STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT: III

Appeal Case No. 2016AP2455-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

CHRISTOPHER JOHN KERR,

Defendant-Respondent,

ON APPEAL FROM AN ORDER GRANTING THE SUPPRESSION OF EVIDENCE, ENTERED IN THE BAYFIELD COUNTY CIRCUIT COURT, THE HONORABLE JOHN P. ANDERSON, PRESIDING

BRIEF OF DEFENDANT-RESPONDENT

Submitted by:
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

ISSUES PRESENTED

1. Was the Ashland County commitment order for the nonpayment of a city ordinance fine *void ab initio*?

   The Appellant and Respondent concur that the order was *void ab initio* as there was no statutory authority under which the judge could issue a commitment order under the circumstances. The Court should so find.

2. Does the good-faith exception to the exclusionary rule apply when the search was predicated upon a commitment order that was *void ab initio*?

   The circuit court concluded that the good-faith exception to the exclusionary rule does not apply and suppressed the evidence pursuant to *State v. Hess*, 2010 WI 82, 327 Wis. 2d 524, 785 N.W.2d 568.

   Both parties agree this Court is bound by *Hess* and must conclude that the good-faith exception does not apply under the precedent set in that case, and uphold the decision made by the circuit court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Respondent does not believe oral argument is necessary in this case. The issues are straightforward and it is not likely that oral argument would assist the court in deciding the case.

Respondent believes that the opinion in the case should not be published. The facts of this case align entirely with *State v. Hess*, 2010 WI 82, 327 Wis. 2d 524, 785 N.W.2d 568, which is a published case.

STATEMENT OF THE CASE

On June 16, 2015, a citation was mailed to Christopher Kerr in Ashland County case number 15FO219 alleging Christopher Kerr violated a county ordinance prohibiting disorderly conduct and requiring Mr. Kerr to pay a forfeiture of $263.50 or appear in court on July 21, 2015. (R. 31:1.) The 15FO219 record indicates that *Default Judgment* was entered against Mr. Kerr on July 21, 2015. (R. 31:4.) However, the court failed to send Mr. Kerr any notice that *Default Judgment* was entered until over a year later, on September 15, 2016. (R. 38:2-3.) The Notice sent to Mr. Kerr in September of 2016 stated that Mr. Kerr had until September of 2015 to pay the forfeiture. *Id.*

Despite apparently not sending Mr. Kerr Notice that default judgment was entered requiring him to pay $298.50, on September 22, 2015, Judge Robert Eaton signed a *Commitment Order for Non-Payment of Fine/Forfeiture*. (R. 31:2.) There is no motion or affidavit in the court record indicating that a prosecutor was seeking an order of commitment. Rather, from the record it appears that the court took up the issue of its own accord and generated the commitment order. (R. 38:2.) The commitment order authorized any law enforcement officer to "arrest and detain

Christopher John Kerr in custody for 90 days or until $298.50 is paid or until the person is discharged by due course of law." (R. 31:2.)

On September 27, 2015, there was a call placed to 911 wherein the 911 operator could hear "a female in the background and when the dispatcher asked, the male said, 'shut the F-up" and the call was disconnected." (R. 56:5.) Officer Ladwig of the City of Bayfield Police Department was given an address in the City of Bayfield and proceeded to drive to that location. *Id.*

While in route, Officer Ladwig was advised that the phone number from which the 911 call was made connected to Christopher Kerr, (R. 61:6.) Officer Ladwig was also informed that Mr. Kerr had an active warrant out of Ashland County. (R. 56:6.) Officer Ladwig did not review the warrant prior to arriving at the residence and didn't "have the capability of doing that." (R. 61:10.) Christopher Kerr answered the door when Officer Ladwig knocked and advised Officer Ladwig that there was no emergency and rather that the sensitivity dials on his phone were turned up. (R. 56:13.) Officer Ladwig determined that the 911 call was accidental. (R. 61:10.)

Officer Ladwig proceeded to arrest Mr. Kerr solely due to the outstanding warrant out of Ashland County. *Id.* Officer Ladwig had no idea

what the warrant authorizing the arrest of Mr. Kerr was for. *Id.* Officer Ladwig arrested Mr. Kerr because the officer was told by dispatch that there was a warrant, but did not see the warrant or know the basis for it. (R. 61:14.)

