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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP1404-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,
v.
GEORGE STEVEN BURCH,
Defendant-Appellant.

On Certification from the Court of Appeals of an Appeal from the Judgment of Conviction entered in the Circuit Court for Brown County, the Honorable John Zakowski Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTE

CASES

REPLY ARGUMENT

I. THE BROWN COUNTY SHERIFF'S OFFICE'S SEARCH OF BURCH'S CELL PHONE EXTRACTION IN AUGUST 2016 VIOLATED THE FOURTH AMENDMENT

A. Consent was Limited

The State concedes that the discussion about searching the phone was limited to only text messages, but asserts that the scope was broadly expanded when Bourdelais asked "to download its contents," making it appear that Burch consented to a search of his phone in its entirety. State's Br. at 16. But that is not what Bourdelais asked. Bourdelais asked to "download *the information* off the phone . . . ." R. 234 at 10 (emphasis added).

To Burch's argument that the definite article "the" limited "the information" to specifically what they discussed–the text messages–the State retorts, "That is not obvious." State's Br. 16. There was no ambiguity in Bourdelais' request. And even if there was, it must be resolved in Burch's favor because "[c]onsent to search must be unequivocal and specific . . . ." *State v. Reed*, 2018 WI 109, ¶ 8, 384 Wis.2d 469, 920 N.W.2d 56.

Not only was the discussion clear as to the scope of consent, but the context and the objective of the search also confirms that consent was limited to text messages. *Florida v. Jimeno*, 500 U.S. 248, 251 (1991)(the scope of consent is defined by its object). Bourdelais' objective was to check out Burch's claim that he was not in the area of the hit and run on the night in question. R. 234 at 8-10. Burch's girlfriend, Schuyler, lived close to the scene of the accident, so Bourdelais had his suspicions, and he wanted to look at the

texts between Burch and Schuyler to confirm or deny his theory. *Id.*

The whole discussion revolved around looking at Burch's text messages, and a reasonable person would conclude that Burch was consenting to a search of only those, not the entire contents of his phone.

B. GBPD could not Retain Data with no Evidentiary Value

Burch did not forfeit this argument. Before the circuit court, Burch moved to suppress on grounds that the police violated his Fourth Amendment rights (R. 68 at 2), and he maintains those same grounds here. Thus, unlike in *Nelis*, Burch does not ground his claim on a different statute than that raised before the trial court; "the specific grounds for inadmissibility" is, and has always been, the Fourth Amendment. *See State v. Nelis*, 2007 WI 58, ¶ 31, 300 Wis. 2d 415, 733 N.W.2d 619.

Also, Burch did not take a contrary position below in arguing that the BCSO should have obtained a warrant. State's Br. at 18. Burch did not concede that the extraction was lawfully retained; he simply argued that a warrant could have cured the constitutional problem, as it did in *United States v. Ganias II*, 824 F.3d 199, 220-21, 225-26 (2d. Cir. 2016). R. 234 at 9.

Back to the real issue. Digital evidence–especially that contained in cell phones–presents concerns our Founders could have never contemplated. Physical evidence imposes natural limits on what police take and retain. Twenty-some years ago, say police wanted to determine whether a suspect had contact with a certain individual, and the suspect consented to police searching the caller

identification log in his home. In conducting this search, police would not also take the suspect's bank records, diaries, home videos, prescription information, etc.; these items are totally irrelevant to their investigation. And even if they did, general principles would require the return of these items if they contained no evidentiary value. *See United State v. Tamura*, 694 F.2d 591, 596-97 (9th Cir. 1982).

Ganias, *Thompson*, and *McCavitt* recognize the unique constitutional implications at issue with digital evidence, and thus enumerate parameters as to when and for how long police can retain digital data.[1] *United States v. Ganias I*, 755 F.3d 125, 137 (2nd Cir. 2014); *People v. Thompson*, 51 Misc.3d 693, 720-21 (Sup. Ct. N.Y. County 2016); *People v. McCavitt*, 2019 IL App (3d) 170830, ¶¶ 20-22, 145 N.E.3d 638. This Court should follow suit and hold that once data relevant to the investigation is identified and isolated, police must return or destroy the non-relevant data.[2] As to the relevant data, this Court should hold that police can retain that data until a trial is complete or a decision is made that no charges will be filed.

