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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP517-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN A. PLENCNER

Defendant-Appellant.

PETITION FOR REVIEW

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ISSUES PRESENTED

1. Is counsel excused from raising a proper Fourth Amendment suppression motion when an appellate court has not previously decided what factors it would consider in its test?

In a written decision, the trial court declined to grant a ***Machner***[1] hearing, holding that trial counsel was not ineffective and that issues as to the whether the delay in charging was cause to dismiss had been previously decided. (22:2; App. 120). The trial court affirmed its decision following Mr. Plencner's motion to reconsider. (24; App. 118).

The Court of Appeals affirmed the trial court's decision that Mr. Plencner was not entitled to a ***Machner*** hearing. (App. 117). The Court of Appeals reasoned that the reasonableness of the duration of the seizure of Mr. Plencner's computer and the subsequent search is an unsettled area of law, and accordingly, trial counsel was not deficient for failing to advance the claim. (App. 112).

2. Did the nearly four-year delay between the initial seizure of the computer, the execution of the warrant to search its contents, render the search unconstitutional?

The trial court did not answer this specific question presented because in its view, it had previously denied trial counsel's motions. (22:2-3; 24; App. 118-119,121).

[1] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

The Court of Appeals did not answer because it determined that the question presented was unsettled area of law; and accordingly, it need not reach this question because counsel was no ineffective for failing to raise a claim on which the law is unsettled. (App. 112).

CRITERIA FOR REVIEW

This case is appropriate for review by this Court under several criteria. The Court of Appeals held that counsel could not be found deficient for failing to advance the correct theory under the Fourth Amendment because the issue raised is unsettled or unclear.[2] However, the standard for whether counsel's act or omission constitutes deficient performance is reasonableness.

Here, as evidenced by the pre-trial motions filed, counsel was aware of the problematic nature of the nearly four-year delay between the time the computer was seized and the time the search warrant for its contents was executed. Despite this, counsel failed to correctly advance the issue. The absence of a clear test for courts to follow in scenarios this case presents does not mean counsel has no duty to raise the issue when doing so will be to her client's benefit. This court should accept review because the Court of Appeal misapplied Strickland and to develop the law for counsel's duties. §809.62(1r)(d).

[2]Importantly, the Court of Appeals noted that counsel *did* argue a motion to dismiss that although undeveloped, included a challenge to the delay in searching. (App. 113). To the extent the Court of Appeals is holding that the issue was raised, though "undeveloped" trial counsel would be ineffective for failing to develop the argument and the Court's decision to the contrary makes this appropriate for review pursuant to Wis. Stat. §§809.62(1r)(d) and (1)(a).

As the Court of Appeals identified, there are no Wisconsin cases applicable under the facts of this case. While generally, Fourth Amendment claims are not novel, with many involving similar tests for evaluating the constitutionality of a search or seizure, this case presents a unique set of facts.

There is no Wisconsin case outlining specifically what factors a court should consider when determining whether the seizure of an item subject to a warrant becomes unreasonable due to delay in executing the warrant. This is a question of law that will likely recur as devices such as computers, phones and tablets sit in police inventory. A decision from this Court is therefore necessary as it will have state-wide impact and will develop case law. Accordingly, review is appropriate under Wis. Stat. §809.62(1r)(c)2 and §809.62(1r)(c)3.

Additionally, both issues presented in this case are appropriate for review by this Court because they relate to significant questions of constitutional law. *See* Wis. Stat. §809.62(1)(a).

STATEMENT OF THE CASE AND FACTS

In March 2010, the Racine Police Department was involved in an investigation of sexual assault of a child. (1:6). Mr. Plencner was arrested, and subsequently charged in Racine County Case Number 10CF464. (1:6)

During that investigation, Officer Spiegelhoff requested a search warrant, which was warrant was issued on the same date by Honorable Judge Simonek. (5:1). Police seized a laptop, a computer tower, and three hard drives. Within days of the filing of criminal charges, the seized

property was turned over to the Wisconsin Department of Justice Division of Criminal Investigations. (DCI).

