STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2018 AP 000770-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ERIC BURROWS,

Defendant- Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED ON FEBRUARY 27, 2018, IN THE CIRCUIT COURT OF SHEBOYGAN COUNTY
The Honorable Edward Stengel, Presiding
Trial Court Case No. 2016 CF 535

Respectfully submitted:

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Argument

I. THE "TEMPORARY WARRANT" ISSUED BY SHEBOYGAN POLICE TO ORCHESTRATE THE ARREST OF BURROWS, WITHOUT ANY INTENTION OF EVER SEEKING A JUDICIALLY ISSUED ARREST WARRANT, UNLAWFULLY VIOLATED THE SEPARATION OF POWERS DOCTRINE.

As Burrows has noted, the "temporary warrant" is a construct largely unknown to Wisconsin law. Burrows found just one published case referencing it. *State v. Allen,* 2010 WI 89, 328 Wis. 2d 1, 786 N.W.2d 124. The State has now cited another – *State v. Collins,* 122 Wis. 2d 320, 363 N.W.2d 229 (Ct. App. 1984) – where the construct was referenced as a "temporary *want.*" *Collins* did not examine the propriety of a temporary "want" or warrant, however, but merely referenced it. The context in *Collins* was that a temporary warrant for an alleged burglary had been entered into the system while law enforcement then pursued and obtained an actual warrant. In a footnote, *Collins* provided its understanding of the concept:

> A "temporary felony want" or "temporary warrant" meant that the suspect was alleged to have committed a felony and should be apprehended promptly, and that there was information sufficient to support an arrest warrant, but that no arrest warrant had yet been issued.

Id. at fn 1. This confirms that a temporary warrant is just that: **temporary,** while police actively seek a judicially issued arrest warrant. In *Collins,* the police had possession of a judicial warrant by the following morning. *Id.* at 322-23.

Here, by contrast, no effort was made to get an arrest warrant, and the record reveals the temporary warrant was never meant to be "temporary." Instead, it was always meant to be *the only* warrant via which Burrows would be arrested. There was both plenty of time and opportunity to seek a judicially issued arrest warrant, but no desire to do so, because

an administratively issued temporary warrant and a judicially issued arrest warrant were viewed as functional equivalents.

Indeed, it appears Detective Clark may actually have met with the district attorney the day before Burrows was arrested to discuss getting an arrest warrant, whereupon it was decided to just go with the temporary warrant. When the circuit court asked Detective Clark what efforts had been made to get an arrest warrant, he replied:

> Well, we thought about it . . . I'm trying to think if I might have even talked to the DA about getting an arrest warrant, and it was decided we would go with probable cause. . . . So specifically we talked. I know we had conversations about [an arrest] warrant the night before, and we went with the temporary felony warrant . . . .

(R191-40). Whether this meeting occurred is not entirely clear, but either way, Detective Clark's testimony about it betrays his belief and intent: since he had issued a temporary warrant, there was no need to ask a judge to issue an arrest warrant.

As Burrows developed in his brief-in-chief, whatever may be appropriate generally with regard to temporary warrants, the specific manner in which the temporary warrant was regarded and used in this case violated the separation of powers doctrine. *Johnson v. United States,* 333 U.S. 10, 14 (1948); *Coolidge v. New Hampshire,* 403 U.S. 443 (1971); *Shadwick v. City of Tampa,* 407 U.S. 345 (1972); *Lo–Ji Sales, Inc. v. New York,* 442 U.S. 319 (1979). In response to this proposition the State says . . . nothing! It fails to address the legality of the specific temporary warrant in this case and simply ignores the separation of powers doctrine.#The State therefore cannot complain if this Court elects to take that proposition as confessed. *Charolais Breeding Ranches v. FPC Securities*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).[1]

[1] The State does not identify any exigency that would have justified the calculated decision to eschew any efforts to get an arrest warrant, and the amount of time police waited to arrest Burrows is *ipso facto* proof that no such exigency existed.

II. THE ARREST OF BURROWS WAS UNLAWFUL BECAUSE EITHER IT WAS AN EXTRA-JURISDICTIONAL ACT, OR THE ARRESTING AGENCY DID NOT HAVE INFORMATION ESTABLISHING PROBABLE CAUSE FOR THE ARREST.

