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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2017AP000603 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

RYAN L. SCHULTZ,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

ON APPEAL FROM CONVICTION AND
SENTENCE ENTERED ON
JANUARY 27, 2017, IN THE CIRCUIT COURT
FOR FOND DU LAC COUNTY, BRANCH 2,
THE HON. PETER L. GRIMM, PRESIDING

Respectfully submitted,

RYAN L. SCHULTZ,
Defendant-Appellant

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I. THE WARRANT SHOULD NOT HAVE BEEN ISSUED BECAUSE THE AFFIDAVIT DOES NOT ESTABLISH PROBABLE CAUSE.

The State argues that the affidavit does not need to contain elaborate specificity, and the officer is entitled to the support of the usual inferences which reasonable people draw from facts, citing to ***State v. Lopez***, 207 Wis. 2d 413, 425-26, 559 N.W.2d 264 (Ct. App. 1996). That language comes from ***State v. Starke***, and, in full, states:

> The fourth amendment does not deny law enforcement officers the support of the usual inferences which reasonable men draw from evidence, although it requires that such inferences be drawn by a neutral and detached magistrate.

State v. Starke, 81 Wis. 2d 399, 409, 260 N.W.2d 739 (1978), citations omitted.

The facts must, therefore, be presented to the magistrate, as it is the neutral and detached magistrate who draws the inferences. There is no requirement that the affidavit's language be hypertechnical. The affidavit should be reviewed in a commonsense manner. ***Id***. at 410. However, recitation of the underlying factual circumstances in the affidavit is *essential* if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police. ***Id.*** The facts included in the affidavit prepared

by Deputy Halfmann are entitled to the fair inferences the magistrate could draw from those facts. However, Deputy Halfmann cannot merely present the inferences she has drawn, without facts supporting those inferences, and ask a magistrate to be a rubber stamp. All facts supporting probable cause must be found within the four corners of the affidavit. ***State v. Haugen***, 52 Wis. 2d 791, 793, 191 N.W.2d 12 (1971).

The State notes that the defense cited the case of ***State ex rel. Evanow v. Seraphim***, 40 Wis. 2d 223, 230, 161 N.W.2d 369 (1968), which involves a review of the sufficiency of a criminal complaint and not an affidavit for a warrant. But that case also directly ties the standard for review of the sufficiency of the complaint to the standard for review of an affidavit when it states that while federal court procedures require supporting affidavits, Wisconsin statutes allow a written complaint to set forth the grounds for probable cause. ***Id.*** at 226. The standard for both the sufficiency of a criminal complaint and the sufficiency of an affidavit is described in that case: "[T]here must be facts in the written complaint which are themselves sufficient or give rise to reasonable inferences which are sufficient to establish probable cause." ***Id.*** Once again, hypertechnical detail is not required, but the question is whether the

facts essential to the finding of probable cause have been provided to the magistrate.

For example, precision in establishing the time of driving is not required. But how can a magistrate draw a reasonable inference that Schultz was impaired while operating his motor vehicle if there are no facts recited which establish the time that he drove or the time that he drank alcohol? How can a magistrate draw a reasonable inference that Schultz's injuries are consistent with being the driver of a vehicle when those injuries are not described in any way, nor is the nature of the accident described? The affidavit must contain facts which allow a neutral and detached magistrate to draw those reasonable inferences. This affidavit does not contain such facts.

Here, the deputy did not provide a sufficient basis for the magistrate to form his own conclusions based upon consideration of the known facts and common-sense probabilities. There were no facts linking the accident that occurred with the type of injuries Schultz had. There were no facts containing the time of consumption of alcohol, the amount of alcohol consumed before or after the accident, the time of the accident, and the time of the observed impairment. Consequently, the affidavit was not sufficient. ***State v. Ward***, 2000 WI 3, ¶ 26, 231 Wis. 2d 723, 604 N.W. 2d 517.

II. IF MATERIAL FACTS WERE INCLUDED IN THE AFFIDAVIT THE MAGISTRATE WOULD NOT HAVE ISSUED THE WARRANT.

The State agrees that the deputy omitted many facts from the affidavit but argues that some of those facts would have strengthened the probable cause showing. However, the State agrees that at least some of the omitted facts are "helpful to him." (Respondent's Br. 12) The State then argues for the facts it thinks *could* have been included to help the State. The real issue is that so many facts were omitted from the affidavit that the magistrate had no ability to make a neutral and detached determination of whether there was probable cause to issue the warrant.

