appeal from the Circuit Court for Walworth County, the
Honorable James L. Carlson, Presiding
Circuit Court Case No. 2014 CT 16

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Wisconsin Statutes

STATEMENT OF THE ISSUE

1. Under the Supreme Court's mandate that probable cause findings be made by the judiciary rather than by police, can an officer seeking a warrant for an OWI blood draw establish probable cause that the arrestee has a prior countable conviction under Wis. Stat. § 343.307(1) by merely concluding that the officer has reviewed "competent proof" and "finds" a prior countable conviction?

Circuit Court Answered: The circuit court found that the affidavit established probable cause.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Slayton doesn't request oral argument or publication of the opinion in this appeal.

STATEMENT OF THE CASE

The sole issue in this appeal is the sufficiency of an officer's affidavit in support of a warrant for an OWI blood draw. Slayton argues that the affidavit failed to provide probable cause that he had a countable prior OWI-type conviction, therefore; he argues that it didn't show probable cause that his blood contained evidence of a crime. He accepted a plea agreement after the circuit court denied his motion to suppress that evidence, and he now asks this Court to reverse that judgment.

On December 13, 2013, Officer Derrick Goetsch arrested Slayton for OWI. (3:1-2). Slayton declined to consent to a blood

draw. *Id.* Thus, the officer requested a warrant to draw Slayton's blood, and drafted an affidavit stating the alleged grounds. (1:3-9; App. 3-9).

The affidavit contained a section that alleged that the current offense was a crime because Slayton had a prior conviction that was countable under Wis. Stat. § 343.307(1). (1:5; App. 5). In that section, the affidavit stated:

> (b.) Affiant has reviewed a report of the defendant's driving record, CCAP, judgment of conviction and/or other competent proof, which documents he/she has referred to in the past and found to be accurate and reliable. According to said documents, the defendant has previously been convicted for a violation the type for which the person is currently arrested and considered a prior countable offense under Chapter 346.
>
> (c.) Affiant has counted the number of prior convictions which count as prior countable offenses and finds the total number of prior convictions to be <u>two</u>.

(1:5; App. 5).

A court commissioner issued the search warrant. (1:1-2; App. 1-2). Medical personnel drew samples of Slayton's blood. (3:2). Later, the State charged Slayton with OWI as a third-offense. *Id.* at 1.

Slayton moved to suppress the blood result because the blood draw violated the rights granted to him by the Fourth Amendment and Article I, Section 11 of the Wisconsin Constitution. (10). He claimed that the affidavit was defective,

and thus it couldn't justify the commissioner's probable cause determination. (10). He alleged that the officer didn't properly swear to the affidavit, and that the affidavit included false statements which negated the commissioner's probable cause finding. (13).

The sole issue at the motion hearing was the sufficiency of the affidavit. (31). The parties focused largely on whether the officer properly swore to the affidavit and whether it contained false statements. *Id.* The officer's statements regarding the prior convictions wasn't specifically discussed by either party, (*id.*), though the ultimate issue was whether the affidavit was sufficient to establish probable cause. Ultimately the court, in the part of its ruling that is relevant to this appeal, held that the affidavit provided sufficient probable cause:

> I believe the affidavit substantially showed probable cause that the court commissioner issued a warrant on.

(31:88; App. 12).

Slayton pled guilty and was sentenced to 180 days in jail, but the court stayed that sentence pending this appeal. (26:1; App. 16). Slayton now appeals and asks that this Court reverse the judgment and order the circuit court to grant his motion to suppress.

ARGUMENT

I. The affidavit was clearly insufficient because, to prove that Slayton had countable prior OWI offenses, it relied on the officer's mere conclusions.

To establish probable cause, an affidavit must include "sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked to the commission of a crime…." *State v. Starke*, 81 Wis. 2d 399, 408, 260 N.W.2d 739 (1978). An OWI arrestee with no prior conviction can't have evidence of a crime in his blood, because first offense OWI isn't a crime. *See* Wis. Stat. § 346.65(2)(am). Therefore, the affidavit had to establish that Slayton had at least one countable prior OWI conviction. It failed to do that because (1) it didn't establish that Slayton's prior convictions, if they existed, were the kind that are countable under section 343.307(1), and (2) it didn't identify or give any reason to trust the source it identified as "other competent proof."

