STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

APPEAL NO. 2015AP001255-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD J. SLAYTON,

Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

ON APPEAL FROM THE JUDGMENT OF CONVICTION
THE HONORABLE JAMES L. CARLSON, CIRCUIT COURT JUDGE
CIRCUIT COURT FOR WALWORTH COUNTY

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STATEMENT OF THE ISSUES

Was there probable cause in the search warrant affidavit to conclude that that arrestee had two prior OWI type convictions?

The trial court answer: Did not answer.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The state believes that the briefs of the parties will set forth well-established legal authority governing the issues presented. Resolution of the issues in this case requires only application of these established legal principles to the particular facts of this case. The state therefore requests neither oral argument nor publication.

STATEMENT OF THE FACTS

The facts in addition to those cited by the Defendant-Appellant, hereinafter Slayton, will be included within the argument section of this brief as needed.

ARGUMENT

I. This Court Should Decline To Review Slayton's Appellate Claim That The Search Warrant Affidavit Failed To Establish Probable Cause To Believe Slayton Had Any Prior OWI Convictions Because Slayton Failed To Raise That Issue At Any Point In The Circuit Court.

This court should refuse to consider Slayton's challenge to the sufficiency of the search warrant affidavit to prove his prior OWI convictions, because as conceded by

Slayton, in the trial court Slayton never alleged that the affidavit was insufficient on this ground. *See* Slayton's Brief at p. 3. In the trial court, Slayton asserted that the search warrant affidavit was defective because the officer was not placed under oath or properly sworn, the statutory requirements for obtaining a warrant were not properly followed, and the affidavit contained false statements by the officer. R10:2; R12; R13. By failing to raise a claim in the trial court that the search warrant affidavit was insufficient to prove his prior OWI convictions, Slayton forfeited (or waived) the right to appellate review of that claim. *State v. Caban*, 210 Wis. 2d 597, 602-08, 563 N.W.2d 501 (1997) (by failing to raise the issue of probable cause to search the vehicle in the trial court, defendant waived his right to appeal that issue).

In determining whether a criminal defendant forfeited the right to appellate review of a suppression issue by failing to preserve that specific issue in the trial court, the appellate court looks both to the defendant's motion to suppress and the arguments he presented to the trial court at the suppression hearing. *Caban*, 210 Wis. 2d at 605-08.

Under Wisconsin law, a party filing a written motion in the trial court is required to state the grounds for the motion with particularity. *Caban*, 210 Wis. 2d at 605; Wis.

Stat. § 971.30(2)(c). Failure to do so deprives the trial court and the opposing party of notice and the opportunity to fully present and consider the issues. *Caban*, 210 Wis. 2d at 605-06. As conceded by Slayton, his written motion never specifically challenged the search warrant affidavit on this ground, nor was this issue ever discussed by either party at the suppression hearing. R31.

By failing to make this claim in the trial court, Slayton deprived the State and the trial court of the opportunity to present, hear and consider such facts.

That failure to provide notice is precisely the reason why an appellate court should decline to review an issue that was not raised in the trial court. Although the appellate court has the power to review an unpreserved claim in the interest of justice, it should exercise that power sparingly. Slayton has offered no justification for why this court should review his unpreserved claim.

For all of these reasons, this court should decline to review Slayton's claim, made for the first time on appeal, that the State did not offer sufficient proof in the search warrant affidavit of Slayton's prior OWI convictions.

II. The Warrant Contained Sufficient Information To Find Probable Cause That A Search Of Slayton's Blood Would Find Evidence Of A Crime.

A. Standard Of Review And Legal Principles.

Reviewing a motion to suppress presents a two-part standard of review. First, this court reviews the circuit court's findings of historical fact, and upholds them unless they are clearly erroneous. *State v. St. Martin*, 2011 WI 44, ¶ 16, 334 Wis. 2d 290, 800 N.W.2d 858. Second, this court reviews the application of constitutional principles to those facts independently. *Id.*

> "In deciding whether probable cause exists for the issuance of a search warrant, the reviewing court examines the totality of the circumstances presented to the warrant-issuing commissioner to determine whether the warrant-issuing commissioner had a substantial basis for concluding that there was a fair probability that a search of the specified premises would uncover evidence of wrongdoing."

