STATE OF WISCONSIN

I N S U P R E M E C O U R T

Case No.: 2017 AP 000208 CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

vs.

JOHNNY PINDER,
Defendant-Appellant

ON REVIEW BY A CERTIFICATION BY THE WISCONSIN COURT OF APPEALS, DISTRICT II, CONCERNING A JUDGMENT OF CONVICTION ENTERED IN OZAUKEE COUNTY CIRCUIT COURT, THE HONORABLE PAUL MALLOY, PRESIDING.

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TABLE OF CONTENTS

CASES CITED

OTHER CITED LAW

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication are warranted.

ISSUES PRESENTED

I. Whether the search of Defendant's vehicle pursuant to a G.P.S. tracking search Order was illegal. This, when the installation of the G.P.S. monitoring system had not occurred until

well after the five day statutory limit for the execution of a search warrant. Here, the trial court had issued the Order that had acted as a warrant on February 27, 2015. However, the actual installation of the monitoring system did not occur until March 9, 2015. The parties had stipulated for trial purposes that this was ten days after the issuance of this warrant. Hence, the execution of the warrant had occurred more than five days after the issuance of the warrant, which violates the statutory requirement, and voids the warrant. Hence, the installation and use of the monitoring system was an illegal warrantless search.

Here, this case appears before the Wisconsin Supreme Court pursuant to Certification from the Court of Appeals, District II. The Issue Certified is "If a search warrant issued under Wis. Stat. Sec. 968.12 for the placement and use of a GPS tracking device on a motor vehicle is not executed within five days after the date of issuance per Wis. Stat. Sec. 968.15(2) is the warrant void under Sec. 968.15(2), even if the search was otherwise reasonably conducted?" (A 101-118).

The trial court in this matter had relied upon State vs. Sveum, 328 Wis.2d 369, 787 N.W.2d 317 (2010), to justify the validity of the execution of the warrant order well after the five day time limit authorized by the Wisconsin Statutes. This Supreme Court case had allowed the return of a warrant after the statutory time limit of two days. However, the Wisconsin Statute in question,

Wis. Stats. 968.15, distinguishes executions from returns. Subsection (1) applies the five day time limit to both executions and returns. However, subsection (2) mandates that the execution of a warrant occurs after the five days time limit, then the warrant shall be void. As the Court of Appeals had indicated in its Certification, this distinction between execution and return is sensible. The return of a warrant is merely ministerial to safeguard property rights. By the time of the return of the warrant, the privacy invasion has been completed.

However, with respect to the execution of a warrant, there are other implicated rights than just those with respect to a return. With respect to the execution itself, a core requirement of a warrant is probable cause, which is inconsistent and may be fleeting. The facts upon which the probable cause was initially based may dissipate if a warrant is not executed promptly. If the police were allowed to execute the warrant at leisure, outside of this statutory limit, the safeguard of judicial control over the search which the fourth amendment is intended to accomplish would be eviscerated. Making a warrant self-voiding after five days recognizes, and helps to protect against, the ever-changing and time sensitive nature of probable cause.

Here, the search warrant in question had authorized a multi-day surveillance of Defendant's vehicle. However, the probable cause leading to the issuance of a warrant still was the crux of

the basis of the warrant. Furthermore, the relevant and applicable law states that the issuance of the warrant is based upon the allegation of presently existing facts. The Wisconsin Statutes clearly recognize that these facts may become stale and negate the very probable cause that led to the creation of that warrant, after five days. Clearly, this leads to the presence of the words "shall be void" if that warrant is not executed after five days. There is no reason that a warrant authorizing a continuous search should not fall within this limit and mandate. As discussed, the law recognizes that the warrant is based upon the probable cause known at the time of the issuance of the warrant. This is the crux of the fourth amendment. This mandate does not differ whether the search is continuous or not.

This Supreme Court should reverse the trial court's Decision denying Defendant's Suppression Motion. This Decision by the Supreme Court affects the Defendant as well as all similarly situated Defendants in the future.

II. Whether or not the trial court had erred in denying Defendant's Postconviction Motion alleging prejudicial ineffectiveness of counsel? This, when trial counsel had not objected to misleading and confusing jury instructions concerning an element of the offense, Burglary of a Building or Dwelling, that had been charged in this case.

Here, after testimony had been completed, the trial court had

indicated that it would amend the Burglary of a Building jury instruction to reflect "office" instead of "building." This was after Defendant had objected to the word "building" because the building relevant to this matter had been unlocked at the time of the alleged entry. Therefore, there was a legal issue as to whether or not a Burglary to a building had even occurred. However, the eventual Burglary jury instruction contained references to both "building" and "office." The first reference was to a "building". However, later references in that instruction were of an "office." Unfortunately, illegal entry into an "office" does not necessarily constitute a Burglary. Entry into an "office" is not one of the statutory options that constitute a Burglary. Also, the dictionary definition of an "office" does not meet the statutory requirement of a Burglary. Furthermore, the dual references in the jury instruction to both "building" and "office", when the "office" entry was not legally appropriate for a Burglary, and the entry into the "building" did not meet the legal standard for a Burglary, were misleading and erroneous. Trial counsel did not object to this instruction. He found this instruction acceptable. The erroneous jury instruction was not harmless error. Trial counsel was prejudicially ineffective.

