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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-Petitioner

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

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

MARK S. ROSEN
ROSEN AND HOLZMAN, LTD.

400 W. Moreland #C
Waukesha, WI 53188
1-262-544-5804
Attorney for Defendant-Appellant
State Bar No. 1019297

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ARGUMENT

I. THE RESPONDENT'S ARGUMENTS CONCERNING THE GPS TRACKING DEVICE'S WARRANT DO NOT SUFFICIENTLY REBUT THE DEFENDANT'S ARGUMENTS SUPPORTING SUPPRESSION.

A. Contrary to the Respondent, the Warrant Present Here was Subject to the Requirements of Wis. Stats. 968.15 and 968.17. These Statutes Have Determined that the Warrant Was Invalid at the Time of Execution.

The Respondent's Brief has indicated that the present warrant was not a statutory warrant which did not need to satisfy the requirements of Wis. Stats. 968.15 and 968.17. However, this is

argument is incorrect.

Here, the relevant and applicable case law indicate that the procedure utilized here was a search that had required a warrant. U.S. vs. Jones, 500 U.S. 400, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012); State vs. Sveum, 328 Wis.2d 369, 787 N.W.2d 317 (2010); State vs. Brereton, 345 Wis.2d 563, 826 N.W.2d 369 (2013). This issue is beyond dispute. However, the Respondent had asserted that, despite this conclusion, the Wisconsin Statutes that govern the applicability, reasonableness, and execution of a warrant do not apply. This, for the reason that the warrant utilized in the present situation is a "common law" warrant that, somehow, is beyond Wisconsin statutory applicability and law. However, this argument is without merit and must be rejected.

The parties clearly agree that State vs. Sveum had dealt with the issue of GPS tracking devices on vehicles and the requirement for a warrant for such law enforcement purposes. State vs. Sveum, 328 Wis.2d 369 at 378. However, this case had further indicated that whether such a search was reasonably ordered and executed is further informed by the Wisconsin Statutes. This case had then cited Wis. Stats. 968.12(1) for the definition of the parameters of a search warrant. Id. at 402. This case had then further analyzed the facts of that case within the requirements of Wis. Stats. 968.15 and 968.17. Id. at 408-409. Hence, the warrant in the present situation was subject to the Wisconsin statutory

requirements, specifically those in Wisconsin Statutes 968. Contrary to the Respondent, this present warrant was not a "generic" warrant that did not require compliance with Wisconsin statutes. Accordingly, the relevant and applicable case law in the present situation has concluded that GPS tracking warrants are statutory warrants subject to the Wisconsin Statutes. The Respondent had clearly erred in arguing otherwise.

The Respondent had also argued that, because the present warrant had included a sixty day expiration deadline, it had, complied with the "spirit" of Wisconsin Statutes 968.15. However, this argument relates to unfair prejudice. This argument is legally inappropriate. As Appellant had argued in his Original Brief, delay in execution results in the potential dissipation of probable cause. Based upon Respondent's argument, execution could legally have commenced on the fifty ninth day. This is clearly impermissible, both factually and legally. However, Respondent's description of the probable cause is legally mere speculation after the fifth day after the issuance of the order.

The Respondent has also argued that the Court should utilize the Wisconsin Statute applicable to communications devices, Wis. Stats. 968.373(4). However, this argument has no legal or factual standing. First, this Statute applies only to tracking the location of a communications device. Sveum, by its failure to recognize GPS trackers as "communications devices," itself has rejected such a

contention. As indicated, this case had clearly analyzed GPS trackers under Wis. Stats. 968.12, 968.15, and 968.17.

Second, the U.S. Supreme Court in U.S. vs. Jones had analyzed GPS trackers under standard search warrant law. That case had not analyzed GPS trackers under any legal analysis concerning the tracking of communications devices. Instead, that case had indicated that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, had constituted a search. U.S. vs. Jones, 565 U.S. 400 at 404-405. Also, the Supreme Court had analyzed that GPS tracking case not under a sixty day window analysis, as would be used for the tracking of a communications device. Instead, the warrant had authorized installation of the device in the District of Columbia and within ten days. However, law enforcement had installed the device on the eleventh day and not in the District of Columbia. The U.S. Supreme Court had thereby concluded that there had been noncompliance with the warrant. Id. at 402-404. Such an analysis is directly contrary to, and materially rebuts, the Respondent's argument that the present analysis should fall under Wis. Stats. 968.373 as a communications device analysis.

