STATE OF WISCONSIN

C O U R T A P P E A L S

District II

Case No. 2017AP000208-CR

STATE OF WISCONSIN,

Plaintiff-Respondent

vs.

JOHNNY PINDER,

Defendant-Appellant

ON APPEAL TO REVIEW THE JUDGMENT OF CONVICTION ENTERED ON DECEMBER 1, 2015, AND THE DECISION AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF ENTERED ON JANUARY 30, 2017, THE HONORABLE PAUL MALLOY PRESIDING ON BOTH MATTERS, BOTH ENTERED IN THE CIRCUIT COURT FOR OZAUKEE COUNTY.

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. THE RESPONDENT'S BRIEF MISINTERPRETS AND MISSTATES THE RELEVANT AND APPLICABLE CASE LAW.

In its Brief, the Respondent indicates that State vs. Sveum, 328 Wis.2d 369, 787 N.W.2d 317 (2010) dispositively supports the

State's position in this present matter. Unfortunately, the Respondent has misinterpreted this case. Contrary to the Respondent, this case is inapplicable to the present situation.

In State vs. Sveum, as Respondent has indicated in its Brief, the law enforcement had installed the GPS tracking device the day after the issuance of the authorizing Order. (Resp. Brf, page 10). State vs. Sveum, 328 Wis.2d 369 at 384. However, unfortunately for the Respondent, this is not the present situation. Here, as discussed in Appellant's Brief, the GPS device had not been installed until ten days after the issuance of the Order. Clearly, unlike the facts in Sveum, this is well past the statutory five day time limit for the execution of the warrant. Wis. Stats. 968.15(1). Accordingly, unlike here, in Sveum, the police had executed the warrant within that five day statutory time period. This difference critically defeats the Respondent's position.

Here, as discussed, the Respondent has miscited Sveum's applicability in the present situation. In Sveum, the order in the case as well as the written inventory had not been returned in a timely fashion to the circuit court, as required under Wis. Stats. 968.15 and 968.17. State vs. Sveum, 328 Wis.2d 369 at 408. Unlike Sveum, the present situation is not related at all to the timeliness of the return of the warrant. The present situation is related solely to the timely execution of the warrant.

True, as Respondent has indicated, Sveum concerned both Wis.

Stats. 968.15 as well as Wis. Stats 968.17. (Resp.Brf, page 12). However, the Supreme Court only dealt with these Statutes as they related to the issue of the return of the warrant. Both of these Statutes detail legal requirements for both the execution as well as the return of warrants. However, in Sveum, the Supreme Court did not deal with these Statutes as they related to the timeliness of the execution of the warrant. The Court, in Sveum, had indicated that the law enforcement's failure to return the order and inventory within the confines of Wis. Stats. 968.15 and 968.17 did not render the execution of the order unreasonable. The timely return of a warrant is a ministerial duty which does not affect the validity of the search. Id. at 408 citing State vs. Elam, 68 Wis.2d 614, 620, 229 N.W.2d 664 (1975). The overwhelming weight of authority is to the effect that required warrant return procedures are ministerial and that failure to comply with them is not ground for voiding an otherwise valid search. Id. at 408 citing United States vs. Kennedy, 457 F.2d 63, 67 (10th Cir. 1972). Hence, Respondent has cited the correct legal standard for the return of an inventory or warrant. However, once again, and clearly, this is not the relevant fact situation, or relevant issue, present here. Accordingly, Respondent's reliance upon this case is materially misapplied.

Respondent has indicated that this Court should disregard Justice Abrahamson's dissent in Sveum. This, because it is a

dissent, and not a majority, opinion. (Resp.Brf, page 12). However, Justice Abrahamson's dissent is the only portion of this case that concerns the time limits with respect to the execution of a warrant. As argued in Appellant's Brief, her dissent clearly states that a search warrant must be executed not more than five days after the date of issuance and that if it is not executed within this time frame, the warrant shall be void. State vs. Sveum, 328 Wis.2d 369 at 419-420 citing Wis. Stats. 968.15. Therefore, unlike the majority opinion, this dissent is both materially applicable and materially relevant to the present situation. Here, Justice Abrahamson has clearly cited the relevant statute for the legal requirement that a warrant not executed within five days is legally void. This is precisely the present situation. This Court should abide by her, and not the majority, opinion.