Trial Court Answered: No.

STATEMENT OF THE CASE

Mr. Johnny Pinder, along with codefendant Darnelle Polk, was charged in a four Count Criminal Complaint dated March 16, 2015. Only Counts One and Two apply to Defendant Pinder. Count One charged Defendant with Burglary of a Building or Dwelling, as a Party to a Crime, contrary to Wis. Stats. 943.10(1m)(a), 939.50(3)(f), and 939.05. The Count charged Defendant with illegal entry into a building. Count Two charged Defendant with Possession of Burglarious Tools, contrary to Wis. Stats. 943.12, 939.50(3)(I). The charges allege that Defendant, along with Polk, entered into a business building located in Mequon. Polk was the driver of a vehicle. According to the Complaint, Defendant entered the building, entered into an office in the building, and took a computer. Upon stopping the vehicle in question, police found the property as well as alleged burglarious tools. (1:1-4).

A preliminary hearing had occurred on March 23, 2015. After taking testimony, the trial court found probable cause and bound Defendant over for trial. (57:26). The State filed a Criminal Information against the Defendant charging the same two charges, with the same charging language, against him as indicated in the Criminal Complaint. The relevant charging language in the Information as to Count One was that the Defendant did intentionally enter a building with the intent to steal and without lawful consent. (4:1-1).

Arraignment occurred on April 28, 2015. At that time, Defendant entered his pleas of Not Guilty to Both Counts in the Criminal Information. (58:1-4).

Eventually, Defendant had filed a Motion to Suppress. In this Motion, Defendant had indicated that on February 27, 2015, the Ozaukee County trial court had issued an Order Authorizing the Placing and Monitoring of an Electronic Tracking Device (henceforth either "the Order" or "Order") on Defendant's vehicle. This was a G.P.S. tracking device. This, pursuant to an Affidavit and Request for Authorization to Place an Electronic Tracking Device submitted that same day to the trial court. However, the actual installation of that tracking device did not occur until March 9, 2015. On March 14, 2015, the device produced a live feed, which allowed the detective to view the movements of the vehicle in real time. The detective notified the Mequon Police Department of the location of the GPS device and, after some time, that Police Department had initiated a traffic stop on Defendant's vehicle. (9:3; 10:3).

Defendant had argued in his Motion to Suppress that the placing of the G.P.S. tracking device on his vehicle had constituted a search. Defendant cited the U.S. Supreme Court case of U.S. vs. Jones, 132 S.Ct. 945 (2012) for this legal conclusion. Accordingly, Defendant had argued that either: (1) the Order was not a lawful search warrant, thereby making the installation of the tracking device a warrantless search; or (2) if the Order was a

search warrant, law enforcement had not attached it within the statutory five day guideline. The Motion cited Wis. Stats. 968.15(1) for the legal requirement that a search warrant must be executed and returned not more than five days after the date of issuance. Otherwise, according to the statute, the warrant becomes null and void if not executed within five days of the date of issuance. Therefore, according to the Defendant, in either case, the search was illegal, thereby requiring suppression of the fruits of that search. (9:1-5; 10:1-5).

An evidentiary hearing on Defendant's Motion to Suppress had occurred on November 9, 2015. At that time, the parties had agreed that most of the facts could be stipulated by the parties. The State had agreed that the G.P.S device had not been installed until ten days after the trial court had issued the Order. The parties had also agreed that the Order had been signed on February 27, but that the device had not been installed until March 9. At the time, Defendant had indicated that it had a copy of the law enforcement Affidavit and Request for Authorization and Order. (62:2-3). Defendant had argued that the basis for the Motion was the Supreme Court case of U.S. vs. Jones. Defendant had first indicated that the "Order" was not a warrant as required by Jones. Defendant had indicated that this case had dictated that the GPS tracking device attached to Defendant's vehicle was a search, requiring a search warrant. Hence, the search was a warrantless, illegal search. In

the alternative, Defendant had argued, as in his written Motion, that even if the court was to find the "Order" to be a warrant, then it had not been executed within five days as required by the Wisconsin Statutes. Defendant had argued that the only way for the police to know of Defendant's location was through the GPS monitor. Based upon these arguments, Defendant had moved for suppression of all evidence found on the basis of this G.P.S. monitoring. (62:4-7).