Id. (quoting *State v. Romero*, 2009 WI 32, ¶ 3, 317 Wis. 2d 12, 765 N.W.2d 756).

This court must determine whether the warrant-issuing commissioner knew '"sufficient facts to excite an honest belief in a reasonable mind that the object sought is linked with the commission of a crime.'" *Id.* (quoting *Bast v. State*, 87 Wis. 2d 689, 692-93, 275 N.W.2d 682 (1979)). The warrant-issuing commissioner's finding "'must stand unless the proof is clearly insufficient'" *Id.* The evidence needed to find probable cause is less than required at a

preliminary examination or for a conviction. *Id.* The warrant-issuing commissioner '"may make the usual inferences reasonable persons would draw from the facts presented.'" *Id.*

The probable cause determination is made on a case-by-case basis and examines the totality of the circumstances. *State v. Gralinski*, 2007 WI App 233, ¶ 15, 306 Wis. 2d 101, 743 N.W.2d 448. "[T]he test is one of common sense." *Id.* There is probable cause even if there are other inferences that can be drawn from the evidence. *State v. Casarez*, 2008 WI App 166, ¶ 19, 314 Wis. 2d 661, 762 N.W.2d 385. The inference must be reasonable. *Id.*

The court must consider the veracity and basis of knowledge of persons supplying hearsay information. *Romero*, 317 Wis. 2d 12, ¶ 20. These considerations are highly relevant, but are not "'entirely separate and independent requirements to be rigidly exacted in every case.'" *Id.* ¶ 20 (quoting *Illinois v. Gates,* 462 U.S. 213, 230 (1983)). Instead, these elements are closely intertwined issues that can "'illuminate the commonsense, practical question whether there is "probable cause" to believe that contraband or evidence is located in a particular place.'" *Id.*

The affidavit must contain facts to enable the commissioner to "evaluate either the credibility of the

declarant or the reliability of the particular information furnished." *Romero*, 317 Wis. 2d 12, ¶ 21. The facts may permit the court to infer that the declarant has supplied reliable information on a particular occasion by corroboration of details. *Id.* This corroboration may be sufficient to support a search warrant. *Id.* "If a declarant is shown to be right about some things, it may be inferred that he is probably right about other facts alleged." *Id.*

"The basis of a declarant's knowledge is most directly shown by an explanation of how the declarant came by his or her information." *Romero*, 317 Wis. 2d 12, ¶ 22. "The extent to which a search warrant's supporting affidavit must demonstrate the veracity and basis of knowledge of a declarant may vary depending on the circumstances specific to each case." *Id.* ¶ 23.

B. The Search Warrant Affidavit Contained Facts From Which the Court Commissioner Could Find Probable Cause That Contraband Would Be Found In Slayton’s Blood.

Slayton asserts that the search warrant affidavit did not establish probable cause. Specifically, Slayton argues that Officer Goetsch did not state the source he obtained Slayton’s prior OWI information from, nor did he identify Slayton’s prior convictions; therefore, the commissioner

could not independently determine the source's veracity. *See* Slayton's Brief at p. 6-7. Slayton's contention, however, is without merit.

The standard required to issue a warrant is "sufficient facts to excite an honest belief in a reasonable mind that the object sought is linked with the commission of a crime." *See St. Martin*, 334 Wis. 2d 290, ¶ 16. Conjecture and inferences are fine as long as they are reasonable. *See Casarez*, 314 Wis. 2d 661, ¶ 19. The affidavit met that standard.