On April 8, 2010, the electronic devices were released from the Racine Police Department, and turned over to Wisconsin Department of Justice, Division of Criminal Investigation (DCI). (8:1)

On April 14, 2010, Mr. Plencner's then-attorney requested his property be returned. (8:2). The computer, which is the subject of this motion, was not returned. The investigating officer received a preview disc from the computer but reported that a full evidentiary look at the computer would take weeks or months. (8:2).

Mr. Plencner ultimately pled guilty to the offense on August 20, 2010. The court placed Mr. Plencner on probation for a period of 8 years and imposed 10 months of condition time. After completing his condition time, in August 2011, Mr. Plencner renewed his request to have his property returned. The property, however, was not returned. (5:2).

Rather, in response to the request, Officer Spiegelhoff stated, "they are still up there [at DCI] and if a DA tells us to turn them over, then I guess we will have to go get them. Otherwise, DCI is still processing them. It takes over a year to get through it all." (5:2).

Two years later, on September 19, 2013, Toby Carlson from DCI contacted Officer Spiegelhoff and indicated that the evidence was being reviewed and child pornography had been found. (8:3). DCI informed Officer Spiegelhoff that it had the 3.5-year-old warrant from 2010, but that under the circumstances, it was requesting a new warrant. (5:2)

The new affidavit submitted by Officer Spiegelhoff indicated that on September 19, 2013 he was contacted by Toby Carlson, who advised that he had "just started working" on this case as it had been previously assigned to other specialists who no longer worked at DCI. (8:3). The court subsequently issued a on September 24, 2013. (8:3). Child pornography was located on one of the hard drives in December 2013, and form the basis for the charges in the present case. (8:3).

During the pendency of this case Mr. Plencner was represented by two different trial counsel. On July 2, 2015, his first attorney filed a motion to dismiss the case, arguing that the delay in issuing charges, and the staleness of the warrant, violated Mr. Plencner's constitutional rights. (5:1).

The circuit court heard argument and issued a decision on the motion on October 2, 2015. At that hearing, the court made findings of fact related to the timeline of events. (33:7-10). The found that "from a fairness standpoint, it seems totally unfair to have a defendant charged with sexual assault back in 2010, be sentenced, be sentenced on that, and I'm assuming, that the court considered something about what was on the computer . . . [s]o this is about as unfair as it gets." (33:10-11).

However, the court determined that it could not make the finding of actual prejudice required to find a delay in charging unconstitutional. (33:11). The court, concerned with this issue, asked the parties to "revisit" the issue of prejudice, and set the matter over to a new date. (33:13).

Defense counsel filed a second motion to dismiss on November 30, 2015. (8: 1-7). In that motion, the defense focused on how the delayed charging caused actual prejudice to Mr. Plencner, arguing that there were issues with the chain

of custody. (8:4-6). The motion also argued that the information in the warrant was "stale and dated". (8:6).

The circuit court held a second motion hearing on February 22, 2016. It denied the motion to dismiss, and reasoned that there was no prejudice, or other agreement that prohibited the state from filing the charges, albeit more than four years after the initial seizure of the items. (34:9).

Mr. Plencner ultimately pled no contest to two counts of possession of child pornography. (36:2-3). New counsel was represented Mr. Plencner at his sentencing hearing. The parties proceeded to sentencing, and no reason to delay the sentencing was raised. (37:2). The court sentenced Mr. Plencner to 3 years of initial confinement and 2 years of extended supervision on each count, to be served consecutively. (37: 32-33).

Mr. Plencner filed a postconviction motion arguing that his trial counsels were ineffective for failing to challenge the seizure of his property under the correct theory.[3]

The circuit court denied the postconviction motion. In its ruling, the circuit court reasoned that Mr. Plencner had already raised a constitutional challenge in a pretrial motion and cited to the July 2, 2015 motion, which stated, "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; App. 102). Accordingly, the circuit court held that trial counsel had not been "'ineffective' as that term is defined." (22:2; App. 102).

