STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

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

REPLY BRIEF OF THE PLAINTIFF-APPELLANT

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I. The Ashland County commitment order was void *ab initio*.

The State and Kerr agree that the commitment order issued by the Ashland County Circuit Court was void *ab initio*. Kerr argues that the State is trying to equate a void *ab initio* warrant with a voidable warrant. (Kerr's Br. 13.) Kerr misinterprets the State's argument. The State is not arguing that there is no distinction between a void and a voidable warrant. Rather, the State is arguing that when it comes to the good-faith exception to the exclusionary rule, there is no reason to treat a void warrant differently from a voidable warrant. "[T]he legal status of the warrant under the Fourth Amendment does not inform the decision of whether the good-faith exception is available in a given case; that inquiry is separate and must be considered in light of the exclusionary rule's purpose and the officers' conduct at issue." *United States v. Werdene*, 188 F. Supp. 3d 431, 451 (E.D. Penn. 2016) (citation omitted).

II. The good-faith exception to the exclusionary rule is meant to deter police rather than judicial misconduct.

Kerr argues that a judge is a government actor. (Kerr's Br. 13, 15.) In the broadest sense, that may be correct. But in the context of the exclusionary rule, Kerr is wrong. The rule is not generally applicable to judicial errors because a judicial officer has no stake in the outcome of any particular case. *United States v. Leon*, 468 U.S. 897, 917 (1984). "Thus the threat of exclusion of evidence could not be expected to deter such individuals from improperly issuing warrants, and a judicial ruling that a warrant was defective [is] sufficient to inform the judicial officer of the error made." *Illinois v. Krull*, 480 U.S. 340, 348 (1987).

Kerr further argues that the State's "argument is flawed and ignores the due process involved before warrants are issued." (Kerr's Br. 15.) Kerr fails to develop that argument, which ignores that, generally, the exclusionary rule does not apply when the police act with "objectively reasonable reliance" on a warrant that is later determined to be invalid. *See Leon*, 468 U.S. at 922.

III. The Bayfield County order granting suppression should be reversed because Officer Ladwig acted in good-faith.

Kerr argues that the good-faith exception cannot apply here because the commitment order was facially deficient. (Kerr's Br. 20–21.) Kerr seems to believe that all commitment orders must be based upon an affidavit of probable cause and reviewed by someone trained in the principles of the Fourth Amendment. (Kerr's Br. 20–21.) Kerr is simply wrong. Apprehension orders are not completely analogous to criminal arrest warrants and search warrants.

Here, the commitment order was issued without any law enforcement input. That does not make the order facially deficient, and that does not mean that the Ashland County Court was acting as the prosecutor and the judge. (Kerr's Br. 22.) The order was a bench warrant or capias. And in the context of apprehension orders, there are a multitude of statutes and administrative rules that govern whether a court can issue such orders and the procedures to follow. *See, e.g., State v. Hess,* 2010 WI 82, ¶¶ 24–28, 327 Wis. 2d 524, 785 N.W.2d 568. Here, those procedures do not require input from law enforcement, nor do they require input from the municipal attorney or the district attorney's office.

Kerr argues that exclusion is the "only way" to deter the Ashland County court from issuing these types of orders. (Kerr's Br. 22.) That argument is contrary to established law. The Supreme Court has found "most important" "that exclusion of evidence seized pursuant to a warrant will [not] have a significant deterrent effect on the issuing judge or magistrate." *Leon*, 468 U.S. at 917. "Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions." *Id.* "The threat of exclusion thus cannot be expected significantly to deter them." *Id.* The exclusion of evidence does not "meaningfully . . . inform judicial officers of their errors." *Id.* And admitting evidence along with a declaration "that the warrant was somehow defective will [not] in any way reduce judicial officers' professional incentives to comply with the Fourth Amendment, encourage them to repeat their mistakes, or lead to the granting of all colorable warrant requests." *Id.* That analysis is not altered by the fact that the warrant was void *ab initio*, and thus, exclusion in not appropriate.

The exclusion of evidence in the Bayfield County drug case has no appreciable deterrent effect on the Ashland County court's decision to issue a commitment order for the non-payment a fine imposed for an ordinance violation. Exclusion punished the residents of Bayfield County for the officer's reasonable good-faith reliance on a commitment order. This is exactly why police misconduct is a necessary predicate for the application of the exclusionary rule. *See Arizona v. Evans*, 514 U.S. 1, 14–15 (1995).

Here, the "application of the exclusionary rule . . . could not be expected to alter the behavior of the arresting officer." *Evans*, 514 U.S. at 15. Officer Ladwig "clearly could not ignore" the information he received regarding the outstanding arrest warrant. (R. 38:3, A-App. 105.) Thus,

"[e]xcluding the evidence can in no way affect the officer's future conduct unless it is to make him less willing to do his duty." *Evans*, 514 U.S. at 15 (citation omitted). And it is inappropriate to apply the exclusionary rule under those circumstances.

IV. In the interest of judicial economy, the State has petitioned the supreme court for bypass.

Pursuant to *Hess*, the State cannot prevail in the court of appeals and will ultimately file a petition for review. This case is a good vehicle to clarify Wisconsin's good-faith exception to the exclusionary rule, and the issue whether exclusion is appropriate absent police misconduct is ripe for reconsideration. Thus, the State's petition will likely satisfy the criteria for review contained in Wis. Stat. § (Rule) 809.62(1r).

The State believes that the supreme court's immediate review is preferable because this case involves the type of law development that is outside of the court of appeals' purview. *See Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1974). Thus, it would further the interests of law development and judicial economy for the supreme court to accept review now.

CONCLUSION

For the foregoing reasons, the State maintains that *Hess* was wrongly decided and the exclusion of evidence was inappropriate.

Dated this 28th day of June, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1086 words.

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TIFFANY M. WINTER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 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 this 28th day of June, 2017.

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Assistant Attorney General