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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2017AP001104-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROY S. ANDERSON,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District II, Affirming a Judgment of Conviction Entered in the Racine County Circuit Court, the Honorable Michael J. Piontek Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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ARGUMENT

I. The warrantless search of Mr. Anderson was illegal because Officer Seeger did not have sufficient knowledge that he was subject to Act 79.

A. This Court should hold that officers must know someone is subject to Act 79 before searching them pursuant to the Act.

Mr. Anderson asserts that before Officer Seeger could undertake a warrantless search pursuant to Act 79, he was required to know that the person he was searching was subject to the reduced search requirements of the Act. In support of this proposition, Mr. Anderson cited a number of cases from other states that addressed what level of knowledge an officer must have when engaging in a warrantless search of a person on probation or parole. (Mr. Anderson's Br. at 13-16).

In response, the State argues that most of those cases are not helpful because they involve situations in which officers had no awareness of the defendant's supervision status before the warrantless search and only discovered it later and attempted to use it to uphold the otherwise illegal search. (State's Response Br. at 16, 17 n.9).[1] The State is correct that most of

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[1] The State also cites to *People v. Douglas*, 193 Cal. Rptr. 3d 79 (Cal. Ct. App. 2015) in support of its argument. (continued)

the cases cited involved officers who had no knowledge of the defendant's supervision status before the search.

However, these cases are still helpful for their analysis of when police may search a person on supervision subject to a reduced search standard. The cases are instructive because they all use the same language: officers must *know* the person they are searching is on supervision and subject to a reduced search requirement as a result.

Regardless of the fact that the officers in those cases had no knowledge as to the respective defendants' supervision status, when discussing what amount of evidence would have been sufficient to uphold the searches, each court held that officers must know, not merely suspect, that the person is on supervision and subject to a reduced search requirement.

Furthermore, the most factually similar case cited by Mr. Anderson on this point is *United States v. Williams*, 702 F.Supp.2d 1021 (N.D. Ill. 2010). In

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Douglas is distinguishable. The officer in that case regularly monitored people on supervision and he had checked and knew that the defendant was on PRCS, which automatically subjected him to a reduced search standard. *Id.* at 83, 89. Additionally, evidence admitted at the hearing showed that the defendant had been convicted of the previous felony for which the officer arrested him. *Id.* at 93-94 n.9. In this case there is no evidence that Officer Seeger knew that Mr. Anderson was convicted of the 2012 felony offense.

that case, the officers conducted a warrantless search of the defendant's residence. *Id.* at 1025. At least one officer knew that the defendant was on parole. *Id.* at 1024. However, the record was devoid of evidence that the officer knew that the defendant's parole subjected him to a reduced search requirement. *Id.* at 1031. Even though a reduced search condition is *mandatory* as part of parole under Illinois law, the federal district court held that simply knowing the defendant was on parole was not enough. *Id.* The officer was also required to know that the defendant's specific parole agreement contained a reduced search requirement. *Id.*

To this the State counters that the law in Illinois is different from Act 79. True, but the point is the same: officers must know all the facts necessary to justify a warrantless search before conducting that search.

At one point in its brief, the State seemingly concedes that Officer Seeger had to know Mr. Anderson was subject to Act 79 to justify the search when it argues "Officer Seeger only needed to *know* that Anderson was on parole, probation or extended supervision for a felony and that the period of supervision commenced after the Act's effective date in December 2013." (State's Response Br. at 16)(emphasis added). Mr. Anderson agrees with that assertion; Officer Seeger did need to know that information before searching Mr. Anderson pursuant to Act 79. However, despite the State's arguments to

the contrary, Officer Seeger did not know that information prior to his search of Mr. Anderson.

Officer Seeger only knew that Mr. Anderson was arrested for possession with intent to deliver cocaine in 2012 and that he was "released on probation" on March 17, 2015. (24:18-19). This is not enough to justify searching Mr. Anderson pursuant to Act 79 because Officer Seeger did not testify that he knew Mr. Anderson was convicted of possession with intent to deliver cocaine or what his sentence was if he was convicted. Furthermore, Officer Seeger did not testify that he knew for what offense Mr. Anderson was placed on probation in March of 2015. If Mr. Anderson had been on probation for a misdemeanor offense not covered by Act 79, or if his probation had ended before August of 2015, then he obviously would not be subject to the reduced search requirements of Act 79.

This case is thus similar to *Williams*, where the officer knew the defendant was on parole in a state where searches are a mandatory condition of parole but did not specifically know that the defendant's parole agreement contained such a condition. Officer Seeger knew that Mr. Anderson was on probation but did not know that his probation subjected him to the reduced search requirements of Act 79.

The State argues Officer Seeger also knew that Mr. Anderson was on probation for a felony. (State's Response Br. at 13, 14 n.8, 15). However, the evidence does not support that finding. In support of

this claim, the State cites a single, nonsensical sentence in the transcript: "I did a record check of him and knew that he felony under Act 79." (24:19). The construction of this sentence makes no sense and thus does not support any rational conclusion as to its meaning.