The State makes a good point that the touchtone of the Fourth Amendment is reasonableness, and courts must make a fact-specific determination balancing the government's interest with the individual's privacy interest. State's Br. at 22. However, this balancing is inherent in the rule Burch proposes. Where the government no longer has (or never did) an interest in the data–apart from maintaining a treasure trove of data to use at its

[1] The fact that these cases involve warrants, as opposed to a consent search, is inconsequential. The issue is, assuming the data was lawfully seized, can police retain data with no evidentiary value? Also, as to the relevant data, can police retain this data indefinitely?

[2] As in *Ganias I*, the State has not established that retaining a complete copy is the only way to authenticate data. 755 F.3d at 139. This argument is just a distraction.

prosecutorial leisure–an individual's privacy interest must prevail.

C. BCSO had no Lawful Authority to Conduct the Second Search

The State justifies its authority to search the data a second time in three ways: 1) that its lawful possession of the data confers unfettered authority to search; 2) that Burch's consent forever terminated his expectation of privacy; and 3) that police can warrantlessly search evidence to which it had unobjectionable access (in other words, taking a "second look.") State's Br. at 18-21, 25-26. None of the cases cited by the State authorized BCSO's second search. More importantly, all of these cases address physical evidence. Given the vast amount of data contained in modern cell phones, there are heightened privacy implications to allowing police unlimited and indefinite access to one's "'privacies of life.'" *Riley v. California*, 573 U.S. 373, 403 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

1. Lawful possession does not confer authority to search

The State relies on *Petrone*, *Reidel*, and *VanLaarhoven* for the premise that GBPD's supposed lawful possession of the data gave police unfettered authority to search it in perpetuity. State's Br. at 18-20. In those cases, the court concluded that the examination of evidence cannot be parsed from the seizure of that evidence; the examination is essential to the seizure and constitutes a single constitutional event. *See State v. VanLaarhoven*, 2001 WI App 275, ¶ 16, 248 Wis. 2d 881, 637 N.W.2d 441; *State v. Petrone*, 161 Wis. 2d 530, 545, 468 N.W.2d 676 (1991); *State v. Riedel*, 2003 WI App 18, ¶¶ 13, 16, 259 Wis. 2d 921, 656 N.W.2d 789.

Unlike in those cases, BCSO's *search* of the data in a homicide investigation was not essential to GBPD's *seizure* of the data to investigate a hit and run months earlier. R. 78; R. 101 at 12; R. 234 at 4; R. 251 at 35, 66. In *Petrone*, could police later share the film canister with another agency for fingerprint examination in an unrelated homicide investigation? Could police subsequently test the blood samples obtained in *VanLaarhoven* or *Reidel* for DNA connecting the defendants to a robbery? The logic–that the examination is essential to the seizure of evidence–collapses when applied to the above hypotheticals. Sure, the examination of evidence is an essential part of the seizure, but none of these cases hold that police can do so in perpetuity for reasons entirely unrelated to the seizure.

Also, *Riley* and *Randall* teach us that lawful possession does not equate to an unrestricted right to search. Police may lawfully *seize* an individual's cell phone incident to arrest to ensure it cannot be used as a weapon and to prevent the destruction of evidence, but police must obtain a warrant to *search* the phone. *Riley*, 573 U.S. at 387-88. Similarly, in *State v. Randall*, this Court made clear that the State's examination of the blood was limited to the purpose of taking the sample–to determine whether Randall was intoxicated when she operated a motor vehicle. 2019 WI 89, ¶ 35, 387 Wis. 2d 744, 930 N.W.2d 223. The State's *possession* of Randall's blood did not confer the authority to perform additional tests–for instance, analysis that would reveal her genetic or medical information. *Id.*

2. Consent is not indefinite

According to the State, *Stout* and *Randall* stand for the proposition that consent permanently terminates one's expectation of privacy. State's Br. at 18-19. As the court of appeals noted in its certification, neither of these cases

"addressed whether a person who consents to a search gives up his or her right to privacy in the searched material in perpetuity." App. 173.

Stout made a passing reference to a person giving up his or her right to privacy by consent, but that relinquishment was temporary. *See State v. Stout*, 2002 WI App 41, ¶ 17 n. 5, 250 Wis. 2d 768, 641 N.W.2d 474. As the court of appeals concluded here, "We doubt the State would argue that by consenting to a search of his or her automobile, a person forevermore gives up his or her right to privacy in that automobile." App. 173. The court noted that the State did not develop any argument that the result should be different as applied to digital evidence (*id.*), and the State likewise failed to do so before this Court.

