STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No.: 15 AP 2675 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

LAUREN ANN ERSTAD,

Defendant-Appellant

REPLY BRIEF OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER ENTERED ON
SEPTEMBER 17, 2015 IN THE CIRCUIT COURT
FOR ROCK COUNTY, BRANCH I,
THE HONORABLE JAMES P. DALEY PRESIDING.

Respectfully submitted,

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Defendant-Appellant

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I. The Search Warrant Fails Without the False Information Contained Within the Affidavit.

While the State attempts to argue the officer didn't have reckless disregard for the truth, it concedes he placed false information into the search warrant. First, the State concedes that, at best, the officer had only circumstantial evidence the defendant had operated the motor vehicle but marked on the search warrant that he personally observed Erstad operating. Resp.Br., p.7. The officer was dispatched only after the accident occurred. (34:3). He observed the defendant in the vehicle. (34:4). The vehicle was on its roof, the engine was not running, and Erstad had difficulty getting out. Eventually, she was able to crawl out of a back window.

Operation requires the physical manipulation or activation of any of the controls to put a vehicle into motion. WIS JI-CRIM 2663. ***Village of Cross Plains v. Haanstad***, 288 Wis. 2d 573, 709 N.W.2d 447 (2006). At no time did the officer observe Erstad operate the vehicle. Yet, the officer averred in the search warrant, "I know the driver was driving because: I personally witnessed the driver driving or operating the vehicle". (22:ex 1, p. 22). That was false information entered into the affidavit in support of search warrant.

The State also concedes the officer was dispatched to the scene of an accident and not to investigate a drunken driver. The State proceeds to argue that it does not matter because the investigation developed into an investigation for operating while intoxicated. Resp.Br., p.7-8. The officer admitted at the motion hearing he checked that box because later in the investigation he felt Erstad was under the influence of an intoxicant. (34:10). He further stated "[t]here's really no spot on this warrant indicating I was dispatched to the location of a traffic accident." Id. However, he also testified he could enter additional information in, as well as checking the boxes already on the form. (34:28-9). It was clearly false to say the officer was "dispatched to the location because of a report of a drunken driver." (22:ex 1, p. 23). Instead, he was dispatched because of an accident. (34:3). Therefore, false information was entered into the search warrant.

The trial court found it necessary to remove those false statements from the affidavit when it ruled:

> Let's remove those two comments. Is there sufficient information on that where an independent magistrate could issue a search warrant? I think, yes, from the observations. It is troubling, but there is sufficient other information in here, such as she indicated she – to the officer she had been consuming alcohol. He was there because of an accident. And the physical observation made of the defendant at the time, I think they're sufficient. Your motion is denied.

(34:38). At no time did the trial court rule the officer did not intentionally misrepresent the facts set forth in the warrant, as argued by the State. Resp.Br., p.9.

The State attempts to characterize Erstad's arguments as saying she unequivocally consented to the blood draw. Resp.Br., p.10. The issue is more nuanced than that. Erstad said more than a simple yes or no when asked whether she would submit to a chemical test of her blood, and that should have been conveyed to the magistrate deciding whether to issue the search warrant or not. Contrary to the State's argument, the officer did have a choice as to whether to consider Erstad's statements a refusal or not. Resp.Br., p.9. The officer chose to begin the process and obtain a search warrant to take Erstad's blood. However, he instead could have informed her she did not have the right to an attorney at that time and requested she make a decision on whether to consent or not. He did not do so. The officer also did not provide the information to the magistrate that Erstad had indicated she would take a test at one point. That was critical information omitted from the search warrant. All critical information must be conveyed to the magistrate. ***State v. Mann***, 123 Wis. 2d 375, 388, 367 N.W.2d 209 (1985). If material and critical information is left out of the affidavit and not considered

by the magistrate, the reviewing Court should act as if that information were added to the affidavit and consider whether probable cause is then not present. ***Id.*** at 389.