[3] Mr. Plencner also argued that the DNA surcharge should be vacated. He does not appeal on that issue.

Mr. Plencner, who identified an issue with sentence credit, filed a supplemental postconviction motion, and in doing so, asked the circuit court to reconsider its prior ruling. (23:1-3). Mr. Plencner clarified that his argument was not that the court should have granted the motions as filed by trial counsel, or that the court should reconsider those, rather, he argued that counsel failed to raise the proper Fourth Amendment argument, and that failing to do so, constituted ineffective assistance of counsel. (23:3).

In a written decision and order, the circuit court granted Mr. Plencner's motion for sentence credit and denied his motion to reconsider its previous decision denying postconviction relief without a hearing. (24).

The Court of Appeals affirmed the circuit court's decision in all matters. ***State v. Spencer***, 2017AP1722-CR, 14, April 16, 2019. Its decision will be discussed further below.

REASONS FOR GRANTING THE PETITION

I. This Court Should Grant Review and Hold that Defense Counsel was Ineffective for Failing to Advance and Develop a Fourth Amendment Argument Attacking the Reasonableness of the Duration of the Seizure

Both the United States and Wisconsin Constitutions guarantee a criminal defendant the right to counsel. U.S. Const. amends. VI, XIV; Wis. Const. art. 1, § 7. To prove deficient performance in a claim of ineffective assistance of counsel, the defendant must "identify the acts or omissions of counsel that are alleged not to have been the result of *reasonable* professional judgment." ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). (emphasis added).

The Court of Appeals in this case held that counsel was not deficient for failing to raise a Fourth Amendment claim under the theory that the duration of the time between the seizure of the computer and the execution of the search warrant was unreasonable because there is no Wisconsin case on point and that provides a test. ***State v. Plencner***, Slip Op. October 28, 2020, ¶¶ 20-21. (App. 112-113).

"Because the law is not an exact science and may shift over time, the rule that an attorney is not liable for an error of judgment on an unsettled proposition of law is universally recognized." ***State v. Maloney***, 2005 WI 74, ¶23, 281 Wis.2d 595, 698 N.W.2d 583. "[I]neffective assistance of counsel cases should be limited to situations where the law or duty is clear such that reasonable counsel should know enough to raise the issue." ***State v. McMahon***, 186 Wis.2d68, 85, 519 N.W.2d621 (Ct. App. 1994)However, failure to recognize well-defined legal principles is nearly "inexcusable." ***Id***. The question, therefore, is not about the unsettled nature of the law, but rather the reasonableness of counsel's actions in failing to raise the issue.

Here, the claim counsel should have made was that the duration of time between the seizure and execution of the warrant was unreasonable, thereby rendering the search unconstitutional. The record supports that counsel identified that the duration of time was problematic. As the Court of Appeals noted, counsel filed a motion to dismiss and argued that the delay violated Mr. Plencner's Fourth, Fifth, Sixth and Fourteenth Amendment rights. ***State v. Plencner***, Slip. Op. October 28, 2020 ¶21 (App. 113).

It is unreasonable for counsel to not have addressed the delay in the execution of the warrant. As evidenced by the pretrial motions, counsel was aware that getting the evidence suppressed was critical to the case. Likewise, counsel was aware that the Fourth Amendment relies on a standard of reasonableness. While the particulars may be unsettled, counsel should have known as much and advanced an argument to preserve the issue.

This Court should accept review and hold that counsel can be ineffective when they should have known to raise the issue even if no case presents precise set of facts.

II. This Court Should Grant Review and Hold that the Proper Test for Evaluating the Reasonableness of Duration of a Seizure a balancing one as described in ***Place***.

In its decision, the Court of Appeals determined it need not reach the issue of what standard to apply when determining when an otherwise lawful seizure pursuant to a warrant become unreasonable because the case went before it on a claim of ineffective assistance of counsel, and counsel could not be ineffective for failing to advance a claim in an area of law that is unsettled. ***State v. Plencner*** (Slip. Op. ¶ 20, October 28, 2020; App. 112). The Court noted that the unsettled nature of the issue is clear, as each of the parties advocated for a different test. ***Id***. at ¶ 18 (App. 110).