The first clause of the sentence, "I did a record check" at least makes sense. However, it is not enough to establish that the officer had the requisite knowledge of Mr. Anderson's status. Whatever "record check" Officer Seeger conducted was insufficient given the fact that he testified that Mr. Anderson was on probation. A thorough record check would have revealed that Mr. Anderson was on extended supervision.

The remaining nonsensical clause adds nothing. In order for this sentence to carry the meaning the State argues for, an entire phrase would have to be added: "I did a record check of him and knew that [he was on supervision for a] felony under Act 79." It is hard to imagine that Officer Seeger spoke the words as they appear in the transcript, but it is equally hard to imagine that the entire clause that would make this sentence have the meaning that the State wishes it to would be omitted. In the end, the evidence is insufficient to establish that Officer Seeger knew Mr. Anderson was on probation for a felony.

B. Even if this Court concludes that officers only need to reasonably believe that someone is subject to Act 79 before searching them, what Officer Seeger knew does not satisfy that standard either.

Despite seemingly conceding that Officer Seeger had to know that Mr. Anderson was on parole, extended supervision, or probation for a felony, the State also argues that an officer need only have a reasonable belief that someone is subject to Act 79 before conducting a search pursuant to the Act. (State's Response Br. at 11).

In support of this argument, the State cites *Illinois v. Rodriguez*, 497 U.S. 177 (1990), *State v. Kassube*, 2003 WI App 64, 260 Wis. 2d 876, 659 N.W.2d 499 and *State v. Tomlinson*, 2002 WI 91, 254 Wis. 2d 502, 648 N.W.2d 367. These cases do not support the State's position.

The issue confronting the courts in *Rodriguez* and *Tomlinson* was whether it was consistent with the Fourth Amendment for officers to enter and search a defendant's residence based on the consent of a third party where it turned out that the person did not have authority to give that consent. *Rodriguez* at 180; *Tomlinson* at ¶ 27. Both courts concluded that as long as the officers reasonably believed that the third party giving consent to enter had the authority to do so, then the entry was justified. *Rodriguez* at 188; *Tomlinson* at ¶ 28.

These cases are not helpful because the matter to be determined, whether or not someone can consent to entry of a residence, is very different from the matter to be determined in this case, whether someone is subject to Act 79. The issue in *Rodriguez* and *Tomlinson*, just like the issues presented in cases where police stop someone or search them based on reasonable suspicion or probable cause, present factually difficult and naturally ambiguous questions that are not easily resolved by readily available information. For example, if an officer sees someone peering in a jewelry store window and then walking to the end of the block and conferring with another person, after which the other person does the same thing, as in *Terry v. Ohio*, 392 U.S. 1, 6 (1968), there is no database that the officer has ready access to that can confirm the two men are preparing to commit a crime. In that situation, an officer can act on this ambiguous situation based on a reasonable suspicion.

In this case, when Officer Seeger confronted Mr. Anderson, he was either subject to Act 79 or he was not. There was nothing ambiguous about this question confronting Officer Seeger. The answer to this question was readily available. Therefore, there is no need to resort to a reasonable belief standard because whether or not someone is subject to Act 79 is an easily verifiable fact that officers can contemporaneously check just before a search.

Kassube is not helpful to the State because that case dealt with a simple traffic stop of a motorist

based on the belief of an officer that the motorist did not have a driver's license. *Id.*, ¶ 2. The temporary detention of a motorist to check their license status is far less invasive than a full-blown search of someone's person and thus there should be a higher standard here.

However, even if this Court concludes that an officer's reasonable belief that someone is subject to Act 79 is enough to justify a search pursuant to that Act, the evidence here still does not support such a reasonable belief. As noted above, the only facts that Officer Seeger knew were that Mr. Anderson was arrested in 2012 for a felony drug offense and that in March of 2015 he was released on probation. Therefore, because some people on probation are not subject to Act 79, these two facts do not support a reasonable belief that Mr. Anderson was subject to Act 79.

II. The Act 79 search in this case was not justified because Officer Seeger did not have reasonable suspicion that Mr. Anderson was committing, was about to commit, or had committed a crime.

The facts relevant to reasonable suspicion in this case can be placed into one of two categories: (1) the information in the alleged tip that Officer Seeger received from a confidential informant, and (2) Officer Seeger's observations of Mr. Anderson on the day of the stop and search.

Perhaps recognizing how thin their case for reasonable suspicion is based solely on Officer Seeger's observations, the State goes to great lengths to argue that the tips may be considered as part of the reasonable suspicion analysis. The State is wrong.

The only evidence as to the source of the alleged tips was Officer Seeger's testimony that he received the tips from a "reliable and credible confidential informant." (24:10). This represents a bald and conclusory statement and it is not sufficient to establish the fact that the alleged informer was in fact reliable or credible.