Here, both the Affidavit and Request for Authorization to Place and Monitor an Electronic Tracking Device as well as the actual signed court Order authorizing the placement of this device had been introduced into evidence on November 9, 2015. (19:1-11; 20:1-2). Here, the Affidavit itself seeks authorization of the placement of Global Positioning System (GPS) tracking device onto the Defendant's vehicle. The legal basis for this request was United States vs. Karo, 468 U.S. at 718. Furthermore, the Affidavit sought permission to enter into Defendant's residence located at 2825 N. 30th Street in Milwaukee. This, in order to install the device onto the Defendant's vehicle. (19:7-11).

The court's Order authorizing the placement of the GPS device onto Defendant's vehicle authorized use of the device for sixty days. The Order mandated removal of the device not later than sixty days from the date of the signing of the Order. Furthermore, the Order authorized entry and reentry into the vehicle and structures

containing the vehicle. The Order is dated February 27, 2015. (20:1-2).

After the November 9, 2015 hearing, the State had filed its Brief opposing Defendant's Motion. (22:1-2). Defendant had filed his own Brief a day later. (23:1-2).

On November 23, 2015, the trial court had orally denied the Motion. The trial court relied upon State vs. Sveum, 328 Wis.2d 369, for the conclusion that the failure to timely execute the court's Order did not warrant suppression. (63:2-7).

Eventually, a jury trial commenced on November 30, 2015. Matthew Weil was Defendant's trial attorney. This was a joint trial along with codefendant Darnelle Polk. Defendant was on trial for both charges in the Criminal Information.

William Mikkelson testified for the State. He testified that he was the property manager and part owner of the office complex at issue in this matter. (65:90-91). He testified that the main entry doors to the building are unlocked, which is the public access hallway. (65:101).

At the close of evidence, both Polk and Defendant requested directed verdicts. Both Defendants had indicated that the evidence had shown that the building was unlocked at the time of the alleged entry. Defendant argued that entry into a place when it is open to the public is not without consent. Defendant cited Champlin vs. State, 84 Wis.2d 621, 267 N.W.2d 295 (1978) for the holding that

"...Entry into a place when it is open to the public is not without consent. Thus, entry into a hotel lobby open to the public although done with the intent to steal is not burglary." Defendant indicated that the testimony of the property manager was that the building was open at the time that this incident allegedly took place. The State moved to amend the pleadings to say room within a building. After hearing argument, the trial court orally amended the jury instruction to that of an "office." (65:187-190).

The trial court subsequently conducted a jury instructions conference with the parties. This conference went as follows:

> THE COURT: " I went through and, gentlemen, so the record is clear, I took out the words "building or dwelling" and put "office" in. I think that it's fair to say that all the testimony showed that this is kind of an office – it's not an office sharing building. It's where people have individual suites within the building. There's really nothing unusual. It's a little more modern version of what you used to see, so you might have free standing law offices there, things of that nature. And that's where the break-in occurred. Mr. Last, anything?
>
> MR. LAST: "No, Your Honor."
>
> THE COURT: "They look acceptable to you and Mr. Polk?"
>
> MR. LAST: "Yes."
>
> THE COURT: "And Mr. Weil?"
>
> MR. WEIL: "Judge, I have reviewed them with Mr. Pinder. They are acceptable..." (65:192-193).

Mr. Last was the attorney for codefendant Darnelle Polk.

Mr. Last gave his Closing Argument on behalf of Mr. Polk. The basis for his argument was that his client had been accused of something that he did not do and did not participate in. The surveillance video had indicated that, at the scene, the driver had remained in the vehicle while the passenger had exited the vehicle. The police had testified at trial that the vehicle had belonged to Mr. Pinder, and that Polk had exited the vehicle upon the traffic stop. The police had searched Polk and found nothing of evidentiary value on him. (65:201-202). The police found the incriminating items n the vehicle. Mr. Last had indicated during his argument that Polk did not own the vehicle, and that his only connection with the vehicle was that on March 14 he was driving the vehicle. All items found in the vehicle belonged to Defendant Pinder. Furthermore, the jury had learned that Polk had provided an explanation for his presence in Ozaukee County, and that presence was because he was looking for Seek Employment. This employment agency was, in fact, located on the same road as the burglary. Therefore, Polk was in Ozaukee County for a legitimate reason. (65:203-204). Mr. Last had argued that the reason that there had been multiple stops of the vehicle by Defendant and Polk was because someone unfamiliar with the area might stop at different locations. This, in order to find a specific location. There was no proof that Polk had even acted as a party to a crime, that he even

had knowledge that a crime was going to be committed, or that he had any desire to assist or be ready to assist in the commission of the burglary that had eventually occurred. (65:205-206).

