STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2017AP587-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTHONY S. TAYLOR,

Defendant-Appellant.

On a Notice of Appeal From a Judgment of Conviction
Entered in the Circuit Court for Dane County,
the Honorable Stephen E. Ehlke, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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I. The Police's Use of a Trained Narcotics Detection Dog to Sniff the Front Door of Ms. Moore's Apartment For the Purpose of Gathering Incriminating Evidence From Inside the Apartment Was an Unreasonable Search Under the Fourth Amendment.

The State now, for the first time, argues that that the independent source doctrine should apply to excuse the failure to obtain a warrant prior to the dog sniff search. The State forfeited this argument by failing to raise it and present evidence to support it below. The argument also fails because the State never actually obtained a warrant.

When police obtain evidence in violation of the Fourth Amendment, the exclusionary rule applies. ***State v. Gant***, 2015 WI App 83, ¶ 15, 365 Wis. 2d 510, 872 N.W.2d 137. In limited circumstances, however, courts allow the admission of evidence obtained unconstitutionally because "suppression would not serve the exclusionary rule's purpose of deterring police misconduct." ***Id.*** (internal quotation omitted). The independent source doctrine is one such exception.

The rationale behind it is that if police had an independent (lawful) basis to obtain information they obtained illegally, "exclusion of such evidence would put the police in a worse position than they would have been absent any error or violation." ***Murray v. United States***, 487 U.S. 533, 537 (1988). Evidence satisfies the independent source doctrine if it is "discovered by means wholly independent of any constitutional violation." ***Nix v. Williams***, 467 U.S. 431, 443 (1984)(emphasis added).

The U.S. Supreme Court in ***Murray*** established a test by which the State must prove that "no information gained" from the illegality "affected either the law enforcement officers' decision to seek a warrant or the magistrate's decision to grant it." 487 U.S. at 540.

Importantly, the State bears the burden of "convincing a *trial court"* that the independent source doctrine applies. *See* ***State v. Carroll***, 2010 WI 8, ¶ 44, 322 Wis. 2d 299, 778 N.W.2d 1 (emphasis added); *see also* ***Murray v. U.S.***, 487 U.S. 533, 540 (1988). This makes sense given the State's burden of proof.

Here, the State's argument first fails because police never obtained a warrant. When police have obtained a warrant, there is no need to prove exigency or some other exception to the warrant requirement. Thus, the ***Murray*** analysis asks whether—taking the illegally-obtained information out of the warrant—the warrant still would have been sought and granted. *See* 487 U.S. at 540.

The independent source doctrine "requires proof that the tainted evidence was *actually* discovered by independent and lawful means". ***State v. Quigley***, 2016 WI App 53, ¶ 51, 370 N.W.2d 702 (emphasis in original). In ***Quigley***, this Court rejected the State's independent source doctrine argument, explaining that it "misses the mark by arguing what would have happened 'later', as compared to what in fact happened." ***Id.***, ¶ 52.

But even if the independent source doctrine could possibly apply to a situation such as this, the State failed to meet its burden. The State never argued the independent source doctrine below. *See* (19;48;49). The State has

therefore forfeited it. ***State v. Ndina***, 2009 WI 21, ¶ 30, 215 Wis. 2d 653, 761 N.W.2d 612 (arguments are forfeited on appeal if not first raised in the circuit court).

Forfeiture rules are important: by failing to raise this argument below, the State failed to (a) present evidence to support its burden, (b) put the defense on notice such that it could question witnesses about it, and (c) give the circuit court an opportunity to address it. *See, e.g.,* ***Schill v. Wis. Rapids Sch. Dist.,*** 2010 WI 86, ¶ 45, n.21, 327 Wis. 2d 572, 786 N.W.2d 177 (discussing the reasons for forfeiture rules).

The State argues that even without the dog sniff, it had probable cause sufficient to apply the independent source doctrine based on Ms. Crawford's statements about Mr. Taylor having marijuana and potentially having a gun, "[o]fficers' observation of the odor of marijuana emanating from Moore's apartment," and Mr. Officer Weaver's "observation of the odor of marijuana while within Moore's apartment." (Response at 9).