In *Randall*, this Court made clear that the defendant's reduced expectation of privacy in the alcohol content of her blood flowed from her *arrest* for drunk driving, not her consent. *State v. Randall*, 2019 WI 80, ¶¶ 21, 36, 387 Wis. 2d 744, 930 N.W.2d 223 (lead opinion)(noting that arrestees have a reduced expectation of privacy in the instrumentalities of their crime and "Upon her arrest, Ms. Randall's reduced expectation of privacy meant that she could not keep the presence and concentration of alcohol in her blood secret from the police."); ¶¶ 42, 76 (Roggensack, C.J., concurring)("a defendant who has been arrested for driving while under the influence of alcohol has no reasonable expectation of privacy in the alcohol concentration of the blood . . . .") Randall's consent was relevant only to the "method" by which police obtained the evidence. *Id.*, ¶ 36. In its certification, the court of appeals said nothing in *Randall* suggests that because the defendant consented to her blood draw that "the State could retain that blood sample for an unlimited period of time and then

perform different tests on it–for instance, DNA testing–in connection with an unrelated case." App. 173.

3. This was not a "second look"

The State argues that Burch did not have an expectation of privacy in the extraction, and thus the second examination was not a search for Fourth Amendment purposes. State's Br. at 20-21. For support, the State relies on *Betterly* asserting that "defendants have a diminished expectation of privacy in evidence that police already have unobjectionable *access* to." State's Br. at 20 (emphasis added). The State is wrong. This Court said that a defendant's reduced expectation of privacy flows from "prior unobjectionable *exposure* of the item to police." *State v. Betterley*, 191 Wis. 2d 406, 418, 529 N.W.2d 216 (1995)(emphasis added).

As previously developed, even if Burch had a reduced expectation of privacy in the text messages viewed by police, this exposure did nothing to diminish his expectation of privacy in the areas of his phone never revealed to police eyes. Also, *McCavitt* teaches us that even if an individual has a diminished expectation of privacy, once the matter is complete, his expectation of privacy is restored. *McCavitt*, 145 N.E.3d 638, ¶ 24. Finally, the State agrees that *Betterley's* "second look" doctrine has never been applied beyond the context of inventory searches, and it does not refute Burch's argument that this Court should not extend the doctrine beyond such. State's Br. at 26.

In the end, even if GBPD lawfully obtained and retained the entire contents of Burch's cell phone, what was BCSO to do when it wanted to conduct a new search of that data months later in an unrelated investigation? *Riley* says the answer is simple: "get a warrant." 573 U.S. at 403.

D. BCSO did not act in Good Faith

The State points to the consent form as providing a good faith basis for BCSO to believe it could search Burch's entire phone download. State's Br. at 28. As to the scope of consent, we know that a general consent form is of little help in determining scope and can be overridden by more explicit statements. *United States v. Lemmons*, 282 F.3d 920, 924 (7th Cir. 2002). As discussed, Burch's consent was limited.

In any event, for the good faith exception to apply, police must have relied on settled precedent; the exception does not apply when the court has not spoken on the issue. *State v. Dearborn*, 2010 WI 84, ¶ 46, 327 Wis. 2d 252, 786 N.W.2d 97. As developed, none of the cases relied upon by the State authorized the second search.

E. There is no Reason to Remand under the State's new "Independent Source" Theory

Under the independent-source doctrine, the State must show that it obtained the evidence by "independent and lawful means[.]" *State v. Quigley*, 2016 WI App 53, ¶ 51, 370 Wis. 2d 702, 883 N.W.2d 139. Apart from having forfeited the issue by not raising it below (*State v. Van Camp*, 213 Wis. 2d 131, ¶ 25-26, 569 N.W.2d 577 (1997)), the State cannot meet either prong.

Starting with the latter, the State asserts that it lawfully searched Burch's phone with a warrant. State's Br. at 30. What warrant? Notably, the State provides no record citation for this proposition. As the circuit court found, after Burch's arrest for the homicide, police searched the same phone "incident to arrest . . . ." R. 101 at 14. This finding was supported by Loppnow's testimony that Burch's phone

was searched incident to his arrest; Loppnow made no mention of this illusive warrant. R. 234 at 58.

In any event, the State cannot show that any subsequent search was independent of the initial illegality. The State points to evidence found after Burch's arrest (State's Br. at 30), but probable cause to arrest relied heavily on the Google data placing Burch at the critical crime locations, which police obtained only after the illegal search of his phone. R. 6 at 5-6.