The trial court subsequently read the Burglary jury instruction pertaining to the Defendant to the jury. This went as follows:

> "Burglary, as defined in Section 941.10 of the Criminal Code of Wisconsin is committed by somebody who intentionally enters a building without the consent of the person in lawful possession and with intent to steal.
>
> Before you may find the Defendant, Johnny Pinder, guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present:
>
> One, the defendant, Johnny Pinder, intentionally entered an office; the defendant Johnny Pinder entered an office without the consent of the person in lawful possession; the defendant, Johnny Pinder, knew that the entry was without consent; and the defendant, Johnny Pinder, entered the office with the intent to steal.
>
> The phrase "intent to steal" requires the defendant had the mental purpose to take and carry away movable property of another without consent and that the defendant intended to deprive the owner permanently of possession of the property. It requires that the defendant knew the property belonged to another and knew the person did not consent to the taking of the property.
>
> The intent to steal must be formed before entry is made. The intent to steal, which is an essential element of burglary, is not more or less than the mental purpose to steal formed at any time before the entry which continued to exist at the time of entry. You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words and statements, if any, and from all of the facts and circumstances in this case bearing upon intent and knowledge.

> If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you must find the defendant guilty. If you are not so satisfied, you must find the defendant not guilty." (65: 217-218.

The written instructions pertaining to this Count were identical to the actual language provided by the trial court to the jury orally. (34:1-18; 43:Exhibit 3).

The jury returned verdicts of guilty against the Defendant. This, with respect to both Counts in the Criminal Information. (65: 248).

On December 1, 2015, the trial court sentenced Defendant on Count One to ten years prison, to consist of five years initial confinement plus five years extended supervision; on Count Two to two years prison, to consist of one year initial confinement plus one year extended supervision, concurrent to Count One. Both sentences were consecutive to any time that the Defendant was presently serving. (66:20; 37:1-2; A 123-124).

Subsequently, Defendant filed his Motion for Postconviction Relief with attachments. He filed this Motion on August 24, 2016. By this Motion, he sought a new trial based upon prejudicial ineffectiveness of counsel. Defendant had argued that trial counsel had been prejudicially ineffective. This, for failing to object to the materially erroneous and confusing jury instructions concerning the dual references to both "building" and "office." (43:1-36).

The trial court had conducted an evidentiary hearing on Defendant's Motion for Postconviction Relief. This hearing occurred on November 7, 2016. At that hearing, trial counsel Matthew Weil had testified. Trial counsel had testified that he had agreed that the relevant jury instruction had contained two words for the Burglary, one of which was "office" and one of which was "building." He also agreed that he had never objected to the jury instruction on the basis that the use of the two different words could possibly create juror confusion. He further testified thathe had never objected to the use of the word "building," even though this situation was not legally a burglary into a building because of Champlin vs. State. He agreed that he did not object to the word "building" being there, even though the word "office" was in the elements, on the possible basis that there might be jury confusion, having two different words. Furthermore, he agreed that he did not object to the use of the word "building", even though Champlin vs. State created a legal issue as to whether or not this was legally a burglary to a building because the building was not locked. (68:14-15).

Eventually, the trial court orally denied Defendant's Postconviction Motion. This occurred on January 19, 2017. The trial court did not deny that the jury instructions were erroneous. However, the trial court had indicated that it believed that the error was harmless. This, based upon State vs. Beamon, 347 Wis.2d

559, 830 N.W.2d 681 (2010). The trial court had indicated that the jury had tracked along and did not seem to have any confusion. Also, the court had relied upon the jury's acquittal of codefendant Polk. (69:8-10; A 120-122). The trial court denied the Postconviction Motion. Thereafter, the trial court had issued a written Order denying the Postconviction Motion. (50:1; A 119).

Defendant filed his Notice of Appeal in a timely manner. (51:1-4).

Subsequent to Briefing, the Court of Appeals, District II, certified the issue of the timeliness of the execution of the search warrant to this Supreme Court. (A 101-118).

ARGUMENT

I. THE TRIAL COURT HAD ERRONEOUSLY DENIED DEFENDANT'S SUPPRESSION MOTION. BASED UPON THE RELEVANT AND APPLICABLE LAW, THE COURT'S AUTHORIZATION ORDER WAS VOID AT THE TIME OF EXECUTION. FURTHER, THIS WAS A LEGAL WARRANT. THEREFORE, THE GPS TRACKING SEARCH WAS ILLEGAL.

The use of Global Positioning System technology to track an individual's movements in his vehicle is a search for Fourth Amendment purposes. United States vs. Jones, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012). An Order authorizing such a search is a search warrant, for all legal purposes. State vs. Brereton, 345 Wis.2d 563, 826 N.W.2d 369 (2013); State vs. Sveum, 328 Wis.2d 369, 787

N.W.2d 317 (2010).