Ultimately, the issue is whether the affidavit established probable cause of a countable prior OWI conviction. Section 343.307(1) defines a countable prior conviction as one of the following:

> (a) Convictions for violations under s. 346.63(1), or a local ordinance in conformity with that section.
>
> (b) Convictions for violations of a law of a federally recognized American Indian tribe or

band in this state in conformity with s. 346.63(1).

(c) Convictions for violations under s. 346.63(2) or 940.25, or s. 940.09 where the offense involved the use of a vehicle.

(d) Convictions under the law of another jurisdiction that prohibits a person from refusing chemical testing or using a motor vehicle while intoxicated or under the influence of a controlled substance or controlled substance analog, or a combination thereof; with an excess or specified range of alcohol concentration; while under ***10** the influence of any drug to a degree that renders the person incapable of safely driving; or while having a detectable amount of a restricted controlled substance in his or her blood, as those or substantially similar terms are used in that jurisdiction's laws.

(e) Operating privilege suspensions or revocations under the law of another jurisdiction arising out of a refusal to submit to chemical testing.

(f) Revocations under s. 343.305(10).

(g) Convictions for violations under s. 114.09(1)(b) 1. or 1m.

Wis. Stat. § 343.307(1).

When a defendant appeals a warrant-issuing official's probable cause determination, the reviewing court will overturn if the facts are clearly insufficient to support that finding. *State v. Higginbotham*, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991). The question is whether the issuing-official had a substantial basis for finding probable cause. *Id.* Though this is a deferential standard, courts must step in when an affidavit contains only the officer's bare conclusions. *Illinois v. Gates*, 462 U.S. 213, 239 (1983).

Because an affiant's bare conclusions are irrelevant, the affidavit in this case is clearly insufficient in two ways. First, instead of providing information about the prior convictions, the affidavit provided the officer's mere conclusion that those convictions were countable. The second problem with the affidavit is the source of that information, which might have come from "other competent proof." (1:5; App. 5). Without more, the commissioner couldn't independently determine the source's veracity or basis of knowledge; instead, the commissioner had to rely on the officer's mere conclusion. *See Aguilar v. Texas*, 378 U.S. 108, 109 (1964) (holding that the officer's description of a source as "a credible person" was a mere conclusion insufficient to justify reliance on that source).

A. The affidavit was clearly insufficient to show probable cause because it relied on the officer's legal conclusion that, under Wis. Stat. § 343.307(1), Slayton's prior convictions fell within the definition of a prior conviction.

The affidavit didn't even identify Slayton's prior convictions. (1:5; App. 5). Instead, it said that the officer "*finds* the total number of prior convictions to be two." (1:3) (Emphasis added). Findings are for judges, not officers; the officer's job was to present facts. *Johnson v. United States*, 333 U.S. 10, 13-14 (1948). But other than the officer's "finding," the affidavit gave the commissioner no reason to believe that Slayton's convictions were countable under section 343.307(1). (1:5; App. 5). Therefore, the affidavit was clearly insufficient to show probable cause that Slayton's blood would contain evidence of a crime.

The essential protection of the warrant requirement is to ensure that the conclusions be drawn by independent judges rather than officers "engaged in the competitive enterprise of ferreting out crime." *Johnson*, 333 U.S. at 13-14. Thus, when an officer asks for a warrant to draw blood, a warrant-issuing official must be more than just a rubber stamp for an officer's conclusion that a prior conviction is countable. *See Higginbotham*, 192 Wis. 2d at 991. In sum, the officer's job in this case was to provide the facts to show that Slayton's prior convictions were for the types listed in § 343.307(1).

The affidavit gave no information about those convictions. It didn't even identify the prior offenses. (1:5; App. 5). It didn't describe any record entries. *Id.* It didn't identify the laws that Slayton broke. *Id.* A judge can't independently find probable

cause that a prior offense is countable without knowing what that offense was.

A simple description of the prior convictions would've sufficed. For example, the officer could've said the record showed a conviction, suspension, or revocation for OWI, DUI, driving while impaired, or anything else involving the combination of intoxicants and operating a vehicle. Without even that sort of brief description, a judge can't independently find probable cause of a countable prior conviction.

Because the affidavit provided none of that information, it was clearly insufficient to show probable cause to believe Slayton's blood contained evidence of a crime. Based on this alone, the Court should reverse the judgment and instruct the circuit court to grant Slayton's motion to suppress the blood result.

