

RECEIVED

06-13-2019

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN
COURT OF APPEALS – DISTRICT III

Case No. 2019AP000175-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SYNIKA ANTONIO KIRK,

Defendant-Appellant.

Appeal Of An Order Denying A Motion To Suppress
Evidence And Of A Judgment Of Conviction,
Entered In Brown County Circuit Court,
The Hon. Thomas J. Walsh, Presiding.

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

THOMAS B. AQUINO
Assistant State Public Defender
State Bar No. 1066516

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-1971
aquinot@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

	Page
Issue Presented.....	1
Statement On Oral Argument And Publication	1
Statement of the Case	1
I. Procedural History	1
II. Factual Background.....	2
Argument.....	6
I. The Government Lacked The Probable Cause Necessary To Satisfy The Automobile Exception To The Warrant Requirement.....	6
A. Legal Standards.	7
B. The state had the burden of establishing probable cause that evidence of a crime would be located in Kirk’s vehicle, whether the “automobile” for the purposes of the automobile exception was the car transport or Kirk’s vehicle.	8
C. The state lacked probable cause to search the trunk of Kirk’s vehicle.	9
Conclusion	14
Certifications.....	15
Index to Appendix.....	100

CASES CITED

State v. Marquardt,
2001 WI App 219, 247 Wis. 2d 765,
635 N.W.2d 188..... 7, 8

State v. Matejka,
2001 WI 5, 241 Wis. 2d 52,
621 N.W.2d 8917

State v. Reed,
2018 WI 109, 384 Wis. 2d 469,
920 N.W.2d 56.....7

United States v. Mazzella,
295 F. Supp. 1033 (S.D.N.Y. 1969) 10

United States v. Ross,
456 U.S. 798 (1982)..... 8, 9

Ybarra v. Illinois,
444 U.S. 85 (1979)..... 6, 7, 10, 11

STATUTES CITED

Wisconsin Statutes

961.41(3g)(e)..... 1

961.573(1) 1

ISSUE PRESENTED

Whether there was probable cause to search the locked trunk of a car being transported due to the presence of illegal drugs on a second, unrelated car on the same transporter and “discrepancies” in the paperwork.

How the circuit court ruled: The court held that there was probable cause to search the vehicle.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is requested, as this case presents the application of well-established legal principles to straightforward facts.

STATEMENT OF THE CASE

I. Procedural History

On November 12, 2015, the Brown County District Attorney’s Office filed a three-count complaint against Defendant-Appellant Synika Antonio Kirk, alleging: (1) possession of THC, 2nd and subsequent offense, Wis. Stat. § 961.41(3g)(e), a Class I felony; (2) possession of drug paraphernalia, Wis. Stat. § 961.573(1), an unclassified misdemeanor; and (3) conspiracy to deliver THC, greater than 2,500 grams, 2nd and subsequent offense, a Class F felony. (2:1-2). An information tracking the complaint was filed on November 18, 2015. (4).

Kirk filed a motion to suppress evidence on March 9, 2017. (33). After an evidentiary hearing (92), oral argument (93), and multiple rounds of briefing (33, 36, 43-44), the court denied the motion in an August 8, 2018, oral ruling from the bench. (94; App. 101-112). Kirk petitioned the court of appeals for leave to appeal the order denying the suppression motion, but the court of appeals denied the petition on November 3, 2017. (51).

Kirk entered into a plea agreement with the state, whereby Kirk would plead guilty to count 3, counts 1 and 2 would be dismissed but read-in, and the state would recommend 3 years of probation with one year of conditional jail time. (55). The court followed the state's recommendation at a sentencing hearing on February 16, 2018. (97).

II. Factual Background

Counts 1 and 2 of the complaint were based on marijuana and paraphernalia found in Kirk's home pursuant to a search warrant executed on October 22, 2015. (2:2-3). Kirk did not challenge this search.

Count 3, however, was based on marijuana found by Kansas officials in the locked trunk of a car – specifically, a Jaguar – Kirk was having transported from California to Wisconsin. (2:4-7). This search was accomplished without a warrant and, along with evidence derived from the search, was the subject of Kirk's suppression motion. (33).