A search warrant must be executed and returned not more than five days after the date of issuance. If it is not executed within this time frame, the warrant shall be void and shall be returned to the judge issuing it. Wis. Stats. 968.15. The legislature has declared warrants not executed within these mandatory warrant requirements as being void. This failure to timely execute such a warrant, or an Order acting as such a warrant, is a fatal flaw. The legislature has explicitly and preemptively instructed judges and courts not to treat the five-day execution period as a "technical irregularity" that can be forgiven under Wis. Stats. 968.22. State vs. Sveum, 328 Wis.2d 369 at 419-420.

As the Court of Appeals' Certification had indicated, the terms "must" and "shall" are mandatory terms. Pries vs. McMillion, 326 Wis.2d 37, 784 N.W.2d 648 (2010). Whether the date of execution is considered to be when the device is installed or removed, it was a violation of Wis. Stats. 968.15(1). By voiding the warrant, the legislature has specified a penalty for noncompliance. The existence of such a penalty favors a mandatory interpretation. Village of Elm Grove vs. Brefka, 348 Wis.2d 282, 832 N.W.2d 121 (2013).

The requirement for mandatory voiding of a search warrant that has been executed after the statutory five day time period is sensible. The element of time can admittedly affect the validity of

a search warrant. Since it is upon allegation of presently existing facts that a warrant is issued, it is essential that it be executed promptly, 'in order to lessen the possibility that the facts upon which probable cause was initially based do not become dissipated.' If the police were allowed to execute the warrant at leisure, the safeguard of judicial control over the search which the fourth amendment is intended to accomplish would be eviscerated. Thus, a search pursuant to a 'stale' warrant is 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 forth 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. The proper test for determining the timely execution of a search warrant requires that the warrant had been executed in compliance with Wis. Stats. 968.15. Furthermore, the Supreme Court in Edwards had recognized that the delay could result in the loss of probable cause, thereby making the search constitutionally impermissible. Id. at 375-376. This is clearly a recognition that the crux of the legality of a warrant is the probable cause at the time of the initial execution of a warrant. Furthermore, this holding is a clear recognition that the legislature has recognized that execution after the five day period satisfies the timeliness

requirement.

As the Court of Appeals Certification had indicated, other courts have concluded that the execution of a warrant within the statutory time period "may not be excused as a mere ministerial or clerical aspect" of search warrant procedure. See California vs. Clayton, 22 Cal.Rptr. 2d 371, 375 (Cal.Ct.App. 1993). (Ct.App.Certific., page 11, footnote 7; A 111).

AS the Court's Certification had further indicated, depending on the statutory language, some courts have concluded that the determination of when a search warrant was executed is the time at which the search began, not when it ended. See Yanez-Marquez vs. Lynch, 789 F.3d 434, 466 n.19 (4th Cir. 2015); State vs. Callaghan, 576 P.2d 14, 18 (Ore.Ct.App. 1978); State vs. Kern, 914 P.2d 114, 116 (Wash.Ct. App. 1996) (a search is timely "so long as the search begins before the warrant expires, and so long as probable cause continues through the completion of the search"). (Ct.App.Certific., page 12, footnote 11; A 112).

Suppression of evidence is necessary when an Order, such as exists here, violates the statutory requirements of a warrant, and therefore, cannot constitute a warrant. State vs. Popenhagen, 309 Wis.2d 601, 749 N.W.2d 611 (2008).

Here, clearly, the Order in question had acted as a search warrant. The trial court had recognized it as such. Furthermore, the Court of Appeals' Certification also recognizes this Order as

a warrant. Also, clearly, the police had failed to execute the Order within the five day statutory required time limit. Under the relevant and applicable law, the Order had ceased to be effective after the five day statutory limit dictated under Wis. Stats. 968.15. Therefore, when law enforcement had eventually installed the GPS device on Defendant's car, the Order had already expired as being a lawful warrant. Hence, any search subsequent to the expiration of that warrant was an illegal search. Evidence obtained through illegal police conduct must be suppressed. Wong Sun vs. United States, 83 S.Ct. 407 (1963).

In the present matter, the trial court did not dispute that the placement of the G.P.S. tracking device had been a search. Furthermore, the court did not dispute that its Order had acted as a warrant authorizing that search.

However, the trial court had relied upon State vs. Sveum to deny Defendant's Motion to Suppress. But, that reliance is misplaced and erroneous. In that case, unlike here, the timeliness issue had not been based upon the timeliness of the actual execution of the Order that had acted as the warrant. There is no indication in that case that law enforcement had not executed the Order within the five day statutory time period. Although the Supreme Court had discussed that the processing of the Order had violated Wis. Stats. 968.15, the facts of this case did not concern the execution of the GPS tracking device within five days of the

signing of the Order. Instead, the facts of that case concerned that the Order in that case had not been returned along with a written inventory to the circuit court within forty eight hours after execution, as required under Wis. Stats. 968.17(1). Hence, this case concerned the procedural warrant requirement procedures and not the execution of warrant requirement present in this present matter. State vs. Sveum, 328 Wis.2d 369 at 408-410. Accordingly, the trial court's present reliance upon that case is irrelevant to any discussion concerning the five day time limit requirement, and the requirement's legal underpinnings. This, as part of a discussion concerning the execution of the Order outside of the five days of the issuance of that Order. This logic applies here, as well as to all further similarly situated Defendants.