Furthermore, Wis. Stats. 968.373 itself rejects the Respondent's contention that this Statute is applicable here. Under this Statute, a communication device is defined as "any wireless or mobile device that transmits wire or electronic communications."

Wis. Stats. 968.373(4). Also, this Statute clarifies such devices as ones that has a provider of electronic communication service (Wis. Stats. 968.373(5)) as well as a subscriber or customer (Wis. Stats. 968.373(8)). Clearly, this Statute applies only to devices such as pagers or cell phones. GPS trackers, such as utilized here, do not have such "providers" or "subscribers or customers." Accordingly, this Statute itself indicates that it only applies to such devices. Therefore, this Statute is inapplicable to the present situation.

Here, the Respondent had indicated that the execution of the warrant is a continuing period based upon the sixty day length of the warrant. (Resp.Brf, page 25). However, the Court of Appeals' Certification had indicated that such an analysis did not consider the voiding provision of Wis. Stats. 968.15(2). The Court had further indicated that, given the voiding provision, it appears that the letter of the law was violated. (A115).

Further guidance can be found from the U.S. Supreme Court and the present warrant itself. As in U.S. vs. Jones, the present warrant had authorized the installation of a GPS tracking device that had authorized tracking for multiple days. However, in that case, as previously discussed, the warrant had not been installed either timely or geographically. The U.S. Supreme Court had simply indicated that the warrant was invalid and had dismissed the search. The Supreme Court had not discussed any continuing probable

cause issues, as Respondent would like. Furthermore, the Supreme Court had not found any technical irregularities that would justify ignoring the violations of the warrant. Importantly, both the District Court as well as the Court of Appeals in Jones had also agreed with the Supreme Court in this analysis. U.S. vs. Jones, 565 U.S. 400 at 403-404.

True, the warrant in the present matter did not have a time limit for the execution of the warrant, as in Jones. However, the situation in Jones did not involve applicable statutes that had determined the validity of the warrant, as here. Here, the relevant and applicable statutes have dictated that Wisconsin warrants are null and void if not executed and returned not more than five days after the date of issuance. Furthermore, even more egregious, execution of the present warrant had not even commenced until several days after the statutory time limit. Law enforcement had not even begun the execution of that warrant until well after the statutory five day time period. Hence, based upon Jones, the present warrant at the time of installation had been simply invalid. The warrant had expired well prior to the date of installation. Based upon Jones, this delay was not a technical irregularity. See also State vs. Edwards, 98 Wis.2d 367, 297 N.W.2d 12 (1980).

The Supreme Court has also previously rejected the Respondent's argument that an analysis of "unfair prejudice, as

opposed to the time limit requirement under Wis. Stats. 968.15 and 968.17, should be dispositive. The Supreme Court has previously stated that the test for timeliness was not unfair prejudice. Instead, the test was: (1) whether the warrant was executed in compliance with Wis. Stats. 968.15, and (2) if such compliance is found, whether the probable cause which existed at the time of the issuance of the warrant still continued at the time of its execution. State vs. Edwards, 98 Wis.2d 367 at 375-376.

Respondent had indicated that Sveum also applies to the five day execution time period and not just the return. (Resp.Brf, pges 31-32). This is true. State vs. Sveum, 328 Wis.2d 369 at 408-409. However, in that case, the installation order had issued on April 22, 2003, with installation occurring the very next morning. Id. at 379, 384. Hence, unlike the present situation, execution of the warrant in that case had commenced within five days of the issuance of the warrant. Respondent's reliance upon this case for this argued position is misplaced.

Based upon the foregoing, the warrant in the present matter was invalid upon execution. Any resulting evidence must be suppressed.

B. The Good Faith Exception to the Exclusionary Rule is Inapplicable in the Present Situation.

Here, the Respondent's argument that the good faith exception to the exclusionary rule should apply in any event is

inappropriate.