The officer had full control over how to fill out the search warrant affidavit and what information to convey to the magistrate. He personally entered information into his computer and testified he filled in blanks and added information. (34:9). For example, he entered information including Erstad's name and the type of vehicle involved in the accident. (22:ex 1, p.22). It is disingenuous to argue he simply checked the boxes closest to true on the form. Resp.Br., p.4. This ignores the reality that the officer should have included all information. By not doing so, he denied the magistrate the opportunity to do a full review of all important facts in determining whether to issue a warrant or not. The officer intentionally and with reckless disregard entered false information into the search warrant and presented it to the magistrate. Because the officer conceded he could enter in additional information, any argument that he was doing the best he could must fail. This affidavit was both incomplete and false.

Finally, the State argues that while the physical characteristics of Erstad could have been caused by factors other than alcohol, the

officer is not required to rule out all innocent factors before making a determination of probable cause. True. What is required is the officer reasonably take into account the totality of the circumstances and reasonably convey that information to the deciding magistrate. ***Franks v. Delaware***, 438 U.S. 154, 165, 98 S.Ct. 2674 (1978), ***Mann, supra***, 123 Wis. 2d 375, 388, 367 N.W.2d 209 (1985). That was not done. Here, the officer did not tell the magistrate Erstad had been involved in a serious accident. (22:ex 2). He did not tell the magistrate it took time to get Erstad out of the vehicle, she was crying, she was treated for a foot injury, and after being told the officer would attempt to obtain a search warrant she indicated she would agree to take a test. Instead, the officer told the magistrate he was dispatched to a report of a drunken driver, and he personally observed her operate the vehicle.

Contrary to the State's argument, the remaining facts known to the officer, when evaluated with full information and looking at the totality of the circumstances, do not rise to the level of probable cause. Physical characteristics, such as difficulty with balance and

bloodshot eyes[1] must be evaluated under the particular circumstances–where there is an accident, Erstad is crying, and has a foot injury.

The validity or invalidity of the warrant rests on the totality of the circumstances and whether accurate and complete information was provided to the deciding magistrate. The information known to the officer which should have been conveyed to the magistrate was not and, instead, the officer affirmatively provided false information. If correct and complete information had been conveyed to the magistrate, the warrant would not have been issued for lack of probable cause. The reviewing court has the duty to ensure the magistrate had a substantial basis to conclude there was probable cause and all important and necessary information was conveyed to the magistrate. ***State v. Jackson***, 313 Wis. 2d 162, 169, 756 N.W.2d 623 (Ct. App. 2008); ***State v. McMurtrey***, 704 F.3d 502, 509 (7th Cir. 2013). Without the false information, but with the omitted but important and necessary information, this warrant fails. Therefore, the Fourth Amendment is violated, and the results of the search must

[1] A National Highway Traffic Safety Administration (NHTSA) study regarding the validity of various clues of intoxication excluded bloodshot eyes from consideration because of the subjectivity of that supposed clue and the many other causes for it besides the consumption of alcohol. Jack Stuster, U.S. Department of Transportation, NHTSA Final Report, *The Detection of DWI at BACS below 0.10*, DOT HS-808-654 (Sept. 1997) at 14 and E-10.

be suppressed. ***Mapp v. Ohio***, 367 U.S. 643, 670, 81 S. Ct. 1684 (1961), quoting ***Wolf v. Colorado***, 338 U.S. 25, 42, 69 S. Ct. 1359 (1949).

II. The Blood Was Analyzed Without Legal Authority.

The State argues that once a blood sample is legally seized it can be tested, without need for any further authority or analysis. Resp.Br., p.11. The State takes it a step further and argues there is no need for any judicial authorization to analyze the blood. Id. The issue is not whether the defendant did or did not consent to the blood draw. The State cannot now change its position and argue that Erstad did consent when she was charged with refusing to consent. Further, the State argues earlier in its brief that the officer correctly informed the magistrate Erstad refused to submit to the blood test. Resp.Br., p.9. The issue is whether the State has authority–whether caselaw or statutory authority–to analyze Erstad's blood after it was drawn in this case.