Many of the facts the State cites as helpful cut both ways – for example, the truck is not registered to Ryan Schultz but to his wife, Sonia. Sonia was also present at the house that night, and she answered the door when the deputy knocked. The home address was close to the location of the accident. Earlier in the day – time not provided – the deputy saw the vehicle at a business which includes a gas station and tavern. Similarly, the deputy indicates Schultz still appeared cold, although if the time periods later established were accurate, he arrived home about two a.m., which was more than an hour and half before the deputy had contact with him. Even if the

description of the physical observations was provided in the affidavit (scratch on his nose with puffiness on the right side of his head, and abrasion on his lower back) *and* the description of the accident had been provided, there is still no argument by the State as to how those injuries are consistent with a person who has been in a roll-over accident. There is information that the family of Ryan Schultz believes he does not drink at home. However, neither Sonia nor R.S. were present with Ryan for the entirety of the lengthy period he was home before the deputy arrived.

The omissions were such that they concealed the real circumstances surrounding the accident and Schultz's arrest. If a complete recitation of actual facts had been presented to the magistrate, the warrant would not have been issued. Where critical omitted facts would have led a neutral and detached magistrate to find there was not probable cause to issue the warrant, the evidence obtained must be suppressed. ***State v. Mann***, 123 Wis. 2d 375, 385-86, 367 N.W.2d 209 (1985).

Although the defense has picked out at least nine instances of critical omissions of Deputy Halfmann, the State has identified even more. (Respondent's Br. 12-14) Had the affidavit included the nature of the accident and the nature of the injuries, it would have called

into question the inference that the injuries were consistent with having been the driver involved in the accident. If the affidavit included the information that Schultz was contacted much later after he was at home in bed, it would have called into question the deputy's inference that he was the driver, that the time of the accident was known, and that he had been impaired when driving.

In a case like this where the only information provided to the magistrate in support of the warrant is the affidavit, the validity of the warrant rests entirely upon the strength of that affidavit. ***United States v. Peck***, 317 F. 3d 754, 755-56 (7th Cir. 2003). Where so many of the critical facts are omitted from the affidavit that a clear picture of the circumstances is not given to the magistrate, the warrant cannot stand.

III. THE DEPUTY CANNOT RELY IN GOOD FAITH ON A WARRANT THAT IS DEFICIENT BECAUSE OF THAT DEPUTY'S OWN OMISSIONS ON THE AFFIDAVIT.

The State argues that even if this Court finds that either Deputy Halfmann did not provide sufficient facts to support probable cause and/or the deputy omitted critical facts in the affidavit, she is still entitled to rely in good faith upon the warrant. That requires the State to argue that this particular deputy has been trained and is knowledgeable about the requirements of probable cause, is trained

in investigating suspected operating while intoxicated cases, and completed a sufficient investigation here. However, the deputy also failed to provide sufficient facts in the affidavit to the magistrate on those and other issues. Because the exclusionary rule is designed to deter unreasonable police action, the exclusion of evidence may not be appropriate when an officer acts in objectively reasonable reliance on a search warrant. ***State v. Eason***, 2001 WI 98, ¶ 27, 245 Wis. 2d 206, 629 N.W. 2d 625. But here, Deputy Halfmann knew that she had omitted information that would have tended to negate probable cause from the warrant application. In other words, she knew that she had more information about the facts of the case than the warrant-issuing magistrate. It therefore cannot be said that it was objectively reasonable for her to defer to the decision of the magistrate that she herself had misinformed.

The deputy omitted critical information from the affidavit and should not be allowed to simply ignore that and continue as if she had provided proper information to the magistrate. Where a deputy has omitted information from an affidavit such that it is insufficient to establish probable cause, that same deputy is not entitled to also reasonably rely upon the warrant. Because the deputy's conduct was

not objectively reasonable, the exclusionary rule should be applied. ***Id.*** ¶ 32.

CONCLUSION

For the reasons stated in this Reply and in defendant's original Brief, the judgment of the trial court should be reversed, and this action be remanded to that court with directions that the court grant the defendant-appellant's motion to suppress.

Dated at Madison, Wisconsin, _____, 2017.

Respectfully submitted,

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CERTIFICATION

I certify that this reply brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

Proportional serif font: Min. printing resolution of 200 dots per inch, 13-point body text, 11 points for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2018 words.

I further certify that the text of the electronic copy of the reply brief is identical to the text of the paper copy of the reply brief.

Dated: October 26, 2017.

Signed,

_____

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