STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

Court of Appeals case no.:
2016AP001954 - CR

v.

DYLAN D. RADDER,

Defendant-Appellant.

REPLY BRIEF DEFENDANT-APPELLANT

APPEAL FROM A NON-FINAL ORDER DENYING THE DEFENDANT'S MOTION TO EXCLUDE EVIDENCE DERIVED FROM UNLAWFUL STOP, DETENTION AND ARREST IN CALUMET COUNTY CIRCUIT COURT, BRANCH I, THE HONORABLE JEFFREY S. FROEHLICH, PRESIDING

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I. The Filing of A Criminal Complaint Does Not Relieve the State From its Burden Once Defense Raises a Fourth Amendment Challenge to a Warrantless Search or Seizure, as a Complaint is Not Evidence

The state argues that the criminal complaint suffices to establish reasonable suspicion and probable cause for purposes of a defendant's suppression motion. This is inaccurate. A complaint is a written statement of the essential facts constituting the offense charged, which may be made on information and belief. Wis. Stat. §968.01. Fact finders are not to consider a complaint as evidence against a defendant in any way. It does not raise any inference of guilt. Wis. J-I Crim 145, *Peters v. State*, 70 Wis.2d 22, 223 N.W..2d 420 (1975). In order to defeat a motion for suppression of a warrantless search or seizure, the state must come forward with evidence which establishes to a clear and convincing standard that search and seizure are reasonable and comply with the constitution. ("The State bears the burden of establishing, clearly and convincingly, that a warrantless search was reasonable and in compliance with the Fourth Amendment. *State v. Matejka*, 2001 WI 5, ¶ 17, 241 Wis. 2d 52, 621 N.W.2d 891.")

Here, Dylan Radder filed a motion asserting a violation of the fourth amendment right against an unreasonable search and seizure, and before such a motion may be denied the State must present evidence which clearly and convincingly establishes that the warrantless search was reasonable and complied with the Fourth Amendment. The criminal complaint is not evidence, cannot be considered evidence, and does not raise any inference of guilt.[1] Absent a hearing, there is no evidence in the record which suffices to meet the state's burden, and as such, Mr. Radder is entitled either to a hearing where the finder of fact would "carefully review testimony and/or video of [the incident] to determine what occurred" (State's brief, page 2) , or judgment in his favor.

II. *State v. Velez* is Not Applicable to a Motion Challenging a Warrantless Search or Seizure, and the Defendant Pled Appropriately Specific Facts for the Type of Motion he Filed

State v. Velez, 224 Wis. 2d 1, 12, 589 N.W.2d 9 (1999), deals with a pretrial motion to dismiss a criminal complaint on the basis that the state intentionally manipulated the system to charge Velez as an adult rather than

[1] The probable cause section of the complaint in this case was written by BT Reedy, who asserted that he or she read the report of officer Meyers, who reported arresting Dylan Radder. BT Reedy does not allege that he or she has any personal knowledge of the facts in this case, or has any ability to provide relevant and admissible evidence.

a juvenile. In such a motion, the prosecution bears the burden of proving it did not intentionally manipulate the system. However, despite the prosecution's burden, the court required that Velez come forward with a threshold showing of manipulative intent. The Court in *Velez* explicitly finds that, while the prosecution bears the burden, there is no legal presumption that the state has in fact acted with malicious intent. Id. at 16 ("To accept [the defendant's] view [of the case] would be to create a rebuttable presumption of the State's manipulative intent whenever an adult is arrested for a crime committed when the adult was still a juvenile. *Our prior cases do not go so far as to create this presumption*." Emphasis added). The legal issue presented in Velez is different than the issue presented by motion challenging a warrantless search or seizure, where in fact there *is* a presumption that the warrantless act was unreasonable. "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se unreasonable* under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions. The exceptions are jealously and carefully drawn, and *there must be a showing by those who seek exemption* that the exigencies of the situation made that course imperative. *The burden is on*

those seeking the exemption to show the need for it." *Coolidge v. New Hampshire*, 403 U.S. 443, 454 -55 (1971) (internal citation omitted, emphasis added).