While Officer Ladwig was the primary officer responding to the September 27, 2015 call from Mr. Kerr's residence, (R. 61:19.), law enforcement officer Deputy Leino assisted at the scene. (R. 61:18.) Deputy Leino testified that he also never reviewed the warrant upon which the arrest of Mr. Kerr was founded. (R. 61:20.) Deputy Leino indicated that he could run a case through his squad computer and sometimes see details about a warrant, including what it is for, but that he did not do so prior to the arrest of Mr. Kerr. (R. 61:20-21.)

Officer Ladwig placed Mr. Kerr under arrest due to the outstanding Ashland County warrant and searched Mr. Kerr incident to arrest. (R. 61:9). Officer Ladwig found a rock-like substance in Mr. Kerr's pocket, that tested positive for methamphetamine. (56: 7-9.)

Christopher Kerr did not know on September 27, 2015 that there was a warrant out for his arrest from Ashland County. (R. 61:23.) Mr. Kerr was never offered a hearing regarding the alleged nonpayment of fines. (R. 61:24).

Mr. Kerr brought a motion to suppress the evidence that was obtained during his arrest. This motion was premised on the precedent set in *State v. Hess*. In *Hess,* the Supreme Court of Wisconsin ruled that the good faith exception to the exclusionary rule did not apply to evidence discovered as a result of an arrest premised upon a warrant that was "void ab initio." *Hess*, 327 Wis. 2d 524, ¶30.

The warrant in *Hess* was conceded to be improper as it lacked statutory authorization. *Id.* at ¶9. The Court determined that the evidence in that case "is subject to the exclusionary rule because it was found pursuant to a warrant issued by a judge with no legal authority to issue such a warrant." *Id.* at ¶18. Turning to the application of the good faith exception, the Court noted that "where police officers act in objectively reasonable reliance upon the warrant, which had been issued by a detached and neutral magistrate, a good faith exception to the exclusionary rule applies." *Id.* at ¶21 (citing *State v. Eason*, 2001 WI 98, ¶74).

The *Hess* court disagreed with the State's argument in that case that the good faith exception applies because the faulty warrant was due to "judicial error." *Id.* ¶22. "When good faith jurisprudence discusses 'judicial error,' it speaks of misjudging the sufficiency of the evidence or the warrant application's fulfillment of the statutory requirements…..The trial court

here did not make that type of error. Instead, it acted outside of the law." *Id.* (internal citations omitted). The Court went on to point out that "the act of issuing a warrant without any authority whatsoever to do so, thus being void from the beginning, is not a 'judicial' act and the attempt to clothe it as such is contrary to judicial integrity." *Id.* ¶30.

ARGUMENT

I. THE ASHLAND COUNTY COMMITMENT ORDER WAS *VOID AB INITIO*.

The Appellant and Respondent concur that the warrant issued by Judge Robert Eaton for the arrest of Mr. Kerr in 2015 was *void ab initio.* The Respondent, being unable to identify from anything in the Ashland County record what statute that court felt it was proceeding under in issuing the commitment order, argued that the warrant did not meet the requirements under §818.02 for bench warrants, nor the requirements under §785.03 for remedial sanctions (R. 32: 3-4.), and neither did it meet the requirements for commitment orders under Chapter 800 of the Wisconsin Statutes. (R. 37:1-4.)

The prosecution argued, at the circuit court level, that the Ashland County court felt it was acting under Chapter 778 of the Wisconsin Statutes. (R. 38:5.) The Bayfield County Circuit Court concluded that the provisions of Wis. Stat. §§800.09 and 800.095 contain clear requirements

prior to issuance of a warrant, that these requirements applied to the Ashland County civil forfeiture case against Mr. Kerr, and that Ashland County failed to meet the requirements prior to Judge Eaton issuing a warrant for Mr. Kerr's arrest. (R. 38:6-9). In particular, Ashland County failed to provide written or verbal information to Mr. Kerr regarding the judgment entered against him until a year later when a Notice of Default Judgment was mailed to Mr. Kerr and failed to provide Mr. Kerr an opportunity to be heard on the issue of the ability to pay a forfeiture. (R. 38:8.) These things, according to the court, were prerequisites to the issuance of a commitment order for Mr. Kerr. *Id.*

The Appellant, agreeing Mr. Kerr never received the statutorily required notice of his obligations and options nor a hearing on his ability to pay the forfeiture, notes another, more fundamental flaw with the warrant. While Wis. Stat. §800.095(1)(b) provides authority to issue a commitment order if certain conditions are met, that authority does not apply if the citation was mailed. (Appellant's Brief, page 8). Thus, the court not only didn't meet the required prerequisite conditions to issuing an arrest warrant, but could not issue a commitment order in any event because Mr. Kerr was originally mailed his citation.