The State relies on language from ***State v. VanLaarhoven,*** 248 Wis. 2d 881, 637 N.W.2d 411 (Ct. App. 2001), quoting ***U.S. v. Snyder,*** 852 F.2d 471 (9th Cir. 1988), to argue there is no need to have separate authority or analysis–once the blood is seized the State can test it. Resp.Br., p.12. The State further relies on ***State v. Riedel***,

259 Wis. 2d 921, 656 N.W.2d 789 (Ct. App. 2003), citing to ***VanLaarhoven*** and ***State v. Petrone***, 161 Wis. 2d 530, 468 N.W.2d 676 (1991)**.** The State argues ***Riedel*** should be considered as settling the issue in Wisconsin, as the defendant should not be allowed to parse the law of seizure of blood sample into multiple components. Resp.Br., p.13. However, the State does not respond to the defendant's arguments that all of the State of Wisconsin cases cited rest on the basis of ***State v. Bohling***, 73 Wis. 2d 529, 494 N.W.2d 399 (1993), which has since been abrogated by ***Missouri v. McNeely***, 133 S.Ct. 1552 (2013) and directly overturned by ***State v. Foster***, 360 Wis. 2d 12, 856 N.W.2d. 847 (2014)**.** Further, the State does not respond to defendant's arguments that neither ***VanLaarhoven*** nor ***Riedel*** address ***Skinner v. Railway Labor Executives' Ass'n***, 489 U.S. 602, 616, 109 S.Ct. 1402 (1989), which states it is a further invasion of the privacy interest to analyze a sample previously extracted. Def.Br., p.23-24. Thus, the State is deemed to have conceded this argument. ***Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.***, 90 Wis. 2d 97, 279 N.W.2d 493 (Ct. App. 1979).

The proper test to apply in order to determine whether the Fourth Amendment is offended is laid out in ***Katz v. U.S,*** 389 U.S.

347 (1967). If a person has 1) exhibited an expectation of privacy and 2) society recognizes that expectation as reasonable, then legal authority ***is*** required before the State can take action to pierce that privacy. Here, Erstad had an expectation of privacy in the information contained in her blood. Further, society recognizes this as a reasonable expectation. ***Skinner, supra*** at 617-18. Therefore, there must be legal authority under which the testing occurs. There is no legal authority for the testing in this case.

It is disingenuous to argue Erstad was informed the blood would be taken from her to be analyzed, that the officer had *no option* other than to take her statements and actions as a refusal, and then to argue she consented to the blood draw, thus submitting to the subsequent analysis. However, the State has argued all of this in its brief. Resp.Br., pp.9, 15, 16. The State cannot rely on consent to fix the problems in this case. There is no testimony in the record that Erstad was given any information about the blood draw other than what was included on the Informing the Accused Form. While the State argues she was well aware of the fact her blood would be tested, there is no record cite and nothing in the record to indicate that Erstad did understand. Resp.Br., p.16. The State simply

speculates that because Erstad was read a form by an officer, she fully understood all aspects of the consequences of a blood draw.

Further, even if the warrant were sufficient, which it is not, and properly authorized ***obtaining*** the blood, it does not purport to authorize analysis of the information contained in the blood. Thus, law enforcement went beyond what the warrant provided. Whether the warrant is overbroad and gives law enforcement no direction or whether law enforcement searches beyond what is permitted by warrant, there is a Fourth Amendment violation. ***State v. Starke***, 81 Wis. 2d 399, 412-13, 260 N.W.2d 739 (1978), ***State v. Sanders***, 311 Wis. 2d 257, 752 N.W.2d 713 (2008). The State argues society would want Erstad's blood to be tested under the circumstances. However, the issue is not societal expectations but legal authority. Societal expectations play a part *only* in whether an area is legitimately private–the information contained in a person's blood is a legitimately private area. HIPAA laws and other requirements that doctors and laboratories keep patient information confidential are obvious areas where those privacy expectations have been codified. The State apparently argues that if one is accused of operating while intoxicated, no further legal authority is needed to analyze the blood once it is taken. However, once a privacy interest is identified,

