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OF WISCONSIN

STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT IV

Case No. 2019AP21-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEITH M. ABBOTT,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
Entered in the Rock County Circuit Court,
the Honorable Michael A. Haakenson, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

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I. The Criminal Character of the Patient Bag Was Not Immediately Apparent.

The state fails to meet its burden to prove that an exception to the warrant requirement applies. Specifically, the state cannot establish the third prong of the plain-view doctrine – the immediately apparent incriminating character of the contents of the patient bag. *State v. Guy,* 172 Wis. 2d 85, 101, 492 N.W. 311 (1992) (citing *Horton v. California,* 496 U.S. 128 (1990)). Officer Kovacs did not immediately have probable cause to believe there was a connection between the evidence and criminal activity and thus the seizure was unlawful. *See id.* at 102 (officer "immediately knew she had evidence at her fingertips"); *State v. Buchanan*, 178 Wis. 2d 441, 450, 504 N.W.2d 400, (Ct. App. 1993) (the officer "testified that he immediately recognized the incriminating character of [contraband]")

Normally, when the plain-view exception to the warrant requirement applies, the incriminating nature of the seized evidence is readily apparent. This situation comes up frequently in drug or child pornography cases. In these cases, the object in plain-view is contraband (e.g. marijuana, cocaine, child pornography), and therefore the connection between the evidence and a crime – possession of the contraband – is immediately apparent. *See e.g. State v. Pinkard,* 2010WI81, ¶62, 327 Wis. 2d 346, 785 N.W.2d 592 (cocaine), *State v. Schroeder,* 2000 WI

App 128, ¶14, 237 Wis. 2d 575, 585, 613 N.W.2d 911 (child pornography); *State v. Robinson*, 2010 WI 80, ¶33, 327 Wis. 2d 302, 786 N.W.2d 463 (marijuana).

Cases cited by the state, *United States v. Chipps,* 410 F.3d 438, 442 (8th Cir. 2005) and *State v. Phillips*, 138 Haw. 321, 382 P.3d 133 (2016) highlight the factual circumstances necessary to establish probable cause that are missing from this case. In *Chipps,* police "discovered a trail of blood" leading to "a blood-stained sweatshirt" at the scene of an alleged assault. *Chipps,* 401 F.3d at 442. The court held "the incriminating nature of a bloody sweatshirt at the site of a potential assault was obvious." *Id.* at 443. Likewise, in *Phillips*, the Supreme Court of Hawai'i held police had probable cause to seize a hammer with blood on it when the weapon was found in the garage of a severely injured and bleeding victim. *Phillips,* 138 Haw. at 344.

The instant case presents a very different situation. At the time of the seizure, there had been no report of a murder, an assault or even any kind of disturbance between Abbott and Miller or between Abbott and anyone else. Police had no idea what was wrong with Abbott or why he was admitted to the emergency room – only that he had an "unknown medical condition." (210:6) Officer Kovacs testified that when escorting Abbott to the hospital, he did not suspect Abbott had committed a crime and that over the course of the day he was unable to identify who Abbott "may have hurt." (213:50,59;210:7).

The state does not argue that brown spots on clothing in an emergency room in and of itself

supports probable cause. Even if it were reasonable and true that Officer Kovacs credited Nurse Darios' statement that she believed the spots to be blood, there is no explanation as to why the nurse thought they were "suspicious" and or why Officer Kovacs should have credited this conclusion.

In addition, although it was the state's burden to establish that Officer Kovacs had probable cause at the time of the seizure, the state did not present any clear evidence regarding what Officer Kovacs knew when the bag was seized. *State v. Buchanan,* 2011 WI 49, ¶23, 334 Wis. 2d 379, 401, 799 N.W.2d 775 (citations and quotations omitted). Even if the bag was seized at the end of the day after the investigation (which is not established by clear and convincing evidence) many of the "facts known to the officer" by the end of that day were obtained from Abbott in violation of Abbott's Fourth Amendment rights. (215:18-22; 216:3-9; App.143-137) To the extent that the "facts known to the officer" were the result of the constitutional violation, the information is tainted and cannot serve as a basis to further infringe upon Abbott's rights. *See State v. Carroll,* 2010 WI 8, ¶19, 322 Wis. 2d 299, 77 N.W.2d 1 (tainted evidence cannot form the basis to obtain derivative evidence).