Appellant argues "this distinction is significant because it renders the commitment order in this case indistinguishable from the order in *Hess."* (Appellant's brief, page 9). Respondent agrees that the commitment order at issue in this case is indistinguishable from the order in *Hess.* However, from Respondent's perspective, the commitment order was void because the citation was mailed and so Wis. Stat. §800.95(1)(b) did not apply, and it would have been just as void because the prerequisites to issuing such a commitment order under Wis. Stat. §800.95(1)(b) were not met. At the time the warrant was issued, there was no statutory authority to issue it. The reason for void-ness (and there appear to be several in this case) are irrelevant, because it was void from the moment it was issued either way.

The Appellant is seeking to find commitments that are presently void ab *inito* to be merely voidable; and, if law enforcement executes them in good faith, that no evidence be excluded. There should be no distinction on the void-ness of the warrant based which part of the government commits the constitutional violation. "Exclusion is a judicial remedy that can apply when the *government* obtains evidence as a result of a constitutional violation." *State v. Jackson,* 2016 WI 56, ¶ 46, 369 Wis. 2d 673, 697, 882 N.W.2d 422, 434 (emphasis added) Exclusion must an option to correct a situation that the circuit court in this matter found consisted of "institutional or administrative disregard for the law governing civil commitments." (R. 38:16).

II. THE CIRCUIT COURT'S RULING EXCLUDING EVIDENCE OBTAINED IN VIOLATION OF THE RESPONDENT'S CONSTITUTIONAL RIGHTS SHOULD BE UPHELD.

A. The Exclusionary Rule applies in this case.

"Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Mapp v. Ohio*, 367 U.S. 643 (1961). The exclusionary rule "operates as a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights ..." *Arizona v. Evans,* 514 U.S. 1, 10. Evidence "obtained by searches and seizures in violation of the Constitution is…. inadmissible in a state court." *Mapp v. Ohio,* 367 U.S. 643, 655 (S.Ct. 1961). Suppression of such evidence serves two functions, to deter unlawful police conduct and to preserve judicial integrity. *Terry v. Ohio,* 392 U.S. 1, 12-13 (S. Ct. 1968).

The Appellant concedes that the Ashland County court lacked authority entirely to issue a warrant for the arrest of Christopher Kerr. That unauthorized warrant did, indeed, lead to the search and seizure of Mr. Kerr. The Constitution of the United States, as well as the Constitution of the State of Wisconsin, protect citizens from unwarranted searches and seizures by the government. Thus, the evidence obtained by the search of

Mr. Kerr was due to a search that violated his constitutional rights. This is exactly the kind of evidence that the exclusionary rule was designed for.

Remarkably, the Appellant argues that "it was inappropriate to apply the exclusionary rule in this case…" (Appellant's brief, page 21). The Appellant offers no reason why the exclusionary rule would not apply. The Appellant admits that the warrant was unauthorized, this void, and the arrest premised on that warrant, therefore, was unwarranted and unconstitutional. Presumably, the State's argument is more accurately stated that the good faith exception should save the evidence from exclusion if law enforcement acts in good faith. That argument is flawed and ignores the due process involved before warrants are issued.

The Appellant seeks to exclude the judiciary's conduct when a motion for exclusion is considered. The judiciary should not get a pass in reviewing the validity of a warrant. The judiciary is just as much a part of the government as a law enforcement officer executing the warrant and should be held to the same level of conduct.

Mr. Kerr's constitutional rights were violated because the due process that is in place by statute was not followed by the judiciary. In this matter, Mr. Kerr does not have any way to redress the violation of his rights

by the government and it should not matter which part of the government violated his rights in the process.

B. The good faith exception does not apply.

The good-faith exception was created by the United States Supreme Court in *United States v. Leon*, 468 U.S. 897. In outlining this new exception, the Court stated that "a warrant issued by a magistrate normally suffices to establish' that a law enforcement officer has 'acted in good faith in conducting the search.'," *Id.* at 922, citing *United States v. Ross*, 456 U.S. 798, 823. However, the rule does not mean that any search pursuant to a warrant will be found to have been conducted in good-faith. Suppression remains an appropriate remedy "if the magistrate or judge in issuing a warrant was misled by information…," "in cases where the issuing magistrate wholly abandoned his judicial role…." And "a warrant may be so facially deficient… that the executing officers cannot reasonably presume it to be valid." *Id.* at 923 (internal citations omitted).