II. THE CIRCUIT COURT ERRONEOUSLY ADMITTED THE FITBIT EVIDENCE WITHOUT AN EXPERT WITNESS TO ESTABLISH THE RELIABILITY OF THE SCIENCE UNDERLYING THE FITBIT TECHNOLOGY AND WITHOUT A WITNESS FROM FITBIT TO AUTHENTICATE THE EVIDENCE. IN ADDITION, THE COURT'S ERROR IS ONE OF A CONSTITUTIONAL MAGNITUDE.

A. Expert Testimony was Required to Establish the Reliability of the Science Underlying the Fitbit Technology

The State approaches the Fitbit issue with an oversimplified view. Like the circuit court (R. 70 at 8-9), it likens the Fitbit technology to a pedometer, watch or speedometer. State's Br. at 33. The Internet of Things aspect of a Fitbit distinguishes it from these devices. *See* R. 63 at 2. The concern is not simply the device itself, a three-axis accelerometer sensor that generates data representing the user's movements. *Id.* at 1. The greater concern is with how the device processes that data into a meaningful output, how that output is exchanged with a phone or computer, and how that evidence ultimately ended up in Fitbit's business records. Behling could not answer any of these questions. *See* R. 251 at 98-100.

The State's claim that jurors need only be generally familiar with technology and need not understand the underlying science is simply wrong. State's Br. at 33. In *Kandutsch*, the case the State likens most to this case, the court's conclusion that expert testimony was not required was not based on jurors not needing to understand the underlying science. The court explained that *because* jurors understand the underlying technology, expert testimony is not required. *State v. Kandutsch*, 2011 WI 78, ¶ 37, 336 Wis. 2d 478, 799 N.W.2d 865.

Also contrary to the State's argument, whether the underlying science is accepted *is* critical to a determination of whether an expert is required. *See* State's Br. at 34. Sure, the ultimate question in *Hanson* was whether the court could take judicial notice of the accuracy and reliability of the science at issue. *State v. Hanson*, 85 Wis. 2d 233, 244, 270 N.W.2d 212 (1978). However, the alternative to the court taking judicial notice was requiring expert testimony. *See id.* at 244-45; *see also Kandutsch*, 336 Wis. 2d 478, ¶ 43 ("The *Hanson* court concluded that judicial notice could properly be taken of the reliability of the underlying scientific principles of speed radar detection without expert testimony.") Because the scientific principles at issue there had been widely accepted and considered unassailable by courts, expert testimony was not necessary. *Hanson*, 85 Wis. 2d at 237-39, 244-45; *Kandutsch*, 336 Wis. 2d 478, ¶ 44.

The Fitbit evidence, involving the "Internet of Things," is unlike any other previously addressed in Wisconsin courts. *See* R. 63 at 2. The State offers no authority that Fitbit, or technology even remotely similar, has been accepted without expert testimony. This case will set the benchmark for the admissibility of such evidence in the years to come.

As *Kandutsch* recognized, judicial notice can sometimes be taken of the reliability of the underlying scientific principles without expert testimony. 336 Wis. 2d 478, ¶ 43. However, courts should not afford a presumption of accuracy until one familiar with the technology testifies. *Id.*, ¶ 45. Behling's testimony was woefully insufficient. *See* R. 251 at 98-100.

B. The State Failed to Properly Authenticate the Fitbit Evidence

Contrary to the State's argument (State's Br. at 35), reliability is critical to authentication. The *Kandutsch* decision was replete with reference to reliability and accuracy as pertinent to its authentication analysis. 336 Wis. 2d 478, ¶¶ 45-46, 48, 64. The State is correct that Wis. Stat. § 909.015 is not mandatory. State's Br. at 35. However, the State does not explain how it otherwise authenticated this data. Indeed, the State does not defend the trial court's self-authenticating conclusion (R. 70 at 17), which, as discussed, failed to account for the information contained within those records.

The State takes a two-dimensional view when it frames the authentication issue as "whether Detrie's Fitbit was accurately tracking the steps he took." State's Br. at 37. The State wholly ignores the three-dimensional aspect, the Internet of Things aspect, and whether the data from the device itself arrived at Fitbit's business records in an authentic, reliable, and accurate manner.