Lastly, even if it were possible to separate out the tainted information from information obtained from an independent source, Officer Kovac's own words – that the clothes in the patient bag "might have evidentiary value" – belie a conclusion that probable cause was immediately apparent.

A patient has a strong possessory interest in clothing that medical personal puts in a patient personal bag. Absent immediately apparent criminal character, police must obtain a warrant from a neutral magistrate before seizing it. At the time of the seizure in this case, the criminal character of Abbott's clothes was not immediately apparent; police should have gotten a warrant before seizing the patient bag.

II. Cruz Did Not Have the Authority to Consent to the Seizure of Abbott's Sweatshirts.

"[I]n a third-party consent case, the state must demonstrate that its inspection of the effects was constitutional in addition to its inspection of the premises…the State must demonstrate it had consent to examine those effects." *State v. Sobczak,* 2013 WI 52, ¶30, 347 Wis. 2d 724. The question here is, did Cruz have sufficient common authority over Abbott's sweatshirts so as to give her the authority to consent to their seizure?

The state cites *State v. Rampage,* 2010 WI App 77, 325 Wis. 2d 483, 784 N.W.2d 746, for the proposition that an individual's access and ability to use particular items are sufficient to establish authority to consent. That case, however, presented very different circumstances because the defendant in Rampage explicitly gave the consenter permission to use the seized item. In *Rampage,* the defendant left his computers (with child pornography) in the care of his live-in girlfriend while he was out of town. *Id.,* ¶¶2-3. Although Rampage owned the computer, it

was not password protected and there was no question that the girlfriend had permission to use it. *Id.* ¶2. Thus, the girlfriend had the access and ability to use that would establish her authority to consent. *Id.,* ¶18; *see also Sobczak,* 346 Wis. 2d 724, ¶31 (citing *Rampage*).

The mere fact that Cruz had access to the items because they were "kept in her home" does not mean Cruz could use the [sweatshirts] if she so desired." Response Brief at 20. The state must show "the consenter [Cruz] had 'joint access or control' of the object [the sweatshirts] 'for most purposes.'" *Sobczak,* 346 Wis. 2d 724, ¶30. Having access to an item without having permission to use it is not the same as having common authority over the item under the Fourth Amendment. Our supreme court has explained, the consenter has "sufficient access and control" of an object when "undisputedly, [the consenter] was explicitly granted permission by [the defendant] to use the [object] and the record contains no intimations of [the defendant] placing any parameters on that use." *See Sobczak,* 346 Wis. 2d 724, ¶31.

Here, there was no record of explicit consent and the record more than intimates that Abbott did not give Cruz permission to use [wear] his sweatshirts. Abbott had had an affair, the couple slept in different rooms and they were divorcing. (214:7; App.110). "Widely held social expectations," which govern an analysis of whether there is consent, show no one would expect an acrimonious, divorcing

couple to give one another access to and use of their personal effects. *Sobczak,* 346 Wis. 2d 724, ¶15.

Furthermore, citing *United States v. Matlock,* 415 U.S. 164 (1974), *Rampage* explains "enforcement of a valid third-party consent stems from the property owner's relinquishment of his or her Fourth Amendment right to privacy in the property by virtue of the third party's relationship with the property and owner." *Rampage*, 325 Wis. 2d 483, ¶12. Here, Abbott did not leave his sweatshirts in the care of his wife – they were forcibly removed in a medical emergency – and thus he relinquished none of his Fourth Amendment rights.

Being technically married to Abbott and the marital property laws that were governing their relationship on January 3 are not enough to establish common authority over his personal effects. *United States v. Matlock,* 415 U.S. at 171 n.7 (common authority is not merely a question of property interests). At the time of the seizure, law enforcement was aware of the deteriorated state of the couple's relationship and indeed, Cruz's incentive to consent to the seizure of Abbott's personal effects without the authority to do so. Cruz did not have apparent or actual authority to give permission to Officer Gelden to seize Abbott's clothing.

