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.

DEFENDANT-APPELLANT'S REPLY BRIEF

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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I. Whether the affidavit established probable cause that Slayton's blood would contain evidence of a crime was argued in, and ruled on by, the circuit court.

The record shows that the issue Slayton raises on appeal—whether the affidavit stated probable cause to believe his blood contained evidence of a crime—was raised and decided in the circuit court. The general rule is that issues not raised in the trial court will not be considered for the first time on appeal, *State v. Caban*, 201 Wis. 2d 597, 604, 563 N.W.2d 501 (1997). However, that is inapplicable here, because Slayton and the State both raised the issue, and the circuit court ruled on it.

To overcome the State's waiver argument, *See* State's Brief at 3-4, Slayton must demonstrate that the issue was raised in moving papers or at the motion hearing. *See Caban*, 201 Wis. 2d at 604-06. A party that raises an issue on appeal must show that the issue was raised in the circuit court. *Id.* at 604. To see if an issue was raised in the circuit court, appellate courts look at the moving papers and the suppression hearing. *Id.* at 605-06. In this case, Slayton raised the issue of probable cause, the State argued that issue, and the circuit court ruled on the issue.

Slayton first raised the issue in his motion. In it he argued for suppression of any evidence seized from his person because the search warrant was defective. R. 10 at 2. He cited, among other provisions, the Fourth Amendment and Article I, Section 11 of the Wisconsin Constitution. *Id.* at 1.

More specifically, in the following portions of the attached affidavit Slayton raised the exact issues that he now argues on appeal:

> 25. That on page 3 of the affidavit at averment number 9 b the arresting officer states:

> 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.
>
> 26. In his report the officer does not indicate that he reviewed any CCAP records.
>
> 27. In his report the officer does not indicate that he reviewed a judgment of conviction.
>
> 28. The officer does indicate in his report that he received information from dispatch about Slayton's driving record.

R. 12 at 4.

Slayton raised the probable cause issue again a few weeks later in a brief, R. 13 at 7-9, that alleged a *Franks-Mann* violation. *See Franks v. Delaware*, 438 U.S. 154 (1978); *State v. Mann*, 123 Wis. 2d 375, 367 N.W.2d 209 (1985). A *Franks-Mann* challenge raises the issue of whether an affidavit supplies probable cause, because it requires that a defendant prove 1) a deliberately false statement, and 2) that the remaining portions of the affidavit are insufficient to establish probable cause. *Franks*, 438 U.S. at 171-72; *Mann*, 123 Wis. 2d at 387-89. Though Slayton incorrectly claimed that the false statements automatically invalidated the warrant, R. 13 at 8, the State and the circuit court correctly applied the *Franks-Mann* standard. R. 31 at 84, 87-88.

In addition, the circuit court ruled on the issue Slayton raises on appeal. In its ruling it stated "I believe the affidavit substantially showed probable cause that the court commissioner issued a warrant on." R. 31 at 88. Thus, had Slayton filed another motion challenging whether the affidavit established probable cause, he would have been raising an issue that the court had already decided.

The State also argued the probable cause issue in the circuit court. At the hearing, the State argued that the affidavit established probable cause, and argued specifically that the affidavit establishes two prior OWI offenses. R. 31 at 84. Moreover, the State later filed a letter brief that reaffirmed that whether the affidavit contained probable cause was one of the issues raised by Slayton's *Franks-Mann* claim. R. at 19.

Given all of that, the State's reliance on *Caban* is misplaced. In that case, the defendant challenged a search of his vehicle by on only two grounds: (1) the search of his vehicle was outside the scope of a warrant to search a home, and (2) the search wasn't incident to arrest. *Caban*, 210 Wis. 2d at 603. He didn't, either in his motion or his arguments at the suppression hearing, challenge whether the police had probable cause to search his vehicle. *Id.* In addition, he tried to prevent the State from raising the probable cause issue by objecting to questions by the State that related to probable cause to search the vehicle. *Id.* Further, he essentially admitted the existence of probable cause by saying that the police "could have obtained a search warrant very easily for the vehicle." *See id.* at 608.

In contrast, Slayton, the State, and the circuit court all addressed whether the affidavit was sufficient to support the warrant, and more specifically, whether it established probable cause to believe his blood contained evidence of a crime. Unlike the defendant in *Caban*, Slayton filed an affidavit that identified the specific deficiencies that he now raises on appeal—the allegations about prior offenses. And his *Franks-Mann* claim, though misstated, brought the probable cause issue before the circuit court. Moreover, he never admitted the existence of probable cause. He didn't try to stop the State from presenting evidence or arguments on that issue. In fact, in this case the State did argue that issue. And the circuit court ruled on the issue he now raises on appeal.

In sum, whether the affidavit established probable cause that Slayton's blood contained evidence of a crime was at issue in

the circuit court. Therefore, Slayton may raise that issue on appeal.

II. The good-faith exception doesn't apply because there is no evidence that the officer was trained in or very knowledgeable of the probable cause standard.

Under Article I, Section 11 of the Wisconsin Constitution, in order to apply the good-faith exception the State must make showings beyond what the Fourth Amendment requires. *State v. Eason*, 2001 WI 98, ¶¶ 60-63, 245 Wis. 2d 206, 629 N.W.2d 625. The State failed to meet that higher standard. Therefore, applying the good-faith exception in this case would violate Article I, Section 11.

Under the Fourth Amendment, the good-faith exception applies when the State shows that an officer's reliance on an invalid warrant was objectively reasonable. *United States v. Leon*, 468 U.S. 897, 922 (1984). In addition to that Fourth Amendment standard, *Eason* held that Article I, Section 11 of the Wisconsin Constitution requires that the State prove that the process used to obtain the warrant included:

> (1) a significant investigation, and,
> (2) a review by an 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. The State never provided, either in the officer's affidavit or at the suppression hearing, any evidence to satisfy the second prong of the *Eason* standard.

The affidavit didn't satisfy that standard. The section that explains the officer's training and experience didn't even include the phrase probable cause. R. 1 at 3. It didn't state that the officer had any training in that or any other Fourth Amendment standard. *Id.* It also didn't say that a government attorney reviewed the affidavit. *Id.* at 3-9.

Even on appeal, the State doesn't identify anything in the affidavit that would satisfy this requirement. It merely states, without any citation to the record, that "the search warrant affidavit made plain that there was…a review by a knowledgeable police officer." State's Brief at 17, 19. But under the *Eason* standard the issue isn't if the officer was generally knowledgeable, it is whether he was very knowledgeable specifically in the subjects of probable cause and reasonable suspicion. *See Eason*, 245 Wis. 2d 206, ¶ 63. The affidavit didn't address that topic.

Similarly, the State presented no evidence to satisfy this requirement at the suppression hearing. The State asked the officer no questions about his training in or knowledge of Fourth Amendment standards. R. 31 at 58-62. And the officer didn't testify that any attorney reviewed the affidavit. *Id.* Instead, the State seemed to rely on the officer's testimony that the warrant-issuing court commissioner told him that the warrant was valid. R. 31 at 85-86. But that doesn't satisfy *Eason's* second prong, because review by an issuing official doesn't constitute review by a government attorney. *Eason*, 245 Wis. 2d 206, ¶ 63 n. 29.

In sum, the State presented no evidence to support the second prong of *Eason*. Therefore, Article I, Section 11 of the Wisconsin Constitution prohibits applying the good-faith exception in this case.

CONCLUSION

For the above-stated reasons, and for the reasons stated in his initial brief, 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 15th day of December, 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 1,491 words.

Dated this 15th day of December, 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 15th day of December, 2015.

_____

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