proper legal authority must be obtained prior to intruding upon that interest. The most efficient way would be to obtain a proper warrant authorizing the action the State wants to take. Unfortunately, this particular warrant was insufficient. It fails to ask the magistrate to authorize analysis of the blood, and it fails to specifically identify the information sought in the search. Both are required. ***State v. King***, 313 Wis. 2d 673, 690–91, 758 N.W.2d 131 (Ct. App. 2008), ***State v. Starke***, 81 Wis. 2d 399, 412-13, 260 N.W.2d 739 (1978).

The Fourth Amendment requires particularity specifically in order to prevent "general searches" where law enforcement is left to its own discretion on what to search and what to take and also in order to prevent mistakes where law enforcement believes it has the authority to search and seize an object but it does not. ***Boyd v. United States***, 116 U.S. 616, 624 (1886); ***Marron v. United States***, 275 U.S. 192, 195 (1927). The warrant here does not specify what the government is authorized to do with Erstad's blood; that is left to the discretion of law enforcement. The State does not respond to this argument. Again, this is either a general warrant or the State went beyond the warrant's authority. Either way, evidence must be suppressed in this particular case. ***Stanford v. Texas***, 379 U.S. 476, 485 (1965). Further, because the State did not respond to this

argument or cite any contrary law or position, the point is conceded. ***Charolais, supra***.

It is not sufficient to say there may be evidence of alcohol in Erstad's blood as if that justified the search. There must be either an exception to the warrant requirement, or there must be a warrant authorizing the action. Even where there is an exception to the warrant requirement, such warrantless searches should be as limited as possible. ***Coolidge v. New Hampshire***, 403 U.S. 443, 467 (1971). Warrants must be narrowly tailored to achieve the objective in order to be lawful. Further, the State has never claimed the warrant here actually authorized the chemical analysis which was carried out on Erstad's blood. The warrant authorizes the following: 1) that law enforcement take a blood sample, 2) that law enforcement obtain the assistance of trained medical personnel to do so, and 3) that the law enforcement officer may use reasonable force to execute the search warrant. (22:ex 1, p.21). Law enforcement was further ordered to execute the search warrant within 5 days and return the warrant with 48 hours after its execution to the Court. Notably, no mention of chemical analysis is made on the search warrant. Id.

The State argues it is "fictitious" to theorize that law enforcement officers would ever do anything other than analyze the

defendant's blood for the presence of alcohol. However, that is not the point being made. The State has the *ability* to analyze the defendant's blood for other highly sensitive information – including DNA, pregnancy, gender, and HIV. The search warrant does not limit that ability at all, which leaves it to the discretion of the State to determine what to search. That is impermissible under the Fourth Amendment. ***Marron, supra*** at 196, ***Stanford, supra***. The State is unable to point to any limitation of its ability to take any action it wishes with the blood because there is no limitation on the search warrant signed in this particular case.

There was no legal justification to analyze Erstad's blood because the warrant did not authorize the analysis, and there was no exigent circumstance and no other exception to the warrant requirement. Consequently, the results of that analysis must be suppressed. ***Wong Sun v. U.S.***, 371 U.S. 471, 484 (1963); *see also* ***Mapp, supra***, at 655.

CONCLUSION

The affidavit for the warrant sworn to by the officer in this case contained false information and omitted material facts known to the officer. Omitting the false information and taking into account the other facts, there was no probable cause stated in the affidavit; and no warrant should have issued in this case. Separately, the warrant issued allowed only a blood draw but made no mention of chemical analysis of the blood. The analysis was done, therefore, without any legal authority. Both of these actions are a violation of the Fourth Amendment, and suppression is the remedy.

Erstad respectfully requests this Court reverse the trial court's decision and order that court to grant the suppression motions.

Dated at Madison, Wisconsin, June 21, 2016.

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

Proportional serif font: Min. printing resolution of 200 dots per inch, 13-point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,993 words.

I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated: June 21, 2016.

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