Respondent has argued that the police had reasonably tracked Defendant's vehicle for more than five days after the circuit court's issuance of a warrant. (Resp.Brf, pges 9-10). However, this is not the present issue. Whether the officers had any way of knowing when Defendant would commit a burglary is irrelevant to the present situation. The time frame for commission of a crime is not relevant to the legal requirements for the execution of a warrant. These legal requirements have no relevance to the criminal activity, only to the Fourth Amendment search and seizure requirements. Hence, this Respondent argument has no relevance to

the statutory requirement that the execution of the authorized warrant occur within five days after the date of the authorization itself.

Furthermore, Respondent has indicated that the trial court did not authorize indefinite tracking of Defendant's car and that the officers did not continuously track his car. (Resp.Brf, page 10). However, once again, these are not relevant factors to the statutory requirements for the execution of the warrant. Defendant has not contended either that the warrant was illegal due to authorized length of tracking or that it was illegal because the officers did not continuously track his car. These are not relevant factors to whether or not the execution of the warrant within five days had been legally accomplished under the relevant and applicable Wisconsin Statute(s). Respondent has misinterpreted the relevant factors and the relevant issue.

Respondent has also indicated that Defendant has not presented a dissipation argument. However, this is clearly inaccurate. Appellant's Brief has clearly argued, and presented relevant case law, for the legal proposition that warrants must be executed promptly. This, in order to lessen the probability that the facts upon which probable cause was initially based do not become dissipated. (App.Brf, pges 17-18). Searches pursuant to 'stale' warrants are invalid. State vs. Edwards, 98 Wis.2d 367 at 372, 297 N.W.2d 12 (1980) citing United States vs. Bedford, 519 F.2d 650,

655 (3rd Cir. 1975). The five day period set for in Wis. Stats. 968.15 represents a legislative recognition that execution within the five day period satisfies any requirement that the execution be with "reasonable promptness, diligence, or dispatch." State vs. Edwards, 98 Wis.2d 367 at 375.

Furthermore, clearly, dissipation is not an argument that can be made for the timeliness of the return of a warrant. Logically and clearly, the dissipation factors cited in the preceding paragraph only apply to the execution of a warrant, not its return.

Based upon the foregoing, and the arguments presented in Appellant's Brief, Respondent's case law is inapplicable to the present situation. The statutory, and relevant case, law clearly indicates that the warrant in this present matter is void. This, due to its execution after the five day statutory time period. Unlike the time limit for return on a warrant, the time period for execution of a warrant is not a technical irregularity that can be forgiven. The Respondent has materially erred in arguing otherwise. This Court should reverse the trial court's Order denying Defendant's suppression motion.

II. RESPONDENT'S ANALYSIS OF TRIAL COUNSEL'S FAILURE TO OBJECT TO THE IMPROPER JURY INSTRUCTIONS IS ALSO INCORRECT. THIS ANALYSIS HAS FAILED TO ADEQUATELY REBUT THE DEFENDANT'S POSITION.

Here, the Respondent has indicated that the trial court had

properly instructed the jury on the charge of Burglary. Respondent has first indicated that the trial court had properly instructed the jury that a burglary requires entry into a building with the intent to steal and without the consent of the person in lawful possession. (Resp.Brf, page 15). However, unfortunately for the Respondent, this was not an appropriate legal definition. This, based upon the present situation.

Respondent's Brief has never addressed the fact that the parties and the trial court had concluded that the mere entry into the unlocked building with the intent to steal, under the facts present, was not a legal burglary. As discussed in Appellant's Brief, because the building had been unlocked and open to the public, the entry was not without consent. Champlin vs. State, 84 Wis.2d 621, 267 N.W.2d 295 (1978). (App.Brf, pges 11, 15, 27). Hence, Respondent has materially erred in indicating that the jury instruction that the entry into the building here was legally correct. Contrary to the Respondent, this entry into the building here was not a legal Burglary. As discussed in Appellant's Brief, under Champlin, this instruction, in the present situation, is legally incorrect.