Kandutsch teaches us that even when expert testimony is not required, testimony by one familiar with the technology is required to establish that the process "produces an accurate result." 336 Wis. 2d 478, ¶ 46. The *Kandutsch* jury heard extensive testimony about how the

technology works, how the information is transmitted, and why the jury could trust that it was accurate. *Id.*, ¶¶ 13-16, 19. Unlike in *Kandutsch*, the witness used to introduce the underlying data, Behling, knew nothing about how the Fitbit data is stored and transmitted, and he could not give the jury any assurance that the data was not manipulated or edited. R. 251 at 98-100.

Along these lines, as to chain of custody, the State attempts to shift the burden to Burch to show that the data could have been manipulated. State's Br. at 36. The State, as the proponent, bears the burden to show that it is improbable that the evidence was contaminated or tampered with. *State v. McCoy*, 2007 WI App 15, ¶¶ 9, 10, 298 Wis. 2d 523, 728 N.W.2d 54. The State did not establish this below and makes no argument as to how it did here.

C. The Admission of the Fitbit Evidence without an Expert and without a Witness from Fitbit Implicated Burch's Right to Confrontation

Burch recognizes that his Confrontation claim does not neatly fit within the test set forth in *Crawford v. Washington*, 541 U.S. 36 (2004). However, as previously developed, it is time for the Confrontation Clause to evolve, and he raises this issue to preserve for review before higher courts.

III. THE ERROR WAS NOT HARMLESS

The State faces a high burden in establishing harmless error; indeed, it must show *beyond a reasonable doubt* that the error *did not contribute* to the verdict. *State v. Harris*, 2008 WI 15, ¶ 42, 307 Wis. 2d 555, 745 N.W.2d 397. The State cannot make that showing.

With respect to the Google Dashboard evidence, the State argues that it was duplicative to the DNA evidence, placing Burch outside VanderHeyden's house and at the field. State's Br. at 39. The discovery of the DNA evidence, however, was the byproduct of the evidence derived from the illegal search of the cell phone. At the time of the illegal search, all police had was an "investigative lead" of the database hit linking Burch to the sock. R. 246 at 194. The DNA link connecting Burch to the cord and the victim's body was not developed until September 12 (R. 152), after his September 7 arrest (R. 246 at 98), the probable cause for which was primarily grounded on the Google Dashboard evidence. R. 6 at 5-6. The DNA evidence referenced by the State, was thus derived from the illegal search, and must also be suppressed under the fruit of the poisonous tree doctrine. *See State v. Knapp*, 2005 WI 127, ¶ 24, 285 Wis. 2d 86, 700 N.W.2d 899. The suppression of this evidence would have resulted in a much different defense strategy.

As to Detrie, it was police who blamed Detrie for Vanderheyden's death. R. 240 at 283-84. And, interestingly, the State opens its brief by acknowledging that it was the Fitbit evidence that set Detrie free. State's Br. at 1. Detrie's lack of injuries and conduct do not establish his innocence. First, Detrie was not entirely cooperative with police, refusing to provide a DNA sample. R. 242 at 196. Second, Burch never claimed that "Detrie beat him up." State's Br. at 39. Burch's testimony was that he woke up on the ground to Detrie pointing a firearm at him. R. 252 at 133, 137, 150.

At closing argument, Burch pointed to a myriad of facts evidencing Detrie's guilt. R. 255 at 105. Among the most notable, was the fact that Detrie did not report Vanderheyden missing until after her body was found. *Id.* at 108. Next, there was Doug's confession to Dallas Kennedy when pressed about what happened: "I don't know. She hit

her head . . . ." *Id.* at 115. There was also the strong odor of cleaning agents discovered in Detrie's home, which was inconsistent with the home's disheveled state. *Id.* at 118-19. Further, the defense pointed to the boxes of cables found in Detrie's garage, the same type of cable used to strangle Vanderheyden. *Id.* at 120. Also, there was DNA consistent with Detrie's on Vanderheyden's underwear, tank top, bra, and under her left fingernail. *Id.* at 124-25. All of this evidence paled in comparison to Detrie's supposed cooperation and lack of injuries relied upon by the State. State's Br. at 40.

Indeed, the jury took particular note of all this evidence, requesting to see the graphs of the Fitbit steps (exhibits 165-66) and the GPS coordinates with time stamps. R. 255 at 147-49. The State cannot show beyond a reasonable doubt that this evidence did not contribute to the verdict.

CONCLUSION

Burch requests that this Court reverse the decisions of the circuit court and remand for a new trial.

Dated this 1st day of March, 2021

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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 3,967 words.

Dated this 1st day of March, 2021

Signed:

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Dated this 1st day of March, 2021

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