With respect to the plain-view doctrine, even if the officer had a lawful right to be present in the home and even if the sweatshirts were in plain-view, once again, the state is unable to demonstrate that the third prong – the object's incriminating character was immediately apparent. Indeed, here, there is

no testimony that the officer, or anyone else, saw anything resembling blood on the sweatshirts. The fact that Abbott was wearing the sweatshirts that day may have meant that the sweatshirts were evidence of a possible crime or it may have meant they were just the sweatshirts Abbott was wearing that day. In order to support an exception to the warrant requirement under the plain-view doctrine, the incriminating nature must be immediately apparent and here, it was not. No exception to the warrant requirement applies; police should have gotten a warrant.

III. Abbott Was Unable to Assert His Right to An Attorney.

The first twenty minutes of the interrogation shows the officers directly asking if Abbott is willing to talk to them without his lawyer. (222: Ex.4: 1:46:05-2:03:30) Abbott was unable to answer this question regardless of how the officers phrased it. His answers are inaudible, non-responsive and childish. Despite Abbott's apparent inability to answer this crucial yes-or-no question, the officers ignored Abbott's inability to respond and proceeded with the interrogation.

In cases cited by the state, (Response Brief at 24,26) the defendant's mental state or ability to make an unequivocal request for an attorney was not an issue. All of these cases requiring the defendant's invocation of counsel to be unequivocal presumed the defendant is capable of making an unequivocal invocation.

Here, knowing that Abbott was not functioning like the respected businessman they knew him to be, knowing he had recently had a mental breakdown and was committed under Ch. 51, knowing he was unable to answer an, important yet simple yes-or-no questions, (213:84, 94, 97, 104) the officers should have recognized Abbott was unable to assert his rights and ceased all questioning until he could directly answer the question of whether he wanted his attorney present or until the attorney was present. *Sample v. Eyman,* 469 F.2d 819, 821 (9th Cir. 1972) (when a person in custody "is too upset to assert…his rights knowingly and intelligently under *Miranda*, all questioning should cease until such time as that person is clearly capable of so responding"). The failure to cease questioning after Abbott was unable to respond to questions violated Abbott's Fifth Amendment right against self-incrimination and as a result, Abbott's statements should be suppressed.

IV. The State Must Show Harmlessness Beyond A Reasonable Doubt

Wisconsin Statute § 971.31(10)[1] created a procedure for this Court to review a suppression ruling, on the merits, notwithstanding the guilty-plea waiver rule. Wis. Stat. § 971.31(10). Accordingly, the guilty-plea-waiver rule prevents a defendant from raising all defenses on appeal except one: the state's evidence was unlawfully and unconstitutionally obtained. Typically, in appeals not brought under Wis. Stat. § 971.31(10), the only way a defendant can be "relieved from such a waiver" is to meet the "heavy burden" of showing the plea was manifestly unjust. *Hatcher v. State*, 83 Wis. 2d 559, 565, 266 N.W.2d 320, 323 (1978); *State v. Cain,* 2012 WI 68, ¶25, 342 Wis. 2d 1, 15, 816 N.W.2d 177, 184. Because of Wis. Stat. § 971.31(10), however, the defendant *has not waived* defenses based on suppression claims, and thus, there is no need for a showing as to why the defendant should be relieved of the waiver.

Since Wis. Stat. § 971.31(10)'s enactment in 1969, Wisconsin courts have *never* held that the defendant has the burden to show an erroneous ruling on a suppression motion is a manifest justice

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[1] Wisconsin Statute § 971.31(10) provides:

> An order denying a motion to suppress evidence or a motion challenging the admissibility of a statement of a defendant may be reviewed upon appeal from a final judgment or order notwithstanding the fact that the judgment or order was entered upon a plea of guilty or no contest to the information or criminal complaint.

or that the erroneous ruling caused him to plea. Indeed, for thirty years after its enactment, courts also eschewed applying a harmless test error test. *State v. Monahan,* 76 Wis. 2d 387, 251 N.W.2d 421 (1977); *State v. Pounds*, 176 Wis. 2d 315, 324-26, 500 N.W.2d 373 (Ct. App. 1993).

The Seventh Circuit explained the rationale for this rule as follows:

> The Wisconsin statute encourages guilty pleas. In doing so it entails the waiver of some very fundamental entitlements, including the right to a jury and the right to confront hostile witnesses at trial. The objective of the statute is obtained by guaranteeing to the defendant that he will have a full trial in the event that after appeal the state's evidence is weaker than it appeared at the time of the trial court's evidentiary rulings. The statute would be a "trap for the unwary" if it deprived a defendant of these rights even after he prevails on some of his evidentiary objections.