Furthermore, Respondent had never addressed Defendant's argument that entry into an "office" is not one of the legal places indicated in Wis. Stats. 943.10 that legally constitute a Burglary. As discussed in Appellant's Brief, the term "office" is legally

vague. (App.Brf, pges 24-25). True, the facts of this present matter indicate essentially that the office was a room inside of the building. However, statutorily, this use of the word "office" allows the jury to convict a Defendant of burglary even though he did not violate the burglary statute. This is impermissible.

Respondent is also incorrect in arguing that the "jury understood" and that "the jury didn't have any confusion. They tracked along." This argument is merely unsubstantiated speculation. Here, there is no indication as to what the jury was thinking, or what legal conclusion/part of the instruction they had used to base their verdict upon. Here, as argued in Appellant's Brief, there is no indication that the jury did not convict the Defendant for entry into the building. This, based upon the clearly erroneous and confusing jury instruction. The instruction provided alternative methods of conviction, one of which was clearly illegal. Under the circumstances, the jury instructions were illegal and improper. Respondent has failed to adequately show otherwise.

Respondent has also indicated that "the evidence of guilt was overwhelming" and that Defendant had failed to prove prejudice. (Resp.Brf, pges 16-17). However, Respondent has failed to provide any legal authority for this proposition. True, there was evidence that Defendant had entered the office inside of the unlocked building. However, Respondent's argument does not even rebut the

legal conclusion that the erroneous jury instructions had clearly allowed the jury to convict the Defendant illegally. This, based upon either: (1) the legal entry into the unlocked building; or (2) the entry into an "office," when such entry does not violate the statutory definition of a Burglary. Accordingly, even though there was evidence that Defendant had entered the office inside of the unlocked building, the Respondent's argument is inapplicable to the present situation. Here, the legal issue is not related to the factual evidence of the entry into the office. The legal issue pertains to the basis for the jury's finding of guilt based upon the illegal jury instructions. Contrary to Respondent, even though the evidence may have been "overwhelming," there is a reasonable possibility that the jury's verdict was illegal. This, based upon the illegal standards and requirements established by the materially erroneous and confusing jury instructions.

Here, contrary to Respondent, the State has not met its burden of establishing, beyond a reasonable doubt, that there was no reasonable possibility that the errors in the present jury instruction had contributed to the conviction. State vs. Dyess, 124 Wis.2d 525, 370 N.W.2d 222 (1985). Hence, Respondent's arguments are legally insufficient and inapplicable. The Court should reject these arguments.

CONCLUSION

As indicated within this Reply Brief and within Appellant's original Brief, the trial court had erred in denying: (1) Defendant's Fourth Amendment Suppression Motion; and (2) Defendant's Postconviction Motion. Both of these Decisions and Orders must be reversed.

Based upon this present Reply Brief, and the arguments raised in Appellant's Brief, Defendant respectfully requests that this Court reverse the Decisions and Orders Denying his Fourth Amendment Suppression Motion and his Postconviction Motion. Furthermore, Defendant requests that this Court reverse and remand this matter for a new jury trial.

Dated this 25th day of May, 2017.

Respectfully Submitted,

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CERTIFICATION

I hereby certify that the Appellant's Reply Brief of Defendant-Appellant in the matter of State of Wisconsin vs. Johnny Pinder, 2017AP000208 CR conforms to the rules contained in Wis. Stats. 809.19 (8)(b)(c) for a Brief with a monospaced font and that the length of the Brief is ten (10) pages.

Dated this 25th day of May, 2017, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-Appellant

CERTIFICATION

I hereby certify that the text of the e-brief of Appellant's Reply Brief of Defendant-Appellant in the matter of State of Wisconsin vs. Johnny Pinder, Case No. 2017AP000208 CR is identical to the text of the paper brief in this same case.

Dated this 25th day of May, 2017, in Waukesha, Wisconsin.

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Attorney for Defendant-Appellant