Importantly, in *Leon*, the Supreme Court said that "in so limiting the suppression remedy, we leave untouched the probable-cause standard and the various requirements for a valid warrant. Other objections to the modification of the Fourth Amendment exclusionary rule we consider to be insubstantial" *Id.* at 923-24. Thus, the limitations to the exclusionary rule

set down by the Court assumed that law enforcement were acting on an order that met the various requirements for a valid warrant.

The Wisconsin Supreme Court adopted the good-faith exception in *State v. Eason,* 629 N.W.2d 625. The limitations of the doctrine were further outlined in *State v. Hess,* 327 Wis. 2d 524. In *Hess,* the Wisconsin Supreme Court found that the exclusionary rule could not be employed to admit evidence obtained based upon a civil bench warrant that was *void ab initio*. In that case, the State argued that the evidence was admissible because a warrant that was issued without statutory authorization was "judicial error" and not "police misconduct." The *Hess* court noted that "judicial error" in such cases refers to misjudging the strength of the evidence, not acting outside of the law entirely. *Hess*, 327 Wis. 2d 524, ¶22.

Ultimately, the *Hess* court concluded that the good-faith exception does not apply in cases where evidence was obtained pursuant to a warrant that was *void ab initio*. *Id.* ¶30. This makes sense since, in *Leon,* the United States Supreme Court noted that the good-faith exception left untouched the requirements for a valid warrant.

The Appellant, in its brief, cites *State v. Scull,* 2015 WI 22, for the proposition that the exclusionary rule has two purposes, deterrence of

police misconduct and assurance of judicial integrity, and that the "'assurance of judicial integrity' standing alone is not a sufficient basis upon which to employ the exclusionary rule…" (Appellants brief, page 13). In *Scull*, a confidential informant revealed to an officer that the defendant was engaged in the sale of cocaine. Another officer and a drug detection dog went to the defendant's residence, without a warrant. *Scull*, 2015 WI 22, ¶6-7. The drug detection dog identified the presence of illegal drugs. ¶8. A court commissioner approved a search warrant for the defendant's residence based upon the information provided by the informant and the results of the sniff by the drug detection dog. *Id.* ¶9. The defendant alleged the use of the drug detection dog constituted a warrantless search of his residence.

The circuit court disagreed and the defendant appealed. While the case was on appeal, the Supreme Court considered a similar case and determined that a dog sniff of a residence does constitute a search for purposes of the Fourth Amendment. Nonetheless, the appellate court affirmed Scull's conviction because, after the drug sniff, a warrant was obtained and officers reasonably relied upon that warrant in carrying out their search of the residence. ¶15.

The Wisconsin Supreme Court determined in *Scull* that "the commissioner's decision to grant the warrant was a reasonable application of the unsettled state of the law at the time the warrant issued." ¶25. Because granting the warrant was a reasonable application of unsettled law, "we turn to our case law addressing the application of the good faith exception…" ¶31.

The decision to grant the warrant was *not* a reasonable application of unsettled law, the court would not have cause to consider the good-faith exception. The Supreme Court's point in *Leon* that the requirements for a valid warrant were left untouched by the advent of the good-faith exception. It simply does not apply in situations where a warrant is void at the time it was issued.

C. Even if the good-faith exception applied to a warrant that was *void ab initio*, the officers cannot be said to have acted in good faith.

"The existence of a warrant does not necessarily mean that the good faith exception to the exclusionary rule will apply." *Scull*, ¶33, citing *Leon*, 468 U.W. at 922. It doesn't apply when a warrant is based upon a deliberately or recklessly false affidavit, a warrant so facially deficient that it cannot reasonably be presumed to be valid, or a warrant issued by a magistrate who wholly abandoned his or her judicial role. *Id.* Wisconsin

courts have added to *Leon* a requirement that the process of obtaining the warrant must include a significant investigation and a review by either a police officer trained and knowledgeable in the requirements of probable cause and reasonable suspicion, or a knowledgeable government attorney. *Id.* ¶35, citing *Eason,* 245 Wis. 2d 206, ¶¶43, 52.