As the Court of Appeals had indicated in its Certification, the distinction between execution and return makes sense. The return of a warrant is merely ministerial to safeguard property rights. By the time of the return of the warrant, the privacy invasion has been completed.

However, as the Certification had indicated, with respect to the execution of a warrant, there are other implicated rights than just those with respect to a return. With respect to the execution itself, a core requirement of a warrant is probable cause, which is inconsistent and may be fleeting. The facts upon which the probable cause was initially based may dissipate if a warrant is not

executed promptly.

Here, the fact is irrelevant that the warrant had authorized a multi-day surveillance of Defendant's vehicle in question. Under the relevant and applicable law, the probable cause leading to the issuance of a warrant still is the crux of the basis of the warrant. As the law indicates, the issuance of the warrant is based upon the allegation of presently existing facts. Both the Wisconsin case law as well as the Wisconsin Statutes clearly recognize that these facts may become stale and negate the very probable cause that led to the creation of that warrant. This, after five days. As indicated, this leads to the presence of the words "shall be void" if it is not executed after five days. As also discussed, the word "shall" is mandatory and warrants a penalty for noncompliance.

There is no reason that a warrant authorizing a continuous search should not fall within this limit and mandate. As discussed, the law recognizes that the warrant is based upon the probable cause known at the time of the issuance of the warrant. This is the crux of the fourth amendment. This mandate does not differ whether the search is continuous or not.

Based upon the foregoing, reliance upon State vs. Sveum does not rebut Defendant's position that the execution of the Order was illegal, that the GPS tracking search of Defendant's vehicle was an illegal search, and that the resulting evidence must be suppressed. This Court must reverse the trial court's Decision denying

Defendant's Motion to Suppress. This reversal Decision applies not only to the Defendant, but to all similarly situated Defendants in the future.

II. MR. WEIL WAS PREJUDICIALLY INEFFECTIVE FOR FAILING TO OBJECT TO IMPROPER JURY INSTRUCTIONS. HERE, THE ERROR WAS NOT HARMLESS. A NEW JURY TRIAL IS, THEREFORE, MANDATED. THE TRIAL COURT HAD ERRED IN DETERMINING OTHERWISE.

A. The Constitutional Standard and Procedural Requirements

The right to effective assistance of counsel stems from the Sixth Amendment of the United States Constitution and Article I, Section 7, of the Wisconsin Constitution, which guarantee a Defendant a fair trial and effective assistance of counsel. The test for ineffective assistance of counsel is two pronged. First, the Defendant must demonstrate that his trial counsel's performance was deficient; and second, the Defendant must demonstrate that the deficient performance prejudiced him. Strickland vs. Washington, 104 S.Ct. 2052, 466 U.S. 668 (1984); State vs. Sanchez, 201 Wis.2d 219, 227-228, 548 N.W.2d 69 (1996). In order to show prejudice, the Defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. State vs. Sanchez, 201 Wis.2d 219 at 236 citing Strickland vs. Washington, 466 U.S. at 694. This showing of prejudice does not rise to a level of beyond a reasonable doubt or even by a preponderance of the evidence. State

vs. Traylor, 170 Wis.2d 393, 489 N.W.2d 626 (Ct. App. 1992), citing State vs. Pitsch, 124 Wis.2d 628, 369 N.W.2d 711 (1985).

Failure to object to improper jury instructions that was not harmless error is prejudicially ineffective assistance of counsel. State vs. Ziebart, 268 Wis.2d 468, 673 N.W.2d 369 (Ct.App. 2003).

B. Trial counsel Weil was Prejudicially Ineffective for Failing to Object to the Trial Court's Improper Jury Instructions with Respect to the Burglary Count. The Burglary Instruction did not Instruct as to a Violation of the Statute. Furthermore, this Instruction was Confusing and Misleading. Here, the Improper Instruction was Not Harmless Error Because it Did Not Allege a Violation of the Law. The Trial Court had Erred in Denying Defendant's Postconviction Motion.

When a trial court incorrectly instructs the jury, the Court of Appeals must set aside the verdict unless the error was harmless, that is to say, unless there is no reasonable possibility that the error contributed to the conviction. State vs. Neumann, 179 Wis.2d 687, 508 N.W.2d 54 (Ct.App. 1993); Wis. Stats. 805.18(2); State vs. Ziebart, 268 Wis.2d 468 at 485.