While there are no Wisconsin cases with this fact pattern, the reasonableness of police action is the cornerstone of the Fourth Amendment. Both trial and appellate courts alike routinely engage in balancing tests and examine the totality of the circumstances when evaluating whether the search or seizure was proper under the Fourth Amendment.

The duration of a seizure is relevant to determining reasonableness, and courts should "assess the reasonableness of a seizure by weighing the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." ***United States v. Place***, 462 U.S. 696, 403 (1983). Courts have consistently applied this test when evaluating the reasonableness of delays between the seizure of a container or device suspected of containing contraband and obtaining a warrant. *See* ***United States v. Place***, 462 U.S.

696 (1983); ***Segura* v. *United States*** *468* U.S. 796 (1984); ***State v. Gant***, 2015 WI App 83.

That the computer in this case was seized properly and there was a delay not in obtaining the warrant, but in its execution, should not render the balancing test long-used by courts unsuitable for evaluating whether the delay rendered the continued seizure of the computer unreasonable. A warrant does not transfer ownership of seized property to the state, nor does it divest a citizen from their interest in the property. For example, Wis. Stat. § 968.20(1) permits the return of property even when a warrant was issued.

The state would like the focus to be on whether the delay in searching rendered the probable cause that initially supported the warrant stale. ***State v. Plencner*** (Slip. Op. ¶ 18, October 28, 2020; App. 111). Adopting this analysis would result in a nearly bright-line rule because as the Court of Appeals noted, while " ' Staleness' is highly relevant to the legality of a search for a perishable or consumable object, like cocaine, but rarely relevant when it is a computer file." ***Id***. at ¶ 19, fn10. (*citing* ***United States v. Seiver***, 692 F. 3d 774, 775-778 (7th Cir. 2012)). Evidence contained in a digital format remains for a long-time and can recovered even after being deleted. ***Id***. Accordingly, where probable cause is found to seize and search an item for digital files or records, the information will almost never become stale. ***Id***.

Under the state's theory, if police seize and obtain a warrant for a computer, tablet, phone, camera, smartwatch, or any other device capable of storing information, that device may be held for any period of time, even many years, before the warrant is executed.

Adopting the analysis advocated by the state circumvents the reasonableness requirement of the Fourth Amendment, and essentially divests citizens of their possessory rights.

Finally, although the Court of Appeals did not reach the question about which test should apply, it stated that Mr. ***Plencner*** did not establish that the test in Place would resolve in his favor. ***State v. Plencner***, Slip. Op. ¶23, October 28, 2020. (App. 114). In conducted the balancing test, the Court of Appeals relied on its own speculation the delay "appeared inadvertent, and that along with the employee turnover that reportedly caused the nearly four-year delay, there was "likely a lack of resources." ***Id***. at ¶ 26 (App. 116). However, because there was no hearing, the Court of Appeals cannot engage in a balancing test.

Therefore, this Court should accept review and hold that a delay between obtaining a warrant and the execution thereof is subject to the same reasonableness standard under the Fourth Amendment as the United States Supreme Court used in ***Place*** and remand this to the circuit court for a ***Machner*** hearing.

CONCLUSION

Mr. Plencner respectfully requests that for the reasons stated above that this Court grant his petition for review and reverse the decision of the court of appeals, holding that attorneys are not insulated from an ineffective assistance of counsel claim when they fail to bring a Fourth Amendment claim because an appellate court had not previously decided a factually similar case. He further asks this Court to hold that delays in the execution of a warrant to search the contents of the computer is subject to a balancing test and not on whether the warrant itself was stale.

Dated this 27th day of November, 2020.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rules 809.19(8)(b) and 809.62(4) 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 2,933 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 27th day of November, 2020.

Signed:

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