STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT III

Case No. 2019AP1317 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL J. VAN LINN,

Defendant-Appellant.

Appeal of a judgment entered in the
Oconto County Circuit Court,
the Honorable Michael T. Judge, presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@opd.wi.gov

Attorney for Defendant-Appellant

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ISSUE PRESENTED

A sheriff's deputy ordered the taking of Daniel Van Linn's blood for alcohol testing without a warrant. The district court suppressed the blood test results, concluding there was no exigency and that the blood draw thus violated the Fourth Amendment. Rather than appealing this ruling, the state instead sought and received a subpoena to the hospital where Mr. Van Linn had been treated. To show probable cause, the subpoena application relied in part on the BAC level found in the earlier illegal search. The hospital turned over its own documentation of Mr. Van Linn's blood alcohol content.

Was the subpoenaed BAC information admissible despite the earlier suppression of the same information?

The circuit court held that it was. This court should reverse.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Van Linn does not request oral argument or publication, as the briefs should be able to present the issue for decision and the case involves only the application of clearly established law.

STATEMENT OF FACTS AND OF THE CASE

Mr. Van Linn was in a car crash and was transported to a hospital. (23:1-3; App. 112-14). Suspecting that Mr. Van Linn was intoxicated, a deputy sheriff informed him that he was under arrest and asked him to consent to a blood draw. Mr. Van Linn refused. (23:3; App. 114). The deputy, believing the circumstances presented an exigency, directed that Mr. Van Linn's blood be drawn anyway without seeking a warrant. (23:3; App. 114).

The state charged Mr. Van Linn with operating while intoxicated and operating with a prohibited alcohol concentration. (11:1-2). Mr. Van Linn moved to suppress the results of the testing of this blood. (12). The state argued the search was justified by exigent circumstances, but the circuit court disagreed, holding that the fact that around two hours had elapsed since that accident did not excuse the deputy's failure even to attempt to obtain a warrant. It accordingly suppressed the results of this blood draw. (18).

About three months later, the state moved the court under Wis. Stat. § 968.135 to issue a subpoena to the hospital that had treated Mr. Van Linn. (21). In support, the state provided an affidavit which was a recitation of the facts from the amended criminal complaint—with the included fact that the (suppressed) blood test had shown a prohibited blood alcohol content. (23:4; 6; App. 115). The court signed the subpoena the following day; Mr. Van Linn's

counsel sent an email to the judge and assistant district attorney on the same afternoon opposing the subpoena and saying he would file a motion to quash. (26:1). He did later file such a motion, but in the interim the hospital had provided the requested documents.[1] Because the parties had the documents, the court determined that the question of the validity of the subpoena was moot, but reserved the question of whether the documents were admissible. (78:9-10).

The parties briefed the issue. Mr. Van Linn argued that the result of the hospital's blood draw was privileged under Wis. Stat. § 905.04, and also that the court's prior suppression of the same information should prevent the state from accessing it via different means. (32:2-4; App. 104-06). After briefing, the court issued a written decision finding the hospital's blood test results admissible. (32; 33; 37; App. 101-111). Mr. Van Linn pleaded no contest. (51:1-2). He appeals the suppression decision. (54; 65); *see* Wis. Stat. § 971.31(10).

ARGUMENT

I. The blood test result was inadmissible as the fruit of the prior unlawful (and suppressed) search.

Unless a recognized exception applies, the Fourth Amendment prohibits the taking of a drunk-

[1] The state also subpoenaed records from the hospital company that had transported Mr. Van Linn. (29). This subpoena is not at issue on appeal.

driving suspect's blood without a warrant. *Missouri v. McNeely*, 569 U.S. 141, 148 (2013). Here, the circuit court held that the only warrant exception offered by the state—exigent circumstances—was not satisfied, and so it suppressed the results of the blood test ordered by the deputy. This ruling was correct; the simple fact of the passage of two hours between the report of the accident and the officer's request for Mr. Back's blood does not constitute an exigency, particularly when there was no attempt, at any time, to get a warrant, and no explanation of why one could not have been sought. *See id.* at 163. In any case, the state did not appeal this ruling, *see* Wis. Stat. § 808.04(4).

The Fourth Amendment's exclusionary rule, though, does more than forbid the of evidence that has been illegally seized—it also excludes evidence discovered later by exploitation of the illegal seizure. This is the "fruit of the poisonous tree" doctrine. *See Nardone v. United States*, 308 U.S. 338, 341 (1939). As Mr. Van Linn argued below, the state should not be permitted to take advantage of its wrongdoing by way of a "back door around the Court's prior ruling" excluding the blood draw evidence. (32:3-4; App. 105-06).

One example of the "fruit of the poisonous tree" is the use of illegally-seized evidence to supply probable cause for a later warranted search. (The subpoena here, while not denominated a "warrant," was subject to the same legal requirements: it could be issued by a judge only on a showing of probable

cause. Wis. Stat. § 968.135.[2]) Where either the decision to seek a warrant, or the issuing magistrate's decision to issue it, was affected by information gathered by illegal conduct, the warrant cannot be an "independent source" of evidence. *Murray v. United States*, 487 U.S. 533, 542 (1988).

Here, the state plainly used information gained from its illegal search to demonstrate the probable cause it needed: it listed the BAC discovered by the warrantless blood draw in its affidavit for the subpoena to the hospital. (23:4; App. 115). The facts of this case thus line up with those of the seminal fruit-of-the-poisonous-tree case, *Silverthorne Lumber Company v. United States*, 251 U.S. 385 (1920).

In *Silverthorne*, federal agents without a warrant "made a clean sweep" of all the documents in the company office of two men it had indicted. 251 U.S. at 390. The men challenged the seizure and the court ordered the documents returned to them. *Id.* at 390-91. The documents were returned, but the government then sought a subpoena for the same documents, in part relying on the knowledge gained by the illegal seizure. The targets of the subpoena refused to comply, and then they were held in

[2] This fact distinguishes this case from *City of Muskego v. Godec*, 167 Wis. 2d 536, 541, 482 N.W.2d 79 (1992), which was a civil matter and involved a subpoena under a different statute not requiring probable cause, and *State v. Jenkins*, 80 Wis. 2d 426, 433, 259 N.W.2d 109 (2019), which involved a physician's testimony and no subpoena at all—and thus no search.

contempt. *Id.* at 391. In the Court's words, the government's position was that although the "seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them." *Id.*

The Court rejected the government's argument, saying it "reduces the Fourth Amendment to a form of words." *Id.* at 392. It went on:

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed.

Id.

In this case, just as in *Silverthorne*, the government violated the Fourth Amendment in taking Mr. Van Linn's blood without a warrant. In this case, as in *Silverthorne*, the court refused to let the government use the illegally-seized evidence directly. And, in this case and that one, the government responded by presenting the court with a subpoena containing information—here the blood-alcohol content—that it had gained in the illegal seizure. The subpoena was thus not an "independent

source," but rather the fruit of the illegal seizure: prompted by the knowledge that Mr. Van Linn's BAC would be above the limit, the government presented this fact to the magistrate, who issued the subpoena. *See Murray*, 487 U.S. at 542. This exploitation of the previous, illegal search requires suppression.

CONCLUSION

Because the state obtained the hospital's BAC records by presenting the judge with the results of its previous, illegal search, Mr. Van Linn respectfully requests that this court vacate his plea, conviction and sentence, and that it remand the case with directions that the BAC evidence be suppressed.

Dated this 17th day of October, 2019.

Respectfully submitted,

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@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 1,332 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 17th day of October, 2019.

Signed:

ANDREW R. HINKEL
Assistant State Public Defender

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