The state's argument in this case is that Officer Ladwig and Deputy Leino did not know about the nature of the warrant under which they arrested Mr. Kerr, and so they acted in good-faith. This amounts to a policy of hear no evil, see no evil. The officers did not see the warrant. They did not even attempt to see the warrant. Therefore, they could have no idea whether it was based on a false affidavit, whether it was facially deficient or issued by a magistrate who abandoned his judicial role. To assert that so long as an officer does not see a warrant then the execution of it was in good faith makes a mockery of the exceptions to the good-faith rule reaffirmed in *Scull.* In fact, such a rule would encourage law enforcement officers to avoid looking at a warrant prior to executing on it.

The warrant for Mr. Kerr's arrest was facially deficient. It stated that Mr. Kerr's arrest was authorized because he had failed to pay a fine ordered by the court. It made no reference to whether Mr. Kerr had an ability to pay, as determined at a statutorily required hearing. It attached no affidavit

or statement by a knowledgeable government attorney or a law enforcement officer trained in the principles of the fourth amendment. In fact, the warrant on its face looks to be initiated not by an investigator or prosecutor, but by the court.

The warrant was clearly issued by a judge who had abandoned his judicial role. Judge Eaton alleged that Mr. Kerr failed to pay his fine intentionally, then found that he did so and ordered his arrest. The prosecutor did not make a motion to procure a warrant. Judge Eaton and his staff were the sole actors. Judge Eaton, in the process, abandoned his judicial role. Thus, even if the requirements for a warrant were met such that the good-faith rule applied, the warrant at issue and the arrest that followed do not allow the rule to save the evidence. The warrant was facially invalid, issued by a judge who abandoned his judicial role, and not investigated or reviewed by a trained officer or knowledgeable government attorney.

Case law on the exclusionary doctrine is rife with references to one of the essential purposes of excluding evidence obtained in violation of one's constitutional rights – deterrence. The State notes in its brief that certain courts have found that judges are not part of the law enforcement system, and therefore do not have the same motivation to procure evidence

as law enforcement officers do. However, in this case, there was no law enforcement officer involved in procuring the warrant. This is one of the defects in what occurred in Ashland County. Judge Eaton took it upon himself to allege that Mr. Kerr intentionally failed to pay a fine, and then made a finding that he did so without any hearing. Judge Eaton acted as a prosecutor and a judge.

In this case, suppressing the evidence is perhaps the only way to deter Judge Eaton from similarly issuing summary warrants and preserving judicial integrity. There is every likelihood that the process undertaken by the court for Mr. Kerr, who simply failed to pay a forfeiture for an ordinance violation, is the same process the court uses in all such situations. And there is every likelihood that there are hundreds of unpaid citations in Ashland County in any given year. This case is not like *Scull*, where the judge made a reasonable interpretation based upon existing law in a fact-specific case that is unlikely to occur much, if at all, in the future. As far as anyone is aware, Judge Eaton will continue to act as prosecutor and jury in processing these warrants into the future.

CONCLUSION

Both the Appellant and the Respondent agree the Ashland County warrant that resulted in the 2015 arrest of Christopher Kerr was *void ab initio.*

We further agree that, under existing precedent, the evidence obtained in that arrest must be suppressed. The State argues that the appellate court should certify this case to the Supreme Court to overturn *State v. Hess* and find that judicial integrity does not justify application of the exclusionary rule. The existing case law, though, is clear and on point. For these reasons, this court should uphold the circuit court's decision and decline certifying this matter to the Wisconsin Supreme Court.

Dated this 13th day of June, 2017.

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CERTIFICATE OF COMPLIANCE WITH RULE § 809.19(8)(b) and (c)

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced using the following font: I hereby certify that this brief and appendix produced with a proportional serif font. The length of this brief is 23 pages and 4,601 words from Statement of Case through Conclusion.

Dated this 13th day of June, 2017.

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CERTIFICATE OF SERVICE AND COMPLIANCE WITH §809.80(3)(b)

§809.80(3)(b) I hereby certify that the brief and appendix were delivered to a 3rd-party commercial carrier, UPS, for delivery to the clerk of the Wisconsin Court of Appeals, for delivery within 3 calendar days, in compliance with §809.80(3)(b). Further, I certify that the brief and appendix were sent to all other counsel by US-mail this same date.

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CERTIFICATE OF E-FILE COMPLIANCE

I hereby certify that a true and accurate copy of this brief has been contemporaneously e-filed with the Court of Appeals.

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