Jones v. State of Wis., 562 F.2d 440, 445–46 (7th Cir. 1977) (citations omitted). Above all, *Jones* noted "only the defendant is in a position to evaluate the impact of a particular erroneous refusal to suppress evidence." *Id.* at 445.

Nevertheless, in *State v. Armstrong,* 223 Wis. 2d 331, 344-45, 588 N.W.2d 606 (1999), modified, 225 Wis. 2d 121, 122, 591 N.W.2d 604 (1999) (per curiam), Wisconsin Supreme Court approved "the use of a harmless error approach in § 971.31(10) appeals."

The "beyond a reasonable doubt" language in the harmless error standard stems from the United State Supreme Court: "… [B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967); At minimum, the constitutional rights of Wisconsin citizens are protected by federal constitutional standards. *State v. Knapp,* 2005 WI 127, ¶57, 285 Wis. 2d 86, 700 N.W.2d 899; U.S. CONST. art VI, cl. 2 (Supremacy Clause). Regardless of any language to the contrary in Wisconsin case law, all constitutional errors must be harmless beyond a reasonable doubt in order to avoid reversal.

To the extent there has been confusion regarding the application of the standard, it is not a confusing standard: the state, as beneficiary of the error, must show, beyond a reasonable doubt, that there is no reasonable possibility the error contributed to the conviction. *See e.g. State v. Harvey*, 2002 WI 93, ¶¶40-41, 47, 254 Wis. 2d 442, 647 N.W.2d 189; *State v. King*, 205 Wis. 2d 81, 93-94, 555 N.W.2d 189, 194 (Ct. App. 1996); *State v. Hicks*, 202 Wis. 2d 150, 173, 549 N.W.2d 435, 445 (1996) (J. Abrahamson, concurring); *Wold v. State*, 57 Wis. 2d 344, 356, 204 N.W.2d 482 (1973) (explaining the harmless error standard in other contexts using both "beyond a reasonable doubt" language and "reasonable probability" language).

Abbott objects to the request for an evidentiary hearing to assist the state in meeting its burden. The state entered the plea agreement with the knowledge that Wis. Stat. § 971.31(10) guaranteed Abbott a review of the suppression rulings on their merits. If the state wanted the ease and certainty of the conviction without a trial wherein Abbott could present his defenses, they should not now be able to argue that they are prejudiced by the procedural posture and lack of record. Wisconsin Stat. § 971.31(10) provides no mechanism for a post-appeal hearing to evaluate the strength of the parties' evidence (effectively a mini-trial), to add speculative terms to the plea agreement, or to otherwise develop the state's arguments that the defendant might nevertheless have plead.

Undoubtedly, on the limited record below, it is difficult for the state to meet its burden. Abbott has consistently asserted his innocence, as demonstrated by the *Alford* plea. The record below does not contain the defense evidence, nor does it contain trial court rulings on motions of limine or questions of admissibility.[2] Without more certainty regarding what evidence would actually be presented at trial, the state cannot prove beyond a reasonable doubt that any erroneous suppression rulings are harmless. Above all, the decision to enter the plea does not necessarily depend on the likelihood of conviction at trial. *Lee* v. *United States,* 137 S. Ct. 1958, 1961

[2] For example, an alleged statement's Abbott made to his wife is subject to marital privilege and thus inadmissible. Wis. Stat. § 905.05.

(2017). As such, it is reasonably possible that if the evidentiary picture has changed since the plea was entered, Abbott would not have entered his plea.

Abbott sought review pursuant to Wis. Stat. § 973.31(10) and this court should decide the suppression issues on the merits. If this Court holds any of the suppression rulings were in error, this Court should also hold the state to its burden to show, beyond a reasonable doubt, that any error was harmless.

CONCLUSION

For the reasons stated, Keith M. Abbott respectfully requests that the court reverse his conviction and remand to the circuit court with instructions to permit him to withdraw his no-contest plea.

Dated this 20th day of August, 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 2,987 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 20th day of August, 2019.

Signed:

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