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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2019AP517-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN PLENCNER,

Defendant-Appellant.

On Appeal From the Judgment of Conviction and an Order Denying Postconviction Relief in the Circuit Court for Racine County, the Honorable Michael J. Piontek, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The Evidence Against Mr. Plencer Should Be Suppressed and the Court's Denial of a Hearing Was Error.

State v. Allen, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433 requires the court hold an evidentiary hearing where sufficient facts are raised. In this case, it seems that the trial court in this case misunderstood the nature of the claim raised on postconviction, and erroneously determined that it had previously ruled on the Fourth Amendment Motion, when in fact, it had not done so.

The Fourth Amendment is nuanced, and not all claims arising out of the it are the same. The circuit court's decision holding it had heard argument from trial "that the state's pre-charging delay violated the rights guaranteed by the 4th, 5th 6th and 14th Amendment to the United States Constitution, Article I, Sections 7, 8, and 11 of the Wisconsin Constitution . . ." (22:2). Accordingly, the circuit court held that trial counsel had not been "'ineffective' as that term is defined." (22:2).

The circuit court's apparent misunderstanding of the issue raised on postconviction informed its decision to deny Mr. Plencner a postconviction motion hearing. The state does not seem to argue that Mr. Plencner's trial counsel raised the Fourth Amendment claim he made on Postconviction. Because the court erroneously exercised its discretion and sufficient facts were raised, Mr. Plencner is entitled to a hearing. ***Allen*** at ¶ 9.

A. Challenging the reasonableness of the duration of a seizure is not novel and therefore counsel should have raised it.

It is hardly novel that the reasonableness of a seizure under the Fourth Amendment includes consideration of the duration of the seizure. *See* ***United States v. Place***, 462 U.S. 696 (1983); **S*egura* v. *United States*** *468* U.S. 796 (1984). The State tries to draw a distinction between the aforementioned cases and the case at hand because in the former, the courts were determining the reasonableness of the delay when the seizure was based on less than probable cause.

This Court should reject this argument. In ***State v. Gant***, 2015 WI App 83, this Court addressed the duration of a seizure and ultimately assumed, without deciding, that the 10-month delay in applying for the warrant made the seizure unreasonable. ***Id***. at ¶ 14. Importantly, this Court noted that the defendant in ***Gant*** had requested the return of his property, and that Wis. Stat. § 968.20(1) was not the only avenue to retrieve property. ***Id***. fn4.

Similarly, in this case, Mr. Plencner requested the return of his property on two occasions. (8:2; 5:2). Although a warrant was obtained here, Wis. Stat. § 968.20(1) permits the return of property even when a warrant was issued. Accordingly, it is reasonable to conclude that the continued seizure of an item seized with a warrant is nonetheless subject to a reasonableness standard as it relates to the duration of the seizure. Moreover, under the State's theory, police who obtain a warrant would be permitted to hold the item to be searched indefinitely. This result would be absurd and unreasonably deprive citizens of their personal property.

While there are some factual distinctions between this case and ***Place***, ***Segura***, ***Gant*** and ***United States v. Burgard***, 675 F.3d 1029 (7th Cir. 2012), the fundamental principles of reasonableness of the duration of the seizure under the Fourth Amendment nonetheless remain the same. Those cases make

clear that the duration of a seizure factors into the totality of the circumstances when a court is determining whether the seizure under the Fourth Amendment was reasonable. Additionally, Wisconsin Statute related to the return of property provides a mechanism for the return of property, even property seized with a warrant, further demonstrating that police may not indefinitely hold property.

There will be many Fourth Amendment cases with slightly different facts, that however, does not abdicate defense counsel from pursuing a motion when the facts are not exactly aligned. Moreover, it is firmly rooted in Fourth Amendment jurisprudence that police action is subject to reasonableness. Here trial counsel raised issues related to delay, but failed to raise the reasonableness of the significant delay in time between the issuance of the warrant and the actual search. Accordingly, counsel was constitutionally ineffective.

B. The suppression claim would have succeeded because the delay between seizure and the execution of the warrant was unreasonable

The State argues that had counsel claimed that the delay in executing the search of the computer, it would have failed. (State's Br. at 12). To support this claim, the State argues that federal court have focused on whether the delay from law enforcement rendered the warrant stale; and because trial counsel raised that issue, there can be no ineffectiveness. (State's Br. at 12).