Here, Dylan Radder has filed a motion for suppression based upon a warrantless search or seizure, and has thus raised a challenge where the state's actions are presumptively unreasonable until proven otherwise with clear and convincing evidence. Contrary to the State's assertion, Mr. Radder did make specific allegations. Many of the facts Mr. Radder alleged are contained in his brief in chief, but most importantly, he alleged that there was no warrant to search or seize him, that he was not accused of poor driving, that he was not displaying any signs or indications of intoxication, that he did not admit to drinking in quantities that would cause impairment or result in a prohibited alcohol concentration. In short, Dylan Radder alleged that the state didn't have a warrant, the fact necessary to trigger the presumption that the state's actions were unreasonable, and alleged that the state can't overcome the presumption or meet its burden.[2] The State would like Mr. Radder to be required to affirmatively state the

[2] The State also cites State v. Fenton for a proposition relating to facts required to a give a portable breath test. Fenton is a case involving a fourth offense drunk driving, and as such, the driver had a legal BAC limit of .02. The law regarding probable cause for a PBT where a person's legal limit is .02 is separate and distinct from the law regarding probable cause where, as here, a person's legal limit is .08, and as such,. Fenton is not applicable to this case.

grounds of his innocence. This is never the appropriate standard for a defendant in the American criminal justice system, where defendants are presumed innocent, and where warrantless searches and seizures are presumed unreasonable.

III. *State v. Rice* is Wrongly Decided Because it Fails to Address the Per Se Unreasonableness of Warrantless Searches or Seizures

The State cites to the unpublished *State v. Rice*, 2009 WI App 1162 as persuasive in this case. *Rice* applies *State v. Garner*, 207 Wis. 2d 520, 558 N.W.2d 916, and *Velez* to a pretrial motion to suppress evidence. However, even in citing to *Velez*, *Rice* fails to distinguish or harmonize the difference in burdens and presumptions between the motion brought in *Velez* and a suppression motion based on a warrantless search or seizure. As noted above, The *Velez* court is explicit in holding that there is no rebuttable presumption that the state acted with malicious intent for purposes of the type of motion involved in that case, where there is absolutely a presumption of unreasonableness for a warrantless search and seizure that the State must overcome. This is a significant legal difference, and as such, the *Velez* standard does not control the pleading requirements for suppression motions based upon warrantless searches and seizures.

In his brief in chief, Mr. Radder cited to the unpublished case of *State v. Franzen*, 2010 WI App 120, where the Defendant's suppression motion was based upon a warrantless search, in this instance a portable breath test. The only facts alleged n the motion were that "the officer failed to obtain probable cause 'to believe' Franzen was driving under the influence prior to requesting Franzen to submit to the PBT test prior in violation of Wis. Stat. §343.303 and therefore the 4th Amendment of United States Constitution." Id. at ¶ 5. In *Franzen*, the court of appeals explicitly found that the defendant had stated the facts with adequate particularity. Id. at ¶ 10. ("As the circuit court correctly noted, Franzen did provide notice of the *grounds* for his motion, as the opposing party and the circuit court must have notice of the issues being raised by the defendant in order to fully argue and consider those issues." Emphasis original, internal citations omitted.) *Franzen* was decided after *Rice*, and did not apply *Rice's* incorrect reasoning to the particularity requirement of a suppression motion based on a warrantless search or seizure.

CONCLUSION

For all of the reasons stated in this brief and in his brief in chief, the defendant-appellant respectfully prays that the matter be reversed and

remanded for an evidentiary hearing on his motion to suppress evidence based on an unlawful stop, detention, and arrest. Mr. Radder has satisfied the particularity requirements of Wis. Stat. §971.30(2)(c), and the state has the burden to show the legality of the presumptively unreasonable warrantless search or seizure.

Signed and dated this 3rd day of April, 2017.

Respectfully submitted,
MISHLOVE & STUCKERT, LLC

_____/s/_____
BY: Emily Bell
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CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stats. §809.19(3)(b) and (c), for a brief produced with a proportional serif font. The length of this brief is 1,425 words.

I 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.

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

Signed and dated this 3rd day of April 2017.

Respectfully submitted,
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