At the outset of the suppression hearing, the court found that, based on the pleadings submitted previously (*see* 33:6), Kirk owned the Jaguar and had standing to challenge its search. (92:3-4).

The state then proceeded to call Trooper Christopher S. Nicholas, of the Kansas Highway Patrol, as its only witness. (92:5). Trooper Nicholas was certified by an unspecified entity to stop and inspect commercial vehicles. (92:7-8). On October 29, 2012, Trooper Nicholas randomly stopped a tractor trailer carrying multiple cars.¹ (92:8-11).

Trooper Nicholas made contact with the driver, and asked to inspect his logbook and other paperwork. (92:10-11). Trooper Nicholas testified that the bills of lading for a Chevy Impala and a Jaguar drew his attention. (92:15-17).

Specifically, Trooper Nicholas testified that “[g]enerally on what I see on the bill of lading, it will have [a] first name and a last name or two different names, like a husband and wife, for instance, and then it will have at least two telephone numbers.” (92:15-17). The bill of lading for the Impala listed only a first name, and it was the same for both the shipper and the receiver. (37:5; 92:18-19).

The bill of lading for the Jaguar also only listed the same first name for both the shipper and the

¹ The parties and the cases variously refer to such vehicles as “car transports,” “car haulers,” and “car carriers.” This brief will refer to them as “car transports.”

receiver. (92:20; 99:2). In addition, the bill of lading listed the Jaguar as a 1999 model when it was actual an '89, and Trooper Nicholas did not believe the Jaguar was worth the \$900 shipping fee. (*Id.*)

Trooper Nicholas clarified on cross-examination that the bills of lading are not directly prepared by the actual shipper or the receiver. (92:33-37). The information provided by the shipper or receiver may be passed along to various “brokers,” hauling companies, subcontractors, etc. before the bill of lading is prepared. (92:33-37; 99:2-3).

Notably, the state only introduced the bills of lading for the Impala and the Jaguar. It did not introduce the bills of lading for the other vehicles.

After Trooper Nicholas completed his inspection of the car transport, he asked the driver for permission to search the Impala. (92:22-23). The driver agreed, and handed Trooper Nicholas a key to the car. (92:23-25). When Trooper Nicholas opened the backdoor to the Impala, he smelled raw marijuana. (*Id.*) He pulled down the back seat, and found in the truck black trash bags containing marijuana. (*Id.*)

After finding marijuana in the Impala, Trooper Nicholas asked the driver about the bills of lading and whether there were any other cars that came from the same place as the Impala. (92:45-46). The driver told Trooper Nicholas that there were not. (*Id.*) Trooper Nicholas said that he wanted to check the other cars on the transport anyway, but did not

specify the Jaguar or otherwise ask about the Jaguar. (92:46-47).²

After Trooper Nicholas searched the main compartment of the Jaguar, he attempted to search the trunk. However, the Jaguar key would not open the trunk. (92:26-27). Trooper Nicholas pushed in a rubber plug behind the bumper, and shoved his knife and a “fiberoptic scope” through the opening. (92:27). The scope revealed black duffle bags. (*Id.*) In addition, Trooper Nicholas believed his knife went through one of the bags because he could smell marijuana on the knife. (*Id.*)

Once the transport was moved to a Kansas Department of Transportation facility, all of the cars on the transport were searched, and the marijuana in Kirk’s Jaguar was seized. (92:51-53).

Trooper Nicholas was the only witness called by either party at the suppression hearing. The court allowed both parties to submit additional briefing after the hearing, and later reconvened for oral argument. The state argued that the automobile exception to the warrant requirement applied, with the “automobile” being the car transport itself and each car on the transport a “container.” According to the state’s logic, once drugs were found in the first car on the transport during a valid search, the

² Trooper Nicholas did not testify that he asked for, or that the transport driver gave him, permission to search the Jaguar. Accordingly, the state did not argue that the driver consented to the search.

government was allowed to search all the “containers” on the car transport, *i.e.*, all of the cars, including Kirk’s Jaguar. (43:1-6).

The circuit court held that the automobile exception did apply, but not in the manner proposed by the state. Instead, the court held that there was probable cause to search the Jaguar (as opposed to the entire car transport) based on the discovery of drugs in the Impala as well as “several suspicious things about the bill of lading for the Jaguar.” (94:8; App. 108).