B. The affidavit was clearly insufficient because, with regard to the source of the information about Slayton's prior convictions, it failed to establish that source's basis of knowledge or veracity.

The affidavit's other defect was that, among the list of possible sources, was the alternative of "other competent proof." The source in this case might have been one of the other unobjectionable alternatives, but the affidavit gave no indication of that. (1:5; App. 5). Thus, the issue is whether an affidavit can rely on an officer's conclusion that a source is competent proof.

When an affidavit relies on a hearsay source for information, and that information is critical to the probable cause determination, the source's veracity and basis of knowledge are highly relevant. *See State v. Romero*, 2009 WI 32, ¶ 20, 317 Wis. 2d 12, 765 N.W.2d 756. This source was the sole source of information about Slayton's history, so it was critical to the probable cause determination. The affidavit said almost nothing about the source's veracity and basis of knowledge. Therefore, this source's information was clearly insufficient to establish probable cause.

Veracity and basis of knowledge are intertwined factors. A source's deficit in one factor can be overcome by a strong-showing on the other. *Gates*, 462 U.S. at 233. To demonstrate veracity, an affidavit can present facts that show either the source's credibility or the reliability of the particular information furnished. *Romero*, 317 Wis. 2d 12, ¶ 21. A source may be credible because it has provided reliable information in the past. *Id.* An affidavit demonstrates that a source's information is reliable by the corroboration of details. *Id.* An affidavit demonstrates a source's basis of knowledge simply by showing how the source obtained the information. *Id.*, ¶ 22.

The affidavit in this case was clearly insufficient to establish the unidentified source's value. It said nothing about the source's basis of knowledge. (1; App. 3-9). It didn't even identify the nature of the source, other than that it was a document. *Id.*

In addition, the affidavit said almost nothing about the source's veracity. Without knowing even the nature of the source, i.e., whether it's a criminal record, a note from an informant, or

an anonymous letter, the commissioner had no way to evaluate the source's credibility. In comparison, the other possible sources, a judgment of conviction, CCAP, or a driving record, are all well-known and widely used by courts, so an affiant wouldn't need to elaborate on those sources.

Although the affidavit states that the source has provided reliable information in the past, that isn't enough, because the affidavit didn't say the source had personal knowledge. *Romero*, 317 Wis. 2d 12, ¶¶ 24-26. When an affidavit doesn't say that the source has personal knowledge, it must give some reason to rely on whoever gave the source its information. *Id.* Alternatively, an affidavit could provide that police corroborated some of the source's information. *Id.* In this case, the affidavit didn't include any statements like that. (1; App. 3-9).

Describing a source as "competent proof" is similar to describing a source as "a credible person," as the affidavit provided in *Aguilar v. Texas*, 378 U.S. 108, 109 (1964). In that case, the Court held that the magistrate couldn't independently evaluate the value of the source's information without more than that affiant's conclusory statement. *Id.* at 113-15. Although *Gates* subsequently abandoned the test that the Court used in *Aguilar*, it reaffirmed the result, and it again said that an affidavit must provide more than just the affiant's conclusions about a source's value. *Gates*, 462 U.S. at 239.

In sum, because the affidavit left the possibility that the sole source was "other competent proof," the Court must decide whether the affidavit provided sufficient facts to justify reliance on that source's information. The affidavit provided only the conclusory statement, and that the officer had previously relied

on the source. (1:5; App. 5). But the source's previous accuracy is insufficient because the affidavit doesn't say the source had personal knowledge. *Romero*, 2009 WI 32, ¶¶ 24-26. Therefore, the affidavit was clearly insufficient to establish that Slayton's blood contained evidence of a crime, and the Court should reverse the judgment.

CONCLUSION

For the above-stated reasons, Slayton requests that the Court reverse the judgment of conviction and remand with instructions that the circuit court grant his motion to suppress the results of the blood test.

Dated this 8th day of September, 2015.

_____

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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) and 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 a minimum of 2 points and maximum of 60 characters per line of body text. The length of this brief is 2,127 words.

Dated this 8th day of September, 2015.

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Rule 809.19(12). I further certify that the 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 8th day of September, 2015.

_____

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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 the brief, is an appendix that complies with Rule 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 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.

Dated this 8th day of September, 2015.

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