STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2018AP000826-CR & 2018AP000827-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SIMON E. JENINGA,

Defendant-Appellant.

On Appeal from Judgments of Conviction and
an Order Denying Postconviction Relief,
Entered in the Walworth County Circuit Court,
the Honorable David M. Reddy Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

COLLEEN MARION
Assistant State Public Defender
State Bar No. 1089028

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 264-5176
marionc@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

United States Constitution

Wisconsin Statutes

ARGUMENT

Mr. Jeninga Was Denied His Sixth Amendment Right To Effective Representation Of Counsel When Counsel Failed To File A Motion To Suppress Evidence Obtained Pursuant To A Search Warrant That Was Facially Deficient, Unconstitutionally Overbroad, And Contained Intentional Or Reckless Omissions And Misrepresentations Of Material Fact.

The State first criticizes the circuit court for "punting" a postconviction decision, and then criticizes Mr. Jeninga for not requesting an extension of the Wis. Stat. § 809.30(2)(i) deadline. (Response brief at 5). The State ignores the fact that the State itself was free to request an extension of the deadline, which Mr. Jeninga pointed out in a letter he filed before the court's deadline passed. (47).

Regardless, the fact that the postconviction motion was denied by operation of law does not affect this Court's decision. The State notes the ordinary rule that whether a defendant may withdraw a plea is for the discretion of the trial court (response brief at 8), overlooking the specific rule that "[w]hen a defendant establishes a denial of a relevant constitutional right, however, withdrawal of the plea is a matter of right . . . The trial court reviewing the motion to withdraw in such instance has no discretion in the matter." ***State v. Van Camp***, 213 Wis. 2d 131, 139, 569 N.W.2d 577 (1997). There are no factual issues in dispute in this appeal. Whether Mr. Jeninga was denied his constitutional right to effective representation of counsel is a question of law,

reviewed de novo. ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987).

A. The search warrant for Mr. Jeninga's cell phone failed to state probable cause.

Contrary to the State's complaint, Mr. Jeninga does not argue that warrant affidavits require "elaborate specificity" (response brief at 18); he simply argues that probable cause must be based on more than conclusory statements of the affiant. Here, the only link between the alleged facts and Mr. Jeninga's phone was a single, conclusory sentence. "Conclusions of the affiant set forth in the affidavit cannot be considered as a basis for the issuance of a search warrant." ***Bast v. State***, 87 Wis. 2d 689, 695, 275 N.W.2d 682 (1979).[1]

In its response brief, the State relies on ***United States v. Scott***, 901 F.3d 842 (7th Cir. 2018), but that case actually supports Mr. Jeninga's position. There, the court upheld a warrant to search for child pornography based on the fact that the defendant was caught soliciting child pornography. Here, there was no allegation that Mr. Jeninga solicited photos of M.Y.V. or any other child. The ***Scott*** court explicitly rejected the government's reliance on an officer's "ipse dixit" assertion that his training and experience demonstrated a link between pedophilia and child pornography.

[1] The State accuses Mr. Jeninga of ignoring the deferential standard of review (response brief at 18), overlooking page 13 of Mr. Jeninga's opening brief where he states that the magistrate's decision is owed deference.

> [S]uch a statement does not supply probable cause, even with the benefit of great deference to the issuing judge, because it is fact free. What training? What experience? Is the training based on data or just intuition? Does the experience show that nine of ten arrested pedophiles possessed child porn? Five of ten? Three of ten? One of ten? Details matter . . .

Id. at 845-46.

Like the officer in ***Scott***, the detective in Mr. Jeninga's case pointed to no facts to support his assertion—no relevant examples of prior experience linking allegations of sexual assault to child pornography, no explanation of relevant studies or literature on point, and no examples of trainings he received on the topic.[2] "[I]nferences from the commission of one crime to the commission of another (e.g., from attempted child molestation to possessing child pornography) ought to be based on data." ***Id.*** at 846.

B. Even if there was probable cause to search Mr. Jeninga's text messages, the warrant was unconstitutionally overbroad because it authorized a search of the entire phone.

The State does not address Mr. Jeninga's argument that the warrant furthermore violated the constitution's particularity requirement. "Unrefuted arguments are deemed conceded." ***State v. Verhagen***, 2013 WI App 16, ¶38, 346 Wis. 2d 196, 827 N.W.2d 891.

[2] The State cites to ***United States v. Colbert***, 605 F. 3d 573, 578 (8th Cir. 2010), which Mr. Jeninga distinguished in his opening brief at p. 17.

C. The search warrant for Mr. Jeninga's cell phone contained intentional or reckless omissions and misrepresentations of material fact.