But the State only called Officer Weaver. Officer Weaver did not leave to draft the warrant; rather, he testified that Detective Mansavage left to do so. (48:16). The record does not reflect what Detective Mansavage actually did—whether he ever attempted to get a warrant and, if so, what information it contained or what he intended it to contain. *See generally* (48).

Officer Weaver also did not smell marijuana outside Ms. Moore's apartment; he testified that other officers told him they had smelled it. (48:16). He testified that he was the "last officer to arrive on scene". (48:26). The record does not reflect when or how those other officers smelled marijuana, and whether they had the training and experience required for

their perceived smells to amount to probable cause. *See* ***State v. Secrist***, 224 Wis. 2d 201, 218, 589 N.W.2d 387 (explaining that the smell of marijuana from a "trained and experienced" officer may amount to probable cause).

Officer Weaver testified that he subsequently smelled "raw" marijuana when he went inside Ms. Moore's apartment with her, but the State also failed to present any evidence about his training and experience to smell "raw" marijuana. *See* (48:20).

These problems are all in addition to the suspect credibility of Ms. Crawford's allegations against Mr. Taylor, given that she had just assaulted his current girlfriend and mostly spoke to police from the "back of a police car." (48:17).

The State recognizes the holes in the record—it just fails to acknowledge that *it* had the burden to try to fill those holes to prove that the independent doctrine could and should apply. For example:

- "[T]here is no evidence in the record that Detective Mansavage was not diligently drafting the search warrant he left the scene to write." (Response at 16).

- "At least one officer, Detective Mansavage, *and possibly two*, Officer Knoeck as well, were able to smell the odor of marijuana coming from Moore's apartment." (Response at 6)(emphasis added).

- "[I]t is admittedly speculative to consider what information would have influenced a judge's decision whether or not to authorize a warrant in this case." (Response at 8).

The State also raises another excellent point: "if police could already smell marijuana, why summon a dog? The record does not answer this question." (Response at 6). This undermines the State's assertions that police had probable cause absent the dog.

The bottom line is that the record fails to demonstrate that police had probable cause without the dog sniff search. This Court is left to guess—and that reflects that the State did not meet its burden to show that the independent source doctrine could apply.

Beyond its independent source arguments, the State's attempts to distinguish this case from ***Jardines***[1] and ***Whitaker***[2] also fall short. The State first asserts that this case differs because Ms. Moore called the police. (Response at 2-3).

That someone under physical attack in the parking lot outside their apartment calls police for help does not mean that the person would, in turn, reasonably expect police to conduct a dog sniff of their doorstep for drugs.

As the Supreme Court explained in ***Jardines***, the "scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose." 569 U.S. at 9. The Court gave an example: "Consent at a traffic stop to an officer's checking out an anonymous tip that there is a body in the trunk does not permit the officer to rummage through the trunk for narcotics." ***Id.***

[1] ***Florida v. Jardines***, 569 U.S. 1 (2013).

[2] ***U.S. v. Whitaker***, 820 F.3d 849 (7th Cir. 2016).

Similarly, that Ms. Moore called police because she was being assaulted does not mean that the police using a dog to try and detect narcotics inside her home was any less of a trespass or invasion of a reasonable expectation of privacy.[3]

The State further argues that this case differs from ***Jardines***, ***Whitaker***, and ***Kyllo***[4] because police had already smelled marijuana from the hallway. (Response at 4-6). But how does this make the sniff any less of a Fourth Amendment search?

As the State points out, if police believed they had probable cause based on their own perceived smell of marijuana, "why summon a dog?" *See* (Response at 6). The heart of ***Jardines***, ***Whitaker***, and ***Kyllo*** is that a Fourth Amendment search occurs when police use a "super-sensitive instrument" to detect what is present *inside* a home: "The police could not stand on the front porch and look inside with binoculars or put a stethoscope to the door to listen. Similarly, they could not bring the super-sensitive dog to detect objects or activities inside the home." ***U.S. v. Whitaker***, 820 F.3d 849, 853 (7th Cir. 2016).