The Fourth Amendment exclusionary rule does not apply to evidence obtained by police officers who acted in objectively reasonable reliance upon a search warrant issued by a neutral magistrate, but where the warrant was found to be unsupported by probable cause. State vs. Eason, 245 Wis.2d 206, 629 N.W.2d (2001) citing U.S. vs. Leon, 468 U.S. 897, 82 L.Ed.2d 677, 104 S.Ct. 3405 (1984). The exception operates only in those close cases where there is no objectively reasonable support for the warrant. Then, the officers could not be found to have, according to an objective standard, reasonably relied upon the warrant. State vs. Eason, 245 Wis.2d 206 at 250. The State has the burden of showing that, objectively, the police officers had reasonably relied upon the warrant. Id. at 215.

In Eason, the officers had relied with objective reasonableness upon a no-knock search warrant. There had been no allegations that the officers had executed the warrant other than according to the terms of that warrant. There had been no allegations that the warrant was so facially deficient that a reasonable, well-trained officer would not have relied upon it. Id. at 259-260. This case detailed the facts surrounding the search and the warrant itself. Id. at 215-220.

Similar to Eason, in Leon, the officers had acted in good faith based upon a defective warrant. U.S. vs. Leon, 468 U.S. 897

at 903-904. As in Eason, this case had detailed the facts surrounding the search and the defective warrant. Id. at 901-904.

Here, unlike the situation in Eason or Leon, there is no allegation that the warrant in the present situation is defective. Simply, the issue here is why a well-trained officer such as Ozaukee County Detective Cory Polishinski had waited ten days to install the GPS tracking device. This, when well-recognized Wisconsin Statutes had dictated that execution must occur not later than five days from the date of issuance. Respondent itself has conceded that the record does not contain facts as to why this Detective had waited for so long to install this device. Respondent had indicated that "the record does not contain specific facts about Detective Polishinksi's actions during this ten day period. However, it does disclose that Detective Polishinski believed that Pinder resided a few blocks away from where his Impala was regularly parked." (Resp. Brf, page 6, footnote 2). Furthermore, Detective Polishinski was a State certified law enforcement officer with fifteen years experience and formal training in the investigation of crimes...including the crime of burglary. (Resp.Brf, page 37). Hence, contrary to the Respondent, he clearly objectively should have known of the requirements of Wis. Stats. 968.15 and 968.17. Also, Detective Polishinski had taken a great deal of time to draft the supporting affidavit and the proposed order. He clearly knew that the situation had required a warrant

and what type. (SA1-SA13). He knew what was required. The facts of Detective Polishinki's background, that State vs. Sveum was valid applicable law at the time, and a clear reading of the well-drafted affidavit and proposed order, materially rebut the application of the good faith exception. Hence, Respondent has failed to meet its burden of proof.

The Respondent has again relied upon State vs. Sveum to support its position that the good faith exception applies to GPS tracking. However, here, this reliance is erroneous. As previously discussed, in Sveum the officers had timely installed the tracking device. Hence, execution had occurred in a timely fashion. Here, on the contrary, the warrant at the time of execution was void. Unlike Sveum, the present matter was a warrantless search with no valid basis for the ten day delay. Jones, and not Sveum, applies.

Based upon the foregoing, Respondent has materially erred in arguing that the good faith exception to the exclusionary rule applies.

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.

Respondent's Brief had 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, pgse 10, 15, 30). Hence, Respondent had 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. According to the Respondent, Black's Law Dictionary agrees. However, this Dictionary is not the Wisconsin Statutes. 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

Based upon the foregoing as well as the reasons outlined in his original Brief, the Defendant-Appellant-Petitioner respectfully requests that this Court reverse the Decision of the Court of Appeals as well as the Decision and Order of the Trial Court.

Dated this 8th day of June, 2018.

Respectfully Submitted,

Mark S. Rosen
State Bar No. 1019297

Rosen and Holzman
400 W. Moreland Blvd., Ste. C
Waukesha, WI 53188
ATTN: Mark S. Rosen
(262) 544-5804

CERTIFICATION

I hereby certify that the Appellant's Reply Brief of Defendant-Appellant-Petitioner 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 thirteen (13) pages.

Dated this 8th day of June, 2018, 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 8th day of June, 2018, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-Appellant