ARGUMENT

I. The Government Lacked The Probable Cause Necessary To Satisfy The Automobile Exception To The Warrant Requirement.

The state failed to meet its burden of proving that an exception to the warrant requirement excused the warrantless search of Kirk’s vehicle. Guilt by association cannot support a search warrant. “[A] person’s mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person.” *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979). The fact that the government found illegal drugs in one car on the transport does not give it probable cause to search all the cars in the transport, any more than finding drugs in one car in a parking lot would give rise to probable cause to search all of the cars in the parking lot.

In addition, the so-called “discrepancies” in Kirk’s bill of lading do not amount to the something “more” contemplated in *Ybarra*. 444 U.S. at 91. The bill of lading was not prepared directly by Kirk, but through at least three layers of intermediaries who could have been responsible for the discrepancies. Further, the discrepancies are minor and do not suggest illegal activity. Accordingly, the court should have granted the motion to suppress the evidence.

A. Legal Standards.

“Searches conducted without a warrant are per se unreasonable under the Fourth Amendment to the United States Constitution.” *State v. Matejka*, 2001 WI 5, ¶17, 241 Wis. 2d 52, 59, 621 N.W.2d 891, 894. The state has the burden of establishing with clear and convincing evidence that an exception to the warrant requirement applies. *Id.* Whether the state has met its burden “is a question of constitutional fact.” *State v. Marquardt*, 2001 WI App 219, ¶9, 247 Wis. 2d 765, 773, 635 N.W.2d 188, 192. The trial court’s findings of historical fact are deferred to unless clearly erroneous, while the application of those facts to the law is reviewed de novo. *State v. Reed*, 2018 WI 109, ¶51, 384 Wis. 2d 469, 489, 920 N.W.2d 56, 66.

- B. The state had the burden of establishing probable cause that evidence of a crime would be located in Kirk's vehicle, whether the "automobile" for the purposes of the automobile exception was the car transporter or Kirk's vehicle.

The state argued and the trial court held that the "automobile exception" justified the warrantless search of Kirk's vehicle, although they differed on whether Kirk's vehicle or the transporter was the "automobile." The automobile exception to the warrant requirement applies when there is: (1) "probable cause to search [the] vehicle"; and (2) "the vehicle was readily mobile." *State v. Marquardt*, 2001 WI App 219, ¶33, 247 Wis. 2d 765, 784–85, 635 N.W.2d 188, 197. According to the state, the "automobile" was the car transporter. The court, however, held that Kirk's vehicle was the "automobile." Regardless of which vehicle is considered the "automobile," the inquiry collapses to the same question: Was there probable cause to support the search of Kirk's vehicle?

The state's position was that once contraband was found in the first car on the transporter, the state had probable cause to search the entire transporter; and that under *United States v. Ross*, 456 U.S. 798, 824 (1982), once there is probable cause to search a vehicle, the state may search all of the "containers" inside, which here would mean all of the vehicles being transported. (43:1-6).

The state reads *Ross* too broadly. Probable cause to search an automobile does not automatically create probable cause to search all of the containers in the vehicle. *Ross* makes clear that there must also be probable cause to search the individual containers in the vehicle.

The scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found. Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab.

Ross, 456 U.S. at 824.

Thus, whether Kirk's vehicle was an "automobile" for the purposes of the automobile exception, or a "container" on another vehicle under *Ross*, the analysis collapses to the same question: whether there was probable cause to search the locked trunk of Kirk's vehicle.

C. The state lacked probable cause to search the trunk of Kirk's vehicle.

The court erroneously held that the discovery of drugs in the first car and the "discrepancies" in the

bill of lading created probable cause that illegal drugs would have been found in Kirk's vehicle.

The Supreme Court has stated, in no uncertain terms, that simply being in the vicinity of illegal activity does not create probable cause.

[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be.

Ybarra, 444 U.S. at 91 (citation omitted). This is simply a restatement of the law's long-standing rejection of guilt-by-association.