With absolutely no support, the State insists that such conclusory information is enough to establish an informer's credibility. (State's Response Br. at 21, 24). The law stands in opposition to this argument. *State v. Mansfield*, 55 Wis. 2d 274, 279-280, 198 N.W.2d 634 (1972)("the mere naming of the informant or the bald conclusory statement that he is reliable is not sufficient to establish reliability" in an affidavit for a search warrant).[2] *See also State v.*

[2] The State argues that *Mansfield* is inapposite because it concerns probable cause standards for search warrant affidavits. (State's Response Br. at 24 n.11). This makes no difference. Courts must be given underlying information about the source of a tip in order to assess the reasonableness of an officer's assertion that the information is reliable. This applies equally to all cases where information from an informant is used to justify police action.

Kolk, 2006 WI App 261, ¶ 13, 298 Wis. 2d 99, 726 N.W.2d 337 ("there must be some type of evaluation of the reliability of victim and witness informants" and "the reliability of such a person should be evaluated from the nature of his report, his opportunity to hear and see the matters reported, and the extent to which it can be verified by independent police investigation"); *State v. Rutzinski*, 2001 WI 22, ¶ 18, 241 Wis. 2d 729, 623 N.W.2d 516 ("Tips should exhibit reasonable indicia of reliability. In assessing the reliability of a tip, due weight must be given to: (1) the informant's veracity; and (2) the informant's basis of knowledge").

In *State v. Hogan*, 2015 WI 76, ¶ 9, 364 Wis. 2d 167, 868 N.W.2d 124, this Court had the opportunity to consider whether police had reasonable suspicion to extend a vehicle stop beyond its initial scope. The evidence included the conclusory testimony from the arresting officer that another officer told him that he had received tips that the defendant was a meth cook. *Id.*, ¶ 16. This Court ultimately concluded that the officer did not have reasonable suspicion to extend the stop. *Id.*, ¶ 53. In doing so this Court stated:

> Ultimately, however, when a court is asked to rule on a suppression motion, *the court must evaluate* whether the information conveyed by a fellow officer, and relied upon in taking the action under review, was reliable information, because the officer conveying the information had either *firsthand knowledge* or a *reliable* informant. No effort was made in this case to

> show that [the other officer's] tips came from a reliable informant.

Id., ¶ 51 (emphasis added). This Court also noted that "the State's failure to tie up loose ends in the circuit court should not be rewarded." *Id.*, ¶ 53.

This case presents a similar situation. There is no information in the record to allow the Court to make a meaningful assessment of the informant's tip. As the *Kolk* Court noted:

> The tip here might have been based on first-hand knowledge, but it might also have been the product of rumor or speculation. We do not know, either because the informant did not tell police or because the police did not tell the circuit court.

Id., ¶ 15. A tip with no evidence upon which the Court may assess the informant's veracity and also gives no indication of the informant's basis of knowledge was not enough in *Kolk* and it is not enough in this case.[3]

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[3] The State argues that this case is different from *Kolk* because Officer Seeger had past experience with the informant in this case. (State's Response Br. at 23-24). However, there is no evidence of that fact in the record. He did not give any testimony about prior instances when he verified this informant's information was credible. In fact, at one point Officer Seeger stated that the confidential informant in this case was a "new confidential informant," indicating that Officer Seeger may never have worked with this informant in the past. (24:18).

Once the informant tips are properly removed from the equation for the reasons noted above and in Mr. Anderson's brief-in-chief, all that is left are Officer Seeger's observations of Mr. Anderson on the day of the stop and search. Those observations, even when coupled with Officer Seeger's knowledge of Mr. Anderson's prior drug history, do not amount to reasonable suspicion.

Those observations were that Mr. Anderson noticed the officers when they arrived in the area. (24:7). Mr. Anderson was riding his bicycle and he made a single turn to go down an alley but did not increase his speed or attempt to run. (24:13). He looked over his shoulder at the officers a few times. (24:7). He put his hand in his pocket but did not try to drop anything. (24:13-14). He stopped immediately when the police told him to. (24:13). This is insufficient to establish reasonable suspicion even when combined with the fact that Mr. Anderson was in an area known for drug crime and he had a previous history of drug sales.

As Mr. Anderson argued in his brief-in-chief, this case is very similar to *State v. Gordon*, 2014 WI App 44, 353 Wis.2d 468, 846 N.W.2d 483, in which the Court of Appeals held police did not have reasonable suspicion where (1) they saw the defendant walking with two friends in a high crime area with a lot of gun violence including a recent shooting, (2) the defendant recognized police and looked nervous and (3) the defendant touched his

pocket, indicating to officers that he may have a gun. *Id.*, ¶¶ 3-4, 14.

The combination of being in a high crime area, recognizing and reacting poorly to police presence and then moving a hand to a pocket was not enough in *Gordon* and it is not enough in this case.

CONCLUSION

Mr. Anderson respectfully requests that this Court reverse the decisions of the Court of Appeals and the circuit court, vacate Mr. Anderson's conviction, and remand with instructions to suppress any evidence obtained pursuant to the unlawful search in this case.

Dated this 17th day of July, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,996 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 17th day of July, 2019.

Signed:

_____

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Assistant State Public Defender