Rather than address the legality of the temporary warrant in this case, the State, without citation to any authority, obliquely justifies the propriety of a temporary warrant generally as a natural outgrowth of the collective knowledge doctrine. (State's Brief, p. 17). It begins this endeavor by citing *State v. Pickens*, 2010 WI App 5, 323 Wis. 2d 226, 779 N.W.2d 1, which is curious, because *Pickens* did not involve a warrant of any kind, but rather, reasonable suspicion to detain. This is not to say *Pickens* has no place in this appeal. It did, after all, discuss the concept of collective knowledge. *Pickens,* however, says nothing about temporary warrants or the separation of powers doctrine and accordingly, the State's use of it in that context is misplaced.

Burrows will address *Pickens* in its proper context, which is whether Manitowoc law enforcement officials could properly arrest Burrows when they possessed none of the facts upon which the arrest was based. In *Pickens,* police investigating a hotel room suspected of having been fraudulently acquired uncovered additional facts suggesting illegal drug activity. A police officer found Pickens sleeping in a car in the hotel parking lot and recognized him as someone other officers in his department suspected of having been involved in a shooting, based on a flier in the police briefing area. After questioning Pickens for a short time, the officer handcuffed and temporarily secured him in the back of a squad car while continuing the investigation.

At a hearing to address the legality of that detention, the State sought to justify such an intrusive detention by arguing the shooting information gave rise to reasonable suspicion Pickens was dangerous. The appellate court thus framed the issue as follows:

> At the time police detained Pickens, they knew that he was suspected by other officers of being

> involved in a shooting on a prior occasion, but there was no testimony at the suppression hearing about facts supporting that suspicion. The parties dispute whether we may consider the officers' knowledge of the bare fact that Pickens was suspected by other officers of being involved in a prior shooting.

Id. at ¶¶ 8-9. *Pickens* held it was not enough for the officer to simply say his actions were justified merely because another officer had information to authorize them. In this context, at least, such a bald assertion will not suffice, which only supports Burrows' position in this case.

The State also cites *State v. Rissley*, 2012 WI App 112, 344 Wis. 2d 422, 824 N.W.2d 853, for the proposition that under the collective knowledge doctrine, "the police force is considered as a unit, and where there is police-channel communication to the arresting officer, the arrest is based on probable cause when such facts exist **within the police department**." (State' Brief, p. 17) (emphasis added), *citing id.* at ¶ 19. Burrows does not disagree with this proposition, the operative language being that *departmental* knowledge must be *communicated* to the officer via police-channel communication. It bears repeating that here, not one fact possessed by Sheboygan police was ever communicated to Manitowoc officials. The State concedes that point.

It must also be noted that *Rissley*, as revealed by the above-emphasized language, examined *intra*departmental knowledge, not *inter*departmental projection of such knowledge out to other law enforcement departments. The State never addresses this distinction, perhaps because it recognizes such a discussion would unearth the absurd consequences of the application it desires. The State's argument, if accepted and taken to its logical conclusion, would collect *all* information possessed by *all* law enforcement departments at *all* levels of state and federal government, and then use that vast pool of information to determine whether a

particular police action might be justified, including *post hoc* sanitizations of otherwise bad arrests.[2]

The State does not dispute that Sheboygan police were without jurisdictional authority to act in Manitowoc County. Instead, it tries to position the Sheboygan police as not really acting. This despite the fact Sheboygan police unilaterally issued a temporary warrant, traveled into Manitowoc County to surveil Burrows, trailed him as he left work, called Manitowoc law enforcement to notify them of Burrows' location and direction of travel, instructed Manitowoc sheriff's deputies to stop and arrest Burrows, and then took custody of him, whereupon they proceeded to search his vehicle. They did absolutely everything except arrest Burrows, and even that lone act was accomplished at their direction under the guise of the temporary warrant they generated.