In ***United States v. Jarman***, the Court did consider the reasonableness of the delay. 847 F.3d 259. 266-267. It determined that any delay was reasonable because the government completed its review within 23 months, and had completed other reviews in four and eight months, respectively. ***Id***. The Court contrasted that to ***United States v. Metter***, 860 F.Supp.2d 205, at 211,215 (E.D.N.Y. 2012),

where the government had not commenced review of the computer after fifteen months, and had no plans to do so. ***Id***.

The state seems to argue that the focus should be whether the probable cause becomes stale due to the delay, rather that the reasonableness of the delay. (State's Br. at 12-13). If, however, the only consideration is whether the information in the probable cause portion of the warrant were to become stale, then the government would be able to withhold personal property indefinitely and circumvent the Fourth Amendment's requirement that all searches and seizures be reasonable. The Court should not permit such a diminishment of the Constitution.

The state further argues that even if the balancing test in ***Place*** is applicable, Mr. Plencner would not have been successful because he had diminished possessory rights. (State's Br. at 13). Specifically, the state argues that Mr. Plencner was prohibited from possessing any device capable of accessing the internet and therefore, he had a diminished interest his property. However, the state points to nothing in the record that the computer had internet capabilities, or that if it did, those could not be disabled. Computers can function without internet abilities. People use computers to type documents, store personal information, listen to music or books (on disc), watch movies or television (disc), play games, etc. Contrary to the state's assertion, Mr. Plencner maintained a possessory interest in his computer despite his inability to access the internet.

The state, of course, has an interest in investigating crimes. This interest, however, does not justify all police and government action, or, as in this case, inaction. Missing from the State's analysis is the significant delay in searching the seized computer. "When police neglect to seek a warrant without any good explanation for that delay, it appears that the state is indifferent to searching the item and the intrusion on an individual's possessory interest is less likely to be justifiable." ***Burgard***, 675 F.3d at 1031.

Likewise, when police have seized property with a warrant, and then delay several years in even beginning to search the property, it appears that the state is indifferent and diminishes any proclaimed state interest in investigating crime and preventing further ones. There is nothing in the record to show that the government did anything to move the investigation along. Even after Mr. Plencner requested the return of his property in August of 2011, another two years passed until a second warrant application was made. (33:9-10). In fact, the affidavit signed on September 24, 2013 stated that DCI "just started working on the items collected in 2010." (33:10). The state offers no reasoning as to how over three years of inaction from the state is reasonable or outweighs Mr. Plencner's possessory interest.

C. The good-faith exception should not apply in this case where the Fourth Amendment violation is the unreasonable duration of a seizure.

The State claims that even if the Fourth Amendment claim had merit, the good-faith exception would have barred suppression. (State's Br. at 14). By the State's own admission, the good-faith exception test as outlined in ***State v. Eason***, 2001 WI 98, 245 Weis. 2d 206, 629 N.W.2d 625 is an ill fit for the facts of this case. (State's Br. at 15).

Rather, the focus of "good-faith" under the facts of this case should be the reasonableness or unreasonableness of government's failure to take any action on the warrant that was issued in 2010..

For example, in ***Burgard***, the Seventh Circuit ultimately determined the delay was not unreasonable since the officer's delay was not the "result of complete abdication of his work or failure to see any urgency." ***Id.*** at 1034 (internal quotation omitted). In ***Jarman***, the Court noted that the defendant was not entitled to suppression because he did not argue that the government acted in bad faith. 847 F.3d at

267. The Court there contrasted that the facts in ***Metter***, where after fifteen months no investigation into the seized evidence had begun, even at the request of defense and the court. ***Id***. (*citing* ***Metter***, 860 F. Supp.2nd at 216). The evidence was suppressed in that case based on a lack of good faith. ***Id***.

The exclusionary rule requires courts to suppress evidence "obtained through the exploitation of an illegal search or seizure." ***Wong Sun v. United States***, 347 U.S. 471, 488 (1963). There is nothing in this record that justifies the several-years long delay. The new warrant and the officer's reliance on the warrant should not save the government from the unreasonably long, unjustified continued seizure of Mr. Plencner's property.

CONCLUSION

For all of the reasons set forth above, and in his Brief-in-Chief, Mr. Plencner respectfully requests that this Court reverse the decision of the circuit court and vacate the judgement of conviction, suppressing the evidence against him, or, remand the matter for a ***Machner*** hearing.

Dated this 17th day of February, 2020.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1,654 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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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 February, 2020.

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