The Court of Appeals will reverse and order a new trial if the jury instructions communicated an incorrect statement of the law. State vs. Laxton, 254 Wis.2d 185, 647 N.W.2d 784 (2002); State vs. Lesik, 322 Wis.2d 753, 780 N.W.2d 210 (Ct.App. 2009). Whether a jury instruction is a correct statement of the law is a question of law that the Court of Appeals reviews independently. State vs. Neumann, 179 Wis.2d 687 at 699.

The State has the burden of establishing, beyond a reasonable doubt that there was no reasonable possibility that the error contributed to the conviction. State vs. Dyess, 124 Wis.2d 525, 370 N.W.2d 222 (1985). An error is harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." State vs. Harvey, 254 Wis.2d 442, 647 N.W.2d 189 (2002) quoting Neder vs. United States, 527 U.S. 1 (1999). This presents an issue of law that the Court of Appeals reviews independently. In determining whether an error is harmless, the Court weighs the effect of the trial court's error against the totality of the credible evidence supporting the verdict. State vs. Harris, 199 Wis.2d 227, 544 N.W.2d 545 (1999).

The options for convictions for an entry, under the Burglary statute, are into any of the places listed in Wis. Stats. 943.10(1m)(a) through (f): any building or dwelling; an enclosed railroad car; an enclosed portion of any ship or vessel; a locked enclosed cargo portion of a truck or trailer; a motor home or other motorized type of home or a trailer home, whether or not any person is living in any such home; or a room in any of the above. Wis.Stats. 943.10(1m)(a) through (f).

Office is defined as a place in which business, clerical or professional activities are conducted. American Heritage Dictionary of the English Language, Fifth Edition (2011). An office is a place for the regular transaction of business or performance of a

particular service. Blacks Law Dictionary, Fifth Edition (1979). An office is a place where a particular kind of business is transacted or a service is supplied as (i) a place in which the functions (as consulting, record keeping, clerical work) of a public officer are performed, (ii) the directing headquarters of an enterprise or organization, (iii) the place in which a professional person conducts his or her professional business. Webster's Ninth New Collegiate Dictionary.

Here, the Burglary jury instruction was incorrect and improper for multiple reasons. First, the jury instruction as read to the jury commenced with the words "Burglary...is committed by one who intentionally enters a building." However, the parties had indicated that this present fact situation did not involve the Burglary of a Building. This, due to the fact that the entry ways into the building were open at the time of the alleged entry, based upon Champlin vs. State. Hence, this instruction referred to a situation that, under the facts, was not a violation of the law. However, this instruction advised the jury to the contrary. The instruction advised the jury that it could convict the Defendant simply based upon his entry into the building. However, as indicated, this was an incorrect statement of the law considering the facts of the case. Trial counsel did not object to the jury instruction, as indicated.

Furthermore, the provided jury instruction's references to

convicting someone for entering an "office," as an element of Burglary, was also legally incorrect. An "office" is not one of the places indicated in Wis. Stats. 943.10(1m)(a) through (f). Furthermore, this omission is with good reason. An illegal entry into an office does not meet the statutory definition and clear intent of the statute, that of an enclosed area. All three dictionary definitions cited above refer to an office as a "place." There is no indication that this must be inside of an enclosed area, much less a "building" or a "room." Hence, this does not describe, or qualify as, any of the statutory examples cited in Wis. Stats. 943.10(1m). The term "place" is not limited to any of these examples. Furthermore, footnote 2 of the Burglary Jury Instruction, 1421, uses the Webster's Ninth New Collegiate Dictionary as an authoritative source in describing the definition of a "building." This is the same source, cited above, that describes an "office" as a place, not necessarily related to a "room" or a "building." Once again, trial counsel did not object to this instruction, as provided. Trial counsel found this instruction acceptable.

Here, clearly, and logically, the errors in the Burglary jury instruction relevant to this case were not harmless. The instruction advised the jury that it could, and should, convict the Defendant improperly. The initial statement that the jury should convict the Defendant for intentionally entering the building was

a key portion of the instruction. This statement advised the jury that Defendant had committed a burglary by simply entering the building itself. However, as detailed, this was legally erroneous. The error was not harmless. Trial counsel did not object.

Furthermore, the error in the jury instruction in advising the jury that an entry into an "office" without consent and with the intent to steal, was also not harmless error. This is not an accurate statement of the law. The definition of office is too broad to withstand legal scrutiny. An "office" does not qualify as a violation of Wis. Stats. 943.10(1m). This error had advised the jury that it could convict the Defendant of Burglary even though he did not violate the Burglary statute. Once again, the error was not harmless. Trial counsel did not object.

