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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP1317-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL J. VAN LINN,

Defendant-Appellant-Petitioner

On review of a decision of the Court of Appeals
affirming the Oconto County Circuit Court,
the Honorable Michael T. Judge, presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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ISSUE PRESENTED

After Daniel Van Linn was arrested on suspicion of drunk driving, a sheriff's deputy ordered his blood drawn for testing. This draw was illegal, and the circuit court excluded its fruit. After the suppression decision, the prosecutor applied for a subpoena for Mr. Van Linn's medical records to the hospital where he had been treated. The application included the results of the first, suppressed blood test. The court issued the subpoena and the hospital turned over evidence including the results of the blood alcohol test it had conducted. Was the evidence procured by this subpoena the fruit of the state's earlier, unlawful search, such that it should have been suppressed?

The circuit court and the court of appeals refused to suppress the hospital blood test results. This Court should reverse.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication of opinions are customary for this Court.

STATEMENT OF FACTS

Mr. Van Linn was in a car crash and was transported to a hospital. (23:1-3; App. 115-17). 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. 117). The deputy directed that Mr. Van Linn's blood be drawn anyway without seeking a warrant. (23:3; App. 117).

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 blood draw was justified by exigent circumstances, but the circuit court disagreed. It held that the passing of two hours between the deputy's dispatch and his request for consent did not excuse his failure even to attempt to obtain a warrant. It accordingly suppressed the results of the draw. (18).

About three months after the suppression order, the state moved the court under Wis. Stat. § 968.135 to issue a subpoena for "medical records" to the hospital that had treated Mr. Van Linn. [1] (21;22). In support, the state provided an affidavit which included the fact that the (suppressed) blood test had shown a prohibited blood alcohol content. (23:4; 6; App. 118). 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,

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

but in the interim the hospital had provided the requested documents. 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 suppression of the blood draw evidence should prevent the state from using the same evidence re-obtained by different means. (32:2-4). After briefing, the court issued a written decision holding the hospital's blood test results admissible. (32; 33; 37; App. 113-14). Mr. Van Linn pleaded no contest. (51:1-2). He appealed the suppression decision. (54; 65); *see* Wis. Stat. § 971.31(10).

The court of appeals affirmed. In an unpublished decision, it held that the subpoena to the hospital satisfied the independent source exception to the exclusionary rule. *State v. Van Linn,* No. 2019AP1317-CR, unpublished slip op. at ¶¶19-24 (WI App. Nov. 17, 2020); App. 109-112.

Mr. Van Linn petitioned this Court for review. Petition of Dec. 16, 2020. The Court ordered a response from the state, which opposed review. Order of February 24, 2021; Response of March 10, 2021. The Court granted review. Order of April 27, 2021.

ARGUMENT

I. The subpoena here, sought after suppression of the illegal police blood draw and with knowledge of its result, was the fruit of the illegality and not an independent source.

Unless a recognized exception applies, the Fourth Amendment prohibits the taking of a drunk-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, so it suppressed the results of the blood test ordered by the deputy. (18). This ruling was correct. The passage of two hours between the report of the accident and the officer's request for Mr. Van Linn's blood did not constitute an exigency—particularly when there was no attempt, at any time, to get a warrant, and no attempt to explain why one could not have been sought. *See McNeely*, 569 U.S. at 163. In any case, the state did not appeal this ruling. *See* Wis. Stat. § 808.04(4).

What the state did instead was obtain the same information that had been suppressed but by a different means: a subpoena to the hospital for Mr. Van Linn's medical records. But the Fourth Amendment's exclusionary rule does more than forbid the use of evidence that has been illegally seized: it also excludes evidence discovered later as a result of the illegal seizure. This is the "fruit of the poisonous

tree" doctrine. *See Nardone v. United States*, 308 U.S. 338, 341 (1939). And the state's behavior in this case—"remedying" the suppression of information gained by an illegal search with a subpoena for the same information—is strikingly similar to the government's tactics in 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 they were held in 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 for the same information it had gained by its unlawful acts.

The state contends, however, that the BAC information the subpoena uncovered falls within an exception to the exclusionary rule: the independent source doctrine. This doctrine also has its genesis in *Silverthorne*; in the above-quoted paragraph the Court cautioned that illegally obtained facts do not "become sacred and inaccessible." Such facts may be "proved like any others" provided that "knowledge of them is gained from an independent source"—that is, a source not tainted by illegality.

The Court expanded on the independent source doctrine in *Murray v. United States*, 487 U.S. 533 (1988). In that case, federal agents suspecting a conspiracy to distribute marijuana illegally entered a warehouse and observed "numerous burlap-wrapped bales." *Id.* at 535. The agents left and applied for a search warrant; the application did not mention the illegal entry or what the agents had seen in the warehouse. *Id.* at 535-36. In executing the warrant, the agents again "discovered" (and seized) the marijuana bales.