The warrant was also invalid because it contained several intentional or reckless omissions and misrepresentations of fact. *See* ***State v. Mann***, 123 Wis. 2d 375, 386-88, 367 N.W.2d 209, 213 (1985) (citing ***Franks v. Delaware***, 438 U.S. 154 (1978)).

The State argues that all of the "material" facts in the affidavit were accurate; however, in recounting what the "material" facts were, the State includes the fact that Mr. Jeninga acknowledged to police that he bounced M.Y.V. on his lap, but denied it was done in an inappropriate manner. (Response brief at 24). But this was one of the *misstatements* of fact. In the affidavit, the detective asserted that Mr. Jeninga "denied that he would put M.Y.V. on his lap." (R1-8:2). In fact, Mr. Jeninga told the detective he bounced her on his lap, but denied it was improper. (R1-36 at 4:11:20).

The State's attempt to gloss over the detective's inaccurate portrayal of his conversation with Mr. Jeninga about viewing Mr. Jeninga's phone fails. The affidavit purported to need a warrant to review Mr. Jeninga's text messages, but no warrant was necessary for the text messages because Mr. Jeninga gave consent to search that portion of his phone. Each of the detective's omissions and misrepresentations—about the lap bouncing, about whom Mr. Jeninga was texting (his mother, not M.Y.V.'s mother), and about Mr. Jeninga's consent to search the text messages—were prejudicial on their own and, when combined, have the effect of negating probable cause.

D. The good faith exception does not apply.

The State ignores the fact that the good faith exception does not apply where a ***Franks*/*Mann*** violation has been proven. ***State v. Eason***, 2001 WI 98, ¶36, 245 Wis. 2d 206, 629 N.W.2d 625. Indeed, when justifying the use of the good faith exception in this case, the State relies on a fact that was omitted from the affidavit—the fact that "Jeninga refused to let the detective look at anything on his phone other than the text message . . . ." (Response brief at 28). The magistrate did not know that Mr. Jeninga gave consent to view the text messages because the detective omitted this fact from the warrant affidavit. The police cannot deprive the magistrate of important information in a warrant application and then claim good faith reliance on the resulting warrant.

Even if the court does not find ***Franks*/*Mann*** violation, the good faith exception still does not apply because the process used in obtaining the warrant did not include a significant investigation and the warrant was so "bare bones" that police could not "reasonably presume it to be valid." ***Eason***, 245 Wis. 2d 206, ¶¶36, 63.

E. Mr. Jeninga was denied his right to effective assistance of counsel.

An objectively reasonable performance of defense duties in this case would have involved a motion to suppress. Contrary to the State's argument, this Court can (and should) find deficient performance even though defense counsel discussed the case with colleagues and conducted research before foregoing a suppression motion because not filing a

suppression motion was objectively unreasonable. An attorney may perform to the best of her ability and still fall below an objective standard of reasonableness. "[T]he defense attorney may have advocated his client's interests to the best of his ability. Nevertheless, the [Supreme] Court has held that if the attorney's inadequacies fall below that of a reasonably competent attorney and his errors may have affected the result, the proceeding, though formally adversarial, is deemed inadequate to satisfy the Sixth Amendment." ***Osborn v. Shillinger***, 861 F.2d 612, 625 (10th Cir. 1988) (citing ***Strickland v. Washington***, 466 U.S. 668, 686 (1984)).

Defense counsel did not have a strategic reason for foregoing a suppression motion. The State argues that Mr. Jeninga would not have risked losing the plea agreement by filing a suppression motion (response brief at 7), but there is no evidence that the plea agreement was contingent on not filing pretrial motions. *C.f.* ***State v. Tucker***, 2012 WI App 67, 342 Wis. 2d 224, 816 N.W.2d 325 (plea agreement contingent on compliance with bond conditions). There was no evidence that the State would have withdrawn the plea offer or have not extended the same offer had a suppression motion been filed.

Instead, defense counsel's choice not to file a suppression motion was based on her incorrect conclusion that a suppression motion had no merit. Counsel testified that she did not believe a suppression motion had merit, and if she *had* believed one had merit, she would have filed it. (R1-68:7-8). As the State conceded in the postconviction court, "if there had been merit, she would have filed it." (R1-69:4-5).

"The object of an ineffectiveness claim is not to grade counsel's performance." ***Strickland***, 466 U.S. at 697. The object of the claim is to ensure that the defendant received fair proceedings. Fair proceedings are those "in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." ***Strickland***, 466 U.S. at 685.

Here, because counsel did not identify the meritorious suppression issues, the evidence was not subject to adversarial testing and Mr. Jeninga was prejudiced as a result. Had the evidence been subject to an adversarial suppression motion, there is more than a reasonable probability that the court would have suppressed the phone evidence. *See* ***Strickland***, 466 U.S. at 694; ***Kimmelman v. Morris***, 477 U.S. 365, 375 (1986).