The circuit court relied on a 1969 case from the District Court for the federal Southern District of New York – *United States v. Mazzella*, 295 F. Supp. 1033 (S.D.N.Y. 1969) – to support its holding that the discovery of drugs in the Impala supported the search of Kirk's Jaguar. *Mazzella* is easily distinguished. There, an informant claimed that multiple trucks contained stolen television sets. After corroborating some of the informant's claims, officers obtained consent to search one of the trucks. Inside, they found stolen television sets. This further corroboration of the informant's tip provided probable cause to search

the other truck without either a warrant or consent. Here, however, there was no informant providing any information about Kirk's vehicle.

Thus, the state had to show something "more" that tied the discovery of drugs in the first car to Kirk's vehicle, or otherwise amounted to probable cause to search Kirk's trunk. *Ybarra*, 444 U.S. at 91. It failed to do so.

First, there was no evidence that the two vehicles were owned or transported by the same person. The bills of lading list different owners for the two cars, different originations and destinations, and different phone numbers. (99:2). Although they are both being transported from California to Wisconsin, it is expected that a car transporter would be hauling vehicles from and to the same general areas.

Second, the "discrepancies" relied upon by the court did not support probable cause. Trooper Nicholas testified that bills of lading "[g]enerally ... will have [a] first name and a last name or two different names, like a husband and wife, for instance, and then it will have at least two telephone numbers." (92:18-19). Here, however, there is only one name, and just a first name, listed for both pickup and delivery of Kirk's vehicle: "Mario." (99:2) Also, according to Nicholas, the bill of lading incorrectly lists the Jaguar as a '99 rather than an '89 model. Further, in Nicholas's estimation, the Jaguar was not worth the \$900 shipping fee.

These so-called “discrepancies” are underwhelming, especially in light of the fact that Kirk did not prepare the bill of lading. There is nothing suspicious about only one name listed for either pickup and delivery. Not everyone is married. Also, with the ubiquity of cellphones, it is not that difficult to get a hold of the one person responsible for pickup up or delivery. Thus, there is less of a need to list multiple contacts for pickup or delivery.

Nor is it suspicious that the same name is listed for both pickup and delivery. There are many situations where a person would ship a car to themselves. For example, a person moving cross-country may decide to drive a moving van and ship their car. Or, a collector of vintage cars may find a car while traveling, and ship it home.

The fact that only a first name is listed is most likely attributable to one of the links in the chain (*e.g.*, a broker or a dispatcher) not asking for or not writing the last name. Clearly, a last name was not necessary for the last two links in the chain. Also, if the suggestion is that the use of just the first name was to hide the identity of the person shipping the car, it would have been a simple matter to make up a last name as well. The incorrect listing of the Jaguar as a ‘99 rather than an ‘89 model can similarly be attributed to a scrivener’s error somewhere down the line.

Also, there was no evidence that Trooper Nicholas had any expertise in evaluating vintage

British sports cars. There was no evidence of how much it would cost to refurbish the Jaguar, or what its resale value would be, and thus no evidence to determine whether it made economic sense to ship the Jaguar. Plus, some cars hold sentimental value worth more than a cold hard economic analysis would suggest.

Importantly, the state did not introduce any of the other bills of lading to establish that these were indeed unusual discrepancies. The other bills of lading may have also had only first names, or the same names for both the shipper and the receiver.

In the end, the only reason the government had for searching Kirk's car was because another car nearby was found to have drugs inside. That is not enough. The government lacked probable cause to search Kirk's vehicle, and the court should have granted Kirk's suppression motion.

CONCLUSION

For the reasons stated above, the court should reverse the Judgment of Conviction with respect to Count 3, and order that the court grant Kirk's motion to suppress evidence.

Dated this 13th day of June, 2019.

Respectfully submitted,

THOMAS B. AQUINO
Assistant State Public Defender
State Bar No. 1066516

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-1971
aquinot@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATIONS

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 2,839 words.

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.

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons,

specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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 13th day of June, 2019.

Signed:

THOMAS B. AQUINO
Assistant State Public Defender

APPENDIX

INDEX TO APPENDIX

	Page
Oral Ruling On Suppression Motion	
Dated August 8, 2017(R. 94)	App. 101-112