The search warrant affidavit laid out sufficient evidence to allow the commissioner to conclude that Slayton had two prior OWI convictions. The search warrant and affidavit stated that Slayton had been arrested for "**driving or operating a motor vehicle while impaired as a second or subsequent offense**." R1:1, 4 [Emphasis Added]. In the affidavit the arresting officer, Officer Derrick Goetsch, swore that he was a certified law enforcement officer and had been so employed as a peace officer for seven years. R1:3. Relevant to Slayton's prior OWI convictions the affidavit stated:

> Affiant has had law enforcement academy training, periodic law enforcement in-service training, and additional on the job training regarding the duties of law enforcement. Affiant has had particular training in the investigation

of cases where persons are suspected to have consumed intoxicants, as well as investigating persons suspected of operating motor vehicles under the influence of alcohol or controlled substances. Further, that Affiant has been trained to administer field sobriety tests, and trained to use these tests in the investigation of cases where Affiant has encountered possibly intoxicated or impaired drivers. Affiant has used these field sobriety tests in the field in the investigation of impaired driving cases, underage alcohol consumption cases and other cases involving the consumption of intoxicants. Affiant has participated in numerous investigations of alcohol related crimes including but not limited to driving or operating a motor vehicle while intoxicated or impaired.

Affiant has personal knowledge that the contents of this application and supporting affidavit, together with the statements made therein, are true. Affiant states that this affidavit references and in part relies upon the observations, verbal reports and/or conclusions of fellow peace officers, including the arresting officer, whose verbal reports Affiant believes to be truthful and reliable.

Affiant knows that blood samples can be analyzed by a chemist at a laboratory such as the State Crime Laboratory, or the Wisconsin Hygiene Laboratory or comparable facility for the presence of controlled substances, substances which can have an impairing or intoxicating effect on human beings, or for the presence and quantity of alcohol in a human being. Affiant knows that such samples can be drawn and are commonly drawn in a hospital or clinical setting by technologists, phlebotomists, nurses or physicians. Affiant is familiar with the practice and procedure of obtaining a blood sample from a suspect and transmitting it to a proper facility for chemical analysis.

R1:3. The affidavit further stated:

The person was read the informing the accused

> form pursuant to the Wisconsin Implied Consent law and refused to submit to the test requested by the peace officer.
>
> 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 been previously convicted for a violation of the type for which the person is currently arrested and considered a prior countable offense under Chapter 346.**
>
> Affiant has counted the number of prior convictions which count as prior countable offenses and finds the total number of prior convictions to be two.

R1:5. [Emphasis Added].

Based on the totality of these facts, the affidavit had probable cause.

The State agrees with Slayton that the affidavit did not specifically list the information about his prior convictions. *See* Slayton's Brief at 6. That, however, is not the standard. The affidavit need not establish proof that Slayton had two prior OWI convictions. "What is required is more than a possibility, but not a probability, that the conclusion is more likely than not." *State v. Tompkins*, 144 Wis. 2d 116, 125, 423 N.W.2d 823 (1988). The affidavit met that standard. The search warrant is not a criminal complaint charging the crime. If it was, then it would have to have proof of each element of the crime. *See*

Wis. Stat. § 968.01(2). The affidavit is instead a tool used to gather evidence of a crime. *See* Wis. Stat. § 968.12(2). The affidavit contained sufficient facts to allow the inference that Slayton has two prior OWI type convictions. As conceded by Slayton, "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." *See* Slayton's Brief at p. 8. As shown above, that is precisely what the affidavit in this case does.

Slayton also challenges the veracity of Officer Goetsch's knowledge of his prior OWI convictions. *See* Slayton's Brief at p. 8. Again, the affidavit contains sufficient information to allow the commissioner to find probable cause. Even without specifically identifying the document relied upon for Slayton's prior OWI convictions, the facts can still permit the commissioner to infer that the officer had supplied reliable information. *Romero*, 2009 WI 32, ¶ 21. "The basis of a declarant's knowledge is most directly shown by an explanation of how the declarant came by his or her information." *Id.* ¶ 22.