As it did in the trial court, the State continues to argue that Mr. Jeninga would have entered into the same plea agreement even if the evidence of child pornography had been suppressed. (Response brief at 30-31). However, the plea agreement involved pleading guilty to a charge of possession of child pornography. Mr. Jeninga would not have pleaded guilty to a crime for which the State had no evidence. Indeed, the circuit court could not have found a factual basis for the charge without any evidence to support the elements of the offense and therefore, would not have accepted the plea agreement. "[E]stablishing a factual basis under § 971.08(1)(b) is necessary for a valid plea." ***State v.***

Lackershire, 2007 WI 74, ¶34, 301 Wis. 2d 418, 734 N.W.2d 23.[3]

The fact that Mr. Jeninga would not have entered into the plea agreement in this case had the suppression motion been filed is sufficient to show prejudice. Yet Mr. Jeninga furthermore proved a reasonable probability that he would not have entered a standalone plea to the sexual assault charge under such circumstances. At the postconviction hearing, defense counsel testified that the pornography evidence was important to her assessment of the strengths of Mr. Jeninga's defense in the sexual assault case. (R1-68:6). Prior to joinder, she believed Mr. Jeninga had a strong case for trial. (R1-68:7). However, once the court joined the two cases for trial, "I believe that changed that case dramatically." (R1-68:7). This changed counsel's advice, and Mr. Jeninga's decision, to forego trial in lieu of a plea. (R1-68:6-7).[4] The State complains that Mr. Jeninga did not testify, but had Mr. Jeninga testified, the State would very likely be dismissing his testimony as self-serving. The State has not

[3] Along these same lines, the State oddly argues that if Mr. Jeninga prevails on appeal, and is permitted to withdraw his appeal, he will be facing charges carrying a total of 310 years. (Response brief at 33, n.12). This 310-year figure includes all of the original child pornography charges. Again, if Mr. Jeninga prevails on his suppression claim, there will be no evidence of child pornography. The State cannot prosecute a crime without evidence of the crime.

[4] The State notes that Mr. Jeninga strenuously argued against joinder of the charges, but "does not on appeal." (Response brief at 2, n.1). A challenge to joinder of charges is waived by virtue of the guilty plea waiver rule. A guilty plea "waives all nonjurisdictional defects, including constitutional claims [.]" ***State v. Multaler***, 2002 WI 35, ¶54, 252 Wis.2d 54, 643 N.W.2d 437.

argued any reason to doubt defense counsel's credibility on this matter. Her testimony proves prejudice.[5]

The State argues that Mr. Jeninga cannot show prejudice because even if a successful suppression motion was filed (and the possession of child pornography charges dismissed), the evidence of child pornography would still be admissible against Mr. Jeninga in a trial on the charge involving M.Y.V. (Response brief at 31). The State cites no authority for the proposition that evidence suppressed under the Fourth Amendment's exclusionary rule can be admitted in the State's case in chief on a separate charge. Nor can it. "Evidence obtained as a direct result of a violation of a constitutional right . . . is inadmissible upon proper objection." ***State v. Loeffler***, 60 Wis. 2d 556, 561, 211 N.W.2d 1 (1973).[6]

Mr. Jeninga has shown a "reasonable probability" of a different result had the evidence of child pornography been suppressed

---

[5] The State's complaint that Mr. Jeninga did not submit an affidavit stating he would not have pleaded as he did had his attorney filed a suppression motion is a red herring. (Response brief at 10). No affidavit was necessary to satisfy the pleading requirement. Wis. Stat. § 802.05 ("Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit.").

[6] Under limited circumstances, suppressed evidence may be admissible for the purpose of impeaching a defendant's testimony when the defendant testifies, and through his testimony, "opens the door" to such evidence. ***Walder v. United States***, 347 U.S. 62 (1954). Mr. Jeninga's appeal cannot be decided on speculation that Mr. Jeninga would testify at some hypothetical future trial and through his testimony, open the door to the suppressed evidence.

F. Mr. Jeninga should be permitted to withdraw his pleas.

The State correctly notes that even if Mr. Jeninga is granted his requested relief, the State can continue to prosecute him for the alleged assault against M.Y.V. Thus, plea withdrawal does not present a windfall for Mr. Jeninga.

CONCLUSION

Mr. Jeninga respectfully asks this Court to reverse the circuit court, and remand with directions to permit Mr. Jeninga to withdraw his pleas and to suppress the evidence of child pornography located on his cell phone.

Dated this 10th day of October, 2018.

Respectfully submitted,

COLLEEN MARION
Assistant State Public Defender
State Bar No. 1089028

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 264-5176
marionc@opd.wi.gov

Attorney for Defendant-Appellant

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 2,445 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 10th day of October, 2018.

Signed:

_____

COLLEEN MARION
Assistant State Public Defender