Finally, the Burglary jury instruction was materially erroneous because it allowed the jury to convict the Defendant of either entry into a building or entry into an office. This clearly reasonably created jury confusion. The instruction did not specify the specific manner of the entry. Hence, the jury instruction was vague and confusing. For example, is a Burglary an entry into a building or an entry into an office? This creates a reasonable issue, and concern, of juror confusion and error. This, regardless of the legal situation that, under the factual circumstances and the law, neither the entry into the building or entry into an office satisfied the legal requirement for non-consensual entry.

Hence, the jury instruction was erroneous and improper. Trial counsel again did not object.

Here, the trial court had denied Defendant's Postconviction Motion for essentially two separate reasons. First, the trial court had relied upon State vs. Beamon, 347 Wis.2d 559, 830 N.W.2d 681 (2012) for its conclusion that the error had been harmless. However, this reliance is misplaced.

In Beamon, the Supreme Court had found that the relevant jury instruction had combined two alternative methods for proving the second requirement of the charged offense of eluding or fleeing. The Court had found that the jury instruction for proving the second element had two different factual predicates, and that the presence of two such different predicates had the requirement of creating an additional requirement for the offense of fleeing or eluding. The Court had concluded that the jury instructions did not properly state the statutory requirements, and that the instructions were erroneous. State vs. Beamon, 347 Wis.2d 559 at 577-581.

Nevertheless, in Beamon, the Court had concluded that the erroneous jury instructions were harmless error. The Court had found that the trial court had twice read to the jury the charge in the Information. This Information had properly set forth the statutory requirements. Notably, one of these readings came immediately before the trial court had read the erroneous jury

instruction. Furthermore, Beamon himself had testified, and he did not attempt to discredit the officers' accounts of the chase. In conclusion, the Supreme Court had found the erroneous jury instruction to be harmless error. Id. at 581-582.

Here, the facts of the present matter materially differ from those in Beamon. In the present matter, the trial court had determined that the Information was not legal. This, due to Champlin vs. State which had held that the entry into the unlocked building was not a burglary. Therefore, the use of the word "Building" in the Information was erroneous and illegal. Hence, unlike in Beamon, where the jury had heard the correct statutory requirements twice by the reading of a correct Information, there was no correct Information here.

Furthermore, here, contrary to Beamon, the jury had never been provided with a correct recitation of the law. The present Information, as discussed, was legally incorrect. Also, the jury instructions here, as in Beamon, had provided two different predicates for conviction. Here, these predicates arguably constituted alternatives. Unfortunately, and arguably, neither alternative was legal.

Finally, here, and again unlike in Beamon, Defendant had never testified. The Supreme Court in Beamon had considered the fact that Defendant had testified, as well as the substance of his testimony. The Court had relied upon this fact. This did not occur here.

The trial court in the present matter had also materially erred in relying upon the acquittal of the codefendant in determining harmless error with respect to the erroneous jury instructions. However, this reliance was also materially erroneous. Contrary to the court, Polk's entire theory of defense was not reliant upon the issue of the jury instruction and what had constituted the offense of Burglary. As previously discussed, and indicated in Polk's Closing Argument, Polk's defense was that he had no involvement in the offense of Burglary. This, regardless of whether or not an office or a building had been illegally entered. Hence, contrary to the trial court, Polk's acquittal is irrelevant to this issue.

As indicated, Mr. Weil had never challenged the Burglary jury instruction, as drafted by the trial court. For the aforementioned reasons, this failure was prejudicially ineffective and warrants a requirement for a new jury trial. The trial court had erred in determining otherwise. This Decision must be reversed.

CONCLUSION

Defendant respectfully requests that this Honorable Court reverse both Decisions by the trial court discussed in this present Brief.

For the reasons indicated within this Brief, the trial court

had materially erred in denying Defendant's Suppression motion. Defendant respectfully requests that this Honorable Court reverse this Decision.

Furthermore, trial counsel was prejudicially ineffective. Based upon the reasons presented within this Brief, the trial court erred in denying Defendant's Postconviction Motion. Defendant respectfully requests that this Court grant him a new jury trial, with the evidence that had resulted from the illegal search discussed within this present Brief suppressed.

Respectfully Submitted,

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INDEX TO APPENDIX

CERTIFICATION

I hereby certify that the Supreme Court Brief of Defendant-Appellant in the matter of State of Wisconsin vs. Johnny K. 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 thirty two (32) pages.

Dated this 28th day of March, 2018, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-
Appellant

CERTIFICATION

I hereby certify that filed with this Brief, either as a separate document or as a part of this Brief, is an appendix that complies with Wis. Stats. 809.19(2)(a) and that contains:

(1) a table of contents;

(2) relevant trial court record entries;

(3) the findings or opinion of the trial court; and

(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decision showing the trial court's reasoning regarding those issues.

I further 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.

Dated this 28th day of March, 2018, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-
Appellant

CERTIFICATION

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

Dated this 28th day of March, 2018, in Waukesha, Wisconsin.

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Attorney for Defendant-Appellant