The affidavit explains that Officer Goetsch has been a law enforcement officer for seven years, and has been trained in the investigations of cases where persons are suspected to have consumed intoxicants and operated motor vehicles under the influence of intoxicants. R1:3. Officer Goetsch has also participated in numerous investigations of alcohol related crimes including driving or operating a motor vehicle while intoxicated or impaired, and is familiar with obtaining blood samples from those individuals. R1:3-4. Finally, Officer Goetsch counted the number of Slayton's prior OWI convictions as two based upon his review of

> 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 been previously convicted for a violation of the type for which the person is currently arrested and considered a prior countable offense under Chapter 346.

R1:5.

The commissioner found Officer Goetsch credible by signing the warrant, and there is nothing to indicate that Officer Goetsch's information is unreliable. A hearsay declarant's veracity and basis of knowledge should be understood simply as closely intertwined issues that may usefully illuminate the common sense, practical question of whether there is probable cause to believe that contraband

or evidence is located in a particular place. *Romero,* 2009 WI 32, ¶ 20. When an average citizen tenders information to police, the police may assume they are dealing with a credible person. *State v. Kerr,* 181 Wis.2d 372, 381, 511 N.W.2d 586 (1994). Similarly, Officer Goetsch's assertion that he has reviewed documentation he has found to be reliable in the past, including a driving record, CCAP or judgment of conviction to determine Slayton's prior OWI convictions, the commissioner could reasonably evaluate the credibility and reliability of Officer Goetsch's information. *State v. Romero*, 2009 WI 32, ¶20.

Relying on *State v. Romero,* 2009 WI 32, 317 Wis.2d 12, 765 N.W.2d 756, Slayton argues that "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." *See* Slayton's Brief at p. 10. *Romero*, however, is distinguishable. *Romero* involved information provided in support of a search warrant application from a confidential informant who related the claim of a third, unidentified person that Romero had supplied the drugs for their transaction. *Id.,* ¶ 9. Here, Officer Goetsch personally checked documents he has relied upon in the past, including a driving record, CCAP, judgment or conviction, or other competent proof, to

determine Slayton's prior OWI offenses. As Slayton concedes, "judgments of conviction, CCAP, or a driving record, are all well-known and widely used by the courts, so an affiant wouldn't need to elaborate on those sources." *See* Slayton's Brief at p. 10. From this information, a magistrate could reasonably evaluate the credibility and the reliability of the information supplied by Officer Goetsch. *Id.,* ¶ 21, 765 N.W.2d 756.

Thus, there was sufficient information in the affidavit to support the conclusion that there was probable cause to believe that evidence of a crime would be found in Slayton's blood. Based on the totality of the circumstances, the documentation reviewed by Officer Goetsch is reliable. The commissioner's determination must stand because Slayton fails to establish that the facts are clearly insufficient to support a finding of probable cause. *See Romero*, 317 Wis. 2d 12, ¶ 18. Applying great deference to the warrant-issuing commissioner's decision, this court should affirm the conclusion that probable cause existed in the affidavit.

III. If This Court Finds The Search Warrant Was Not Supported By Sufficient Evidence, The Good Faith Exception To The Exclusionary Rule Denies Slayton Relief.

In *United States v. Leon*, 468 U.S. 897 (1984) the United States Supreme court recognized an objective good

faith exception to the exclusionary rule that normally applies to evidence obtained as a result of a violation of the Fourth Amendment. *State v. Marquardt*, 2005 WI 157, ¶ 24, 286 Wis. 2d 204, 705 N.W.2d 878.

In *State v. Eason*, 2001 WI 98, ¶¶ 3, 74, 245 Wis. 2d 206, 629 N.W.2d 625, the Wisconsin Supreme Court adopted an objective good faith exception to the exclusionary rule that normally applies to evidence obtained as a result of a violation of Wis. Const. art. I, § 11.