In the end, the State attempts to dodge the import of *State v. Friday*, 140 Wis. 2d 701, 412 N.W.2d 540 (Ct. App. 1987),[3] by arguing that here Sheboygan police communicated to Manitowoc officials that they should arrest him. This does not constitute communication of knowledge. This involves communication of a directive. It is for this reason the State also avoids any meaningful discussion of *State v. Black*, 2000 WI App 175, 238 Wis. 2d 203, 617 N.W.2d 210. *Black* is problematic for the State because in that case this Court stated:

> [W]here there is a "police-channel communication to an arresting officer who acts in good faith on the information, the arrest is valid if probable cause is demonstrated by the **facts** held by the department **which were summarized in police dispatches**. In both these

[2] The State also justifies the issuance of a temporary warrant as a historical tradition by pointing to the "Wanted" posters of the Old West. (State's Brief, p. 18). To the extent the State believes that certain principles of our modern criminal justice system can be sanctioned because they were employed in the Wild West, the State should recall that many of those posters read "Wanted: Dead or Alive."

[3] The State correctly points out that Burrows cited the Wisconsin supreme court case that overruled, on other grounds, this Court's decision in *Friday,* which is the case (i.e., *this* Court's case) Burrows meant to cite. Here Burrows provides the correct case cite.

> cases, the collective police **information** was communicated to the arresting officer prior to the arrest. In the present case, the information was not given to the officer. We therefore conclude that in order for the collective-information rule to apply, **such information must actually be passed to the officer** before he or she makes an arrest or conducts a search. This conclusion is supported by *State v. Friday*, . . . where we held that collective police **data** cannot support an officer's search when the **data** is not in fact communicated to the officer prior to the time the search is made.

Black, 238 Wis. 2d 203, ¶ 17, n.4.

Thus, as can be seen, "information" or "data" must be communicated, not a bald directive to arrest an individual. The problem *Black* had with the State's attempt to use the collective knowledge doctrine in that case is the same problem with the State's attempt to use it here. In *Black,* two officers instructed a third to obtain information from a particular individual, but provided no details. *Id.* at 212. Similarly, Sheboygan police instructed Manitowoc officials to arrest Burrows, but provided no details. Application of the collective *knowledge* doctrine must be based on communicated *knowledge.* Here, there was nothing "collective" about the factual basis for Burrows' arrest. This was simply one law enforcement agency directing another to act, on nothing more than faith, as its surrogate. That it did so in the absence of witnessing any felony or serious misdemeanor affecting a breach of the peace makes it all the more egregious. *State v. Barrett,* 96 Wis. 2d 174, 181, 291 N.W.2d 498 (1980); *City of Waukesha v. Gorz*, 166 Wis. 2d 243, 246–49, 479 N.W.2d 221 (Ct. App. 1991).

III. THE SEARCH OF BURROWS' VEHICLE FOLLOWING HIS ARREST BY SHEBOYGAN POLICE OFFICALS WAS UNLAWFUL.

Even assuming, *arguendo,* that the arrest of Burrows by Manitowoc sheriff's deputies at the direction of Sheboygan police can be sanitized because technically, it was not Sheboygan police who slapped on the cuffs, what about the

vehicle search subsequently conducted by Sheboygan police, and Sheboygan police alone? What jurisdictional authority did the Sheboygan police have to conduct a search of Burrows' vehicle in Manitowoc County? The State desperately seeks to avoid an examination of this issue and to that end, argues it has been waived. (State's Brief, p. 23). To bolster its waiver argument, it tries to position the issue as requiring the resolution of factual issues. (*Id.*).

There is not, however, a single factual issue that needs to be resolved for this Court to address this issue. The record is entirely unambiguous that Sheboygan police, specifically Detective Clark, alone conducted the search of Burrows' vehicle. What remains, then, is purely a legal issue, constitutional in nature, that both parties have had an adequate opportunity to address. The waiver rule is one of judicial administration, and it does not affect this Court's power to deal with an issue, *State v. Kruzycki*, 192 Wis. 2d 509, 517, 531 N.W.2d 429 (Ct. App. 1995), particularly an error of constitutional dimension. *See, e.g, State v. Johnson*, 60 Wis. 2d 334, 343, 210 N.W.2d 735, 740 (1973).[4]