The Supreme Court held that *if* the warrant was "genuinely independent" of the earlier, illegal entry, then the seized marijuana would be admissible. The warrant would not be genuinely independent, though, in either of two cases: first, "if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry"; second, "if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant." *Id.* at 542.

The subpoena here, while not denominated a "warrant," was subject to exactly the same legal requirements applicable to a warrant: it could be issued by a court only on a showing of probable cause. Wis. Stat. § 968.135. The BAC information revealed by this subpoena must be suppressed because the state fails the first prong of the *Murray* test: it cannot show its decision to seek the subpoena was not prompted by the illegal search, for two reasons.

First, the state's decision to seek the subpoena was motivated specifically by the "information obtained" via the unlawful blood draw. *Murray*, 487 U.S. at 542. The state *knew* what the result would be because it had performed the illegal search; this gave it reason to seek the subpoena. This is precisely the position of the government agents in *Silverthorne*, 251 U.S. at 391—the state sought to "use the knowledge that it [had] gained" to obtain the same information in a "more regular form."

Second, the facts here are not like the facts in *Murray* (or the many other cases that have followed *Murray*). The typical independent-source warrant case involves a warrant issued roughly contemporaneously with some illegal act by state agents. The question in these cases is whether the warrant would have issued even if the illegality had not occurred. But one thing that we know in such a case is that the police *did* seek a warrant, even if they also committed illegal acts. It's therefore plausible in these cases (as in *Murray*) to ask whether police would still have sought the warrant if they had refrained from breaking the law. *See, e.g.*, *State v. Carroll*, 2010 WI 8, ¶49, 322 Wis. 2d 299, 778 N.W.2d 1.

The situation here is very different. Here, we know the deputy did *not* seek a warrant for the contents of Mr. Van Linn's body, before or after he performed his search. And when the state did—eventually—seek judicial permission to get the BAC information it wanted, it didn't do so independently of

the deputy's illegal search. The state's subpoena request was, instead, the direct result of the judicial consequence of that illegal act: suppression. We know this because the state didn't seek the subpoena in March of 2017, when Mr. Van Linn was arrested. It did so ten months later, in January of 2018, after the court had held the trooper's draw unconstitutional. The state would have had no reason to seek a subpoena had the earlier search not been illegal. In *Murray*'s terms, the fact of the earlier illegality—by way of the circuit court's suppression decision—"prompted" the later subpoena.

To call the subpoena here "independent" of the illegal search is thus plainly a fiction. In *United States v. Eng*, 971 F.2d 854, 860 (2d Cir. 1992), the Second Circuit observed that after-the-fact subpoenas for information previously obtained illegally have the effect of "swallowing the exclusionary rule" such that "special care is required … when the government relies on the subpoena power." It went on that "[p]articular care is required where, as here, subpoenas are issued after or at the time of the unlawful search." *Id.* This case is different from *Eng*. Here it is even clearer that the illegal search prompted the subpoena: the subpoena here wasn't just issued after the unlawful *search*, but also after the circuit court's decision excluding the evidence it uncovered. It was not independent of the illegal search; it was its direct result.

"The purpose of the Fourth Amendment exclusionary rule is to deter unreasonable searches, no matter how probative their fruits." *Oregon v. Elstad*, 470 U.S. 298, 306 (1985). As *Eng* noted, this purpose can't be met if the state—having violated the law by searching without a warrant—can duck suppression by seeking the equivalent of a warrant months later. The Ninth Circuit also recognized this when it rejected the government's reliance on subpoenas in *Center Art Galleries-Hawaii, Inc. v. United States*, 875 F.2d 747, 748 (9th Cir. 1989). There, the district court had noted that the subpoenas were served after the illegal search and seizure, when "there was nothing left to discover." *In re Motion for Return of Prop. Pursuant to Rule 41*, 681 F. Supp. 677, 687 (D. Haw. 1988). This led, said the court, to "the inevitable conclusion that the subpoenas were used as an 'insurance policy' in the event of a subsequent invalidation of the search and seizure." It went on that this "should not be permitted. Such a rule would allow the government to violate the Fourth Amendment with impunity as long as they could obtain a subpoena." *Id.*

Suppression was the proper result of the deputy's illegal blood draw. The state's subpoena sought to circumvent this result by requesting—months too late—the judicial approval the Constitution required for the initial search. The subpoena was not an independent source, but the last link in a chain that began with the unlawful invasion of Mr. Van Linn's body. This court should reject the

state's attempt "to violate the Fourth Amendment with impunity."

CONCLUSION

Because the state unlawfully obtained Mr. Van Linn's BAC evidence, and because its later subpoena was not an independent source of that evidence, Mr. Van Linn respectfully requests that this Court vacate his plea, conviction and sentence, and that it remand with directions that the subpoenaed BAC evidence be suppressed.

Dated this 27th day of May, 2021.

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 2,254 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 May, 2021.

Signed:

ANDREW R. HINKEL
Assistant State Public

CERTIFICATION AS TO APPENDIX

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.

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Dated this 27th day of May, 2021.

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APPENDIX

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