In ***Kyllo***, ***Jardines***, and ***Whitaker***, police had reason to suspect that there were drugs inside the target homes when before they used the thermal imaging and drug dogs, respectively. *See* ***Kyllo***, 533 U.S. at 30; ***Jardines***, 569 U.S. at 3; ***Whitaker***, 820 F.3d at 850. The fact that police already had

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[3] Indeed, from a public policy standpoint (which, because of the reasonableness standard of the Fourth Amendment is encompassed in the analysis), does the State really want people who are being attacked to *not* call police? Should crime victims have to expect that if they call for help, police will have trained dogs search for drugs?

[4] ***Kyllo v. U.S.***, 533 U.S. 27 (2001).

suspicion did not mean—and does not mean here—that the use of specialized instruments to try to confirm those suspicions was not a search under the Fourth Amendment.

The dog sniff was a search under the Fourth Amendment, and police conducted that search without a warrant, exigency, or valid consent.

II. Ms. Moore's Ensuing Consent to Search Was Not Voluntary Because It Was Given Under Duress or Coercion.

The State argues that it has proven by clear and convincing evidence that Ms. Moore's consent was voluntary because police told her she could leave, did not physically restrain her, "never tried to talk her out of refusing", and because she ultimately "thought about it and then reinitiated the topic with police." *See* (Response at11-23); ***State v. Artic***, 2010 WI App 83, ¶ 32, 327 Wis. 2d 392, 786 N.W.2d 430.

The State's arguments overlook *why* Ms. Moore "thought about it and then reinitiated the topic."

Follow the State's reasoning out logically: the police tell Ms. Moore that she cannot enter her apartment to check on her son without police coming in too. With all other facts the same, alter the officer's estimate about the time it would take to get a warrant. Police tell her that they do not expect to be able to obtain a warrant for three days. One week. One month.

In those circumstances, the State could make the same arguments it makes now: police told her she was free to leave;

she knew she could refuse consent because had repeatedly refused[5]; her mother encouraged her to provide consent.

But the question is not whether she did consent in fact—she did—the question is whether it was "an essentially free and unconstrained choice," not the "product of duress or coercion, express or implied." ***State v. Artic***, 2010 WI 83, ¶ 32, 327 Wis. 2d 392, 786 N.W.2d 430 (quoted source omitted). It was not.

The State stresses that police "never tried to talk her out of refusing". *See, e.g.* (Response at 17). That police did not have a discussion in which they explicitly told Ms. Moore "you should change your mind" does not mean they did pressure her to consent. The record shows they did.

Ms. Moore had just been attacked—her finger broken and hair ripped out. (48:34-35). She called police for help. (48:40). She told police that her four-year-old son was in her apartment alone and scared. (48:36).

Knowing this, police told her she could not go into check on her son without police coming with her. (48:38). Police told her she would be arrested if she tried. (48:38).

[5] The State notes that it can only find "evidence in the record of one request by police and one refusal." (Response at 19). The State asked Ms. Moore on cross-examination: "[Y]ou a few times told the officers that they could not come into your apartment and search, correct?" "Correct." (48:42).

Police also told her she might have to wait several hours for them to obtain a warrant. (48:39).[6]

When she refused, police brought a dog to the scene and conducted a warrantless dog sniff without lawful authority to do so. *See* (48:16). Police told her that the dog alerted, and at first she again still refused consent. (48:16).

While Ms. Moore talked to her mother, Officer Weaver interjected and told her that police would not just walk away and stressed all of the steps involved in them getting a warrant. (48:20-23).

It was only after all of this that Ms. Moore finally gave consent. (48:23,41). The State is correct that Ms. Moore's mother also pressured her, and that her mother is not an agent of the government. But the fact that a third party also exerted pressure does not undo or mitigate the pressure the agents of the government exerted.