Explaining the good faith exceptions to the respective exclusionary rules, the court said in *Marquardt*, 286 Wis. 2d 204, ¶¶ 24-26:

> Under *Leon*, evidence seized by officers "reasonably relying on a warrant issued by a detached and neutral magistrate" will not necessarily be suppressed. *Leon*, 468 U.S. at 913. "In the ordinary case," the Court in *Leon* explained, "an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient." *Id*. at 921.
>
> At the same time, the Court in *Leon* described four sets of circumstances under which the good faith exception does not apply:
>
> > [1] the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth. . . . [2] the issuing magistrate wholly abandoned his judicial role. . . [3] Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit "so lacking in indicia of probable cause as to render official

> belief in its existence entirely unreasonable." [4] Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient—*i.e.*, in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.

Id. at 923 (citations omitted).

> In *Eason*, this court added two requirements that must be met before the good faith exception may apply. Specifically, the State must show that the process used in obtaining the search warrant included (1) a "significant investigation," and (2) a "review by a police officer trained in, or very knowledgeable of, the legal vagaries of probable cause and reasonable suspicion, or a knowledgeable government attorney." *Eason*, 245 Wis. 2d 206, ¶ 63.

In Slayton's case, the search warrant affidavit makes plain that there was both an investigation and a review by a knowledgeable police officer. And, none of the *Leon* deficiencies are present.

In *Marquardt*, 286 Wis. 2d 204, ¶ 28, the court explained that the inquiry into whether a warrant affidavit is "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable'" is different from the inquiry into whether the facts in the warrant application are "'clearly insufficient to support a determination of probable cause'" (citation omitted). Consequently, a conclusion that the warrant application was insufficient to support the warrant-issuing judge's probable cause determination does not mean that the affidavit in

support of the warrant was lacking in indicia of probable cause within the meaning of *Leon*. *Marquardt*, 286 Wis. 2d 204, ¶ 30. "[T]he good faith exception will not apply when the warrant is based on an affidavit so lacking in indicia of probable cause that a law enforcement officer—who ordinarily should not be expected to second-guess the warrant-issuing judge—can be said to have unreasonably relied on the warrant." *Marquardt*, 286 Wis. 2d 204, ¶ 34.

The standard for an "indicia" of probable cause is less demanding than the standard for probable cause. The standard for "indicia" of probable cause "requires sufficient signs of probable cause, not probable cause *per se*." *Marquardt*, 286 Wis. 2d 204, ¶ 37.

In *Marquardt*, 286 Wis. 2d 204, ¶¶ 38-44, the court concluded that there were sufficient indicia of probable cause for purposes of *Leon*. The court said in *Marquardt*, 286 Wis. 2d 204, ¶ 38:

> A number of facts in the warrant application, along with reasonable inferences that law enforcement officers could draw from those facts, satisfy us that there is sufficient indicia of probable cause that the objects sought are linked with the commission of a crime, and that the objects sought will be found in the place to be searched.

The court later explained that "[i]n determining whether an affidavit contains sufficient indicia of probable

cause, any competing reasonable inferences are resolved in favor of the State." *Marquardt*, 286 Wis. 2d 204, ¶ 44.

In Slayton's case, the search warrant affidavit made plain that there was both an investigation and a review by a knowledgeable police officer, and that none of the *Leon* deficiencies were present. In addition, after the search warrant was signed the Court Commissioner specifically told the officer that the warrant was valid. R31:28, 59. There was certainly no evidence of any false allegations made by the affiant police officer or a reckless disregard for the truth.

CONCLUSION

For the foregoing reasons, the State respectfully requests this court affirm the judgment of conviction and the circuit court's order denying Slayton's motion to suppress evidence.

Dated this _____ day of November, 2015.

Respectfully submitted,

_____
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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c).

____ Monospaced font: 10 characters per inch; double spaces; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides.

The length of the brief is ____ pages.

I also 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: _____

Signed,

_____
Attorney