Finally, Burrows posits that Sheboygan police did not have probable cause to arrest him, even if such could be blindly imputed to Manitowoc officials, or probable cause to obtain the subsequent search warrants, or any reasonable basis to believe his vehicle contained relevant evidence. *See*, *e.g., Atwater v. Lago Vista,* 532 U.S. 318, 324 (2001); *Knowles v. Iowa,* 525 U.S. 113, 118 (1998). The arrest, in particular, must be scrutinized in light of the elements of stalking: (1) intentionally course of conduct; (2) that would have caused a reasonable person to suffer serious emotional distress, to fear bodily injury or death to herself or member of her family household; (3) which did cause serious emotional distress, inducing fear of bodily injury or death; and (4) the defendant knew or should have known that at least one of the acts constituting the course

[4] Burrows did argue in the circuit court that the burden is always on the State to establish the legality of a warrantless search. (R191-14). Burrows also noted that a police officer acting outside his or her jurisdiction does not act in his or her official capacity. (R47-14-15), *citing State v. Slawek*, 114 Wis. 2d 332, 338 N.W.2d 120 (Ct. App. 1983). The vehicle search also violated section 968.11, Stats., even if not the Constitution, because it was not a search in an area within Burrows' "immediate presence."

of conduct would cause the target to suffer serious emotional distress. Section 940.32, Stats.

What was missing here was "a course of conduct." The information available to the police, at best, pointed to Burrows' possible involvement in a single act: the delivery of the non-poisonous snake to E.W.'s apartment complex. All the other alleged acts, both in substance and delivery, and in the estimation of the investigating officer, were the work of an unknown female. A single act cannot constitute a "course of conduct."

The applications for the search warrants also fell short in this case. An essential element of the offense of stalking was that Burrows' acts caused E.W. to suffer serious emotional distress or induced fear in her of bodily injury or death, whether her own or that of a member of her family or household. "Suffer serious emotional distress" is further defined as "feel[ing] terrified, intimidated, threatened, harassed, or tormented." Section 940.32(1)(d). Nowhere in the affidavits in support of the search warrants, however, were such facts ever alleged or stated. Moreover, as previously noted, what *was* alleged suffered from "reliability" problems as the affidavits reference threatening phone calls and letters from a *female,* not Burrows. The missing element of the alleged offense, coupled with the reliability issues, means probable cause was not contained within the four corners of the search warrant and affidavit. *State v. Eason*, 2001 WI 98, ¶ 11, 245 Wis. 2d 206, 629 N.W.2d 625

Finally, the crime for which Burrows was arrested was alleged "stalking," and not the kind of stalking that might be conducted with a vehicle. Nor was he arrested for drug trafficking, for example, or for possession of a firearm or other contraband, despite the circuit court's strained efforts to analogize stalking to drug dealing. (R191-58-59). The idea that a search of Burrows' vehicle would yield evidence of stalking is unpersuasive. *Arizona v. Gant*, 556 U.S. 332, 343 (2009). The evidence relevant to the stalking crime against E.W. consisted of letters, voicemails from a blocked number, and a snake, all of which were already held by the Sheboygan police at the time of Burrows' arrest. No evidence suggested the perpetrator had used a vehicle to stalk E.W., and the evidence,

as already noted, pointed to a *female* perpetrator and *not* Burrows. When viewed from the standpoint of police at the time of arrest, there was no reasonable basis to believe a search of Burrows' vehicle would turn up evidence of stalking.

Conclusion and Relief Requested

For all the foregoing reasons, Burrows respectfully requests this Court vacate his convictions and sentences, and remand with directions that the circuit court suppress the evidence obtained as a result of Burrows' arrest, and the subsequent searches.

Dated this 12th day of October, 2018.

/s/ Rex Anderegg
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CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, minimum 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,882 words, as counted by Microsoft Word 2016.

Dated this 12th day of October, 2018.

/s/ Rex Anderegg
REX R. ANDEREGG

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that I have submitted an electronic copy of the appellant's reply brief in *State of Wisconsin v. Eric Burrows,* 2018 AP 000770-CR, which complies with the requirements of s. 809.19 (12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of 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 12th day of October, 2018.

/s/ Rex Anderegg
Rex Anderegg