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[6] The State asserts that this case is critically different from ***Bumper v. North Carolina*** because there police claimed to have a warrant where here police claimed they would get one. (Response at 16); 391 U.S. 543, 550 (1968). LaFave disagrees:

> In ***Bumper*** the Court found the situation to be "instinct with coercion" when defendant's elderly grandmother was told by police that they had a warrant in hand. Certainly the same would have been true had the police falsely claimed that they could obtain a warrant, for once again the grandmother would simply have submitted to the inevitable.

4 Wayne R. LaFave, Search and Seizure, § 8.2(c) (5th ed. 2012). LaFave posits that the only way this distinction could seemingly matter would be to the "sophisticated suspect" in a situation where police were not preventing him from destroying evidence, because the threat is "less immediate." ***Id.*** Otherwise, he explains, the distinction "is hardly determinative." ***Id.***

Police *knew* she did not want to provide consent and used coercive tactics—including an unlawful warrantless search—to change her mind. Ms. Moore's consent was not voluntary.

III. Even if the Ensuing Consent Was Voluntary, the State Has Failed to Meet Its Burden to Show a Sufficient Break in the Causal Chain Between the Illegality and the Seizure of Evidence. Therefore, All Evidence Seized as a Result of the Consent Search Must Be Suppressed as "Fruit of the Poisonous Tree."

The State asserts that the circuit court implicitly found Ms. Moore's consent to be sufficiently attenuated by concluding that even if the dog sniff was an unconstitutional search, it did not "think that would negate her consent to search". *See* (Response at 24;49:8). Whether the State met its burden based on the lower court's fact findings to prove that the consent was sufficiently attenuated is a question of law this court reviews independently. *See* ***State v. Phillips***, 218 Wis. 2d 180, 194, 204-05, 577 N.W.2d 794.

The State forfeited any argument about attenuation. *See* (Taylor Initial Brief at 24). But even if this Court concludes otherwise, the State cannot show that Ms. Moore's consent was sufficiently attenuated from the illegal dog sniff search. That is because her consent was the direct result of the unlawful dog sniff search.

The Court found Ms. Moore to be a credible witness. (49:4). Ms. Moore testified that she would not have signed the consent form without the dog signaling at her door. (48:41-42).

The State here again acknowledges holes in the record but fails to recognize that they reflect its failure to meet its burden. The State recognizes that "it is not clear how much

time elapsed between the dog's sniff and Moore's consent". (Response at 27). The State also asserts, without citation, that Ms. Moore was "not surprised, frightened, or confused" when she consented. (Response at 29).

With regard to the purpose or flagrancy of the police conduct, the State argues that there "is no evidence in the record to suggest that the officers' use of a drug-sniffing dog was purposeful or flagrant." (Response at 30).

On the contrary: the record does not explain—as the State recognizes—why police did the dog sniff if they already smelled marijuana. (Response at 6). Given that police had the dog perform the sniff, it follows that at least part of their motivation was to determine whether there was indeed marijuana in the apartment. Thus, police had the purpose of extracting incriminating evidence. *See* ***Artic***, 2010 WI 83, ¶ 91. The record suggests they also had the purpose to pressure Ms. Moore to give consent (again—if they already believed they had enough information without the dog sniff, why bring the dog?).

As to flagrancy, the State notes that the "extensive briefing" reflects that the law was unclear as to whether there was "anything amiss with the dog sniff." (Response at 30). But the Fourth Amendment *presumes* warrantless searches are unconstitutional. ***Welsh v. Wisconsin***, 466 U.S. 740, 749 (1984). Given that the law did not establish that police *did* have the authority to conduct the sniff without a warrant, the police were required by the Fourth Amendment to presume it was unconstitutional. ***Jardines*** and ***Whitaker*** were strong added indicators that this warrantless sniff was unconstitutional. Yet, police did it anyway.

The State has not proven that there was a sufficient break in the causal chain between the illegal dog sniff and Ms. Moore's consent.

CONCLUSION

For the reasons and those set forth in his Initial Brief, Mr. Taylor respectfully requests that the court reverse the judgment of conviction and remand to the circuit court with directions that all evidence derived from the search be suppressed.

Dated this 27th day of October, 2017.

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,983 words.

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I hereby certify that:

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This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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Dated this 27th day of October, 2017.

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