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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2019 AP 001983 CR

**STATE OF WISCONSIN,**

Plaintiff-Respondent,

vs.

**JACOB R. BEYER**,

Defendant-Appellant.

# REPLY BRIEF OF DEFENDANT-APPELLANT

On Appeal from Orders of the Court Denying Defendant's Pretrial Motions and from the Judgment of Conviction and Sentence dated July 23, 2019, in the Circuit Court for Dane County, the Honorable William E. Hanrahan Presiding, Trial Court Case No. 17-CF-2831

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## ARGUMENT

Beyer seeks relief from this Court on two separate bases. He has asserted (1) that the trial court erred in denying his discovery request for forensic analysis of the State's investigative computer in contravention of his right to due process; and (2) that suppression was warranted in this case because the search warrant application at issue failed to establish probable cause. In response, the State has asked this Court to preclude Beyer from contesting the aforementioned discovery ruling on appeal altogether, arguing that his conviction by way of a stipulated court trial should be deemed the functional equivalent of a conviction pursuant to a plea of guilty and treated accordingly insofar as the guilty-plea-waiver rule is concerned. To hold otherwise and allow Beyer's appeal of the discovery ruling to proceed on its merits, the State insists, would be tantamount to permitting him to "circumvent" the guilty-plea-waiver rule and "game the system." Furthermore, and irrespective of whether the fact of the stipulated trial should effectuate a procedural waiver, the State contends that the trial court did not err in its discovery ruling and that Beyer's constitutional arguments lack merit. Finally, the State contends that the warrant application supported a finding of probable cause and that Beyer's contrary protestations regarding its myriad deficiencies are unavailing.

In reply, Beyer would submit that a stipulation at a court trial is fundamentally different than an entry of a guilty plea in fact and should otherwise remain a permissible means of adjudication without eliciting application of the guilty-plea-waiver rule as matter of judicial economy. He would

further submit that the only systemic manipulation that warrants reproach here is the State's concerted effort to shield its undercover investigative software ("UIS") from any meaningful scrutiny by electing not to issue charges based on the original illicit material allegedly detected by the UIS which in turn comprised the substantive basis for the warrant application. Beyer has argued that in these types of cases, the State often uses an allegation as to the existence of certain evidence to get approval for a warrant, but then refuses to use that evidence "at trial" so as to effectively prevent an offender in Beyer's position from ever being able to ascertain whether the inceptive detection leading to his prosecution was authentic or lawful. This, Beyer submits, is the real sort of cynical "circumvention" lacking any comportment with fundamental fairness or due process which ought to be maligned in the matter at hand.

Lastly, Beyer submits that he has challenged the trial court's decision on his motion to suppress on the whole, including its credibility determinations in light of the rest of the relevant adduced evidence. He would reiterate that he believes that the scant evidence of a crime cited in the warrant application, the misleading information contained therein about the expected propensities of offenders and about him personally, along with the omitted information about the true recoverability rate of illicit material, all amounted to a defective warrant requiring suppression.

## I. THE GUILTY-PLEA-WAIVER RULE IS INAPPLICABLE IN BEYER'S CASE.

The State asserts that Beyer's consent to his conviction on the basis of stipulated facts to the trial court constituted a de

facto guilty plea. It construes the stipulated facts and the discussion at trial as an admission of guilt akin to that which would attend a formal plea colloquy, but in reality Beyer was simply acknowledging, via the stipulation, that he had made certain inculpatory statements to law enforcement in the course of their investigation and indicating to the trial court that these statements, along with some other contextualizing facts, could adequately form the factual basis for a finding of guilt. He was, as the trial court noted, effectively "giving the State a pass" rather than forcing them to put on their case for what would have been a foreordained conclusion in light of the adverse discovery ruling and denial of his motion to suppress. (R.72:6).

Specifically, the stipulated facts indicated that law enforcement executed a warrant of Beyer's home, where he was the sole tenant. (R.55:1). In the course of executing that warrant, law enforcement agents located suspected child pornography on Beyer's computer. (R.55:1). Beyer indicated to law enforcement that he was the only individual with access to that computer. (R.55:1). Moreover, "Beyer admitted to agents at that time that he used a file sharing network to download many different kinds of pornography." (R.55:2). He also admitted that "he was in possession of adult pornography and child pornography."(R.55:2). "Beyer indicated that the child pornography on his computer consisted of children engaging in sexual acts" and that he knowingly possessed the image of child pornography charged at Count 1 of the Information. (R.55:2). Beyer admitted to knowingly downloading child pornography, which was verified by law enforcement agents viewing the images contained on his computer. (R.55:2). Against that factual backdrop, the stipulation indicated that "Beyer waives his right to a jury trial and agrees to have the Court find him guilty based

upon the above-stipulated set of facts."(R.55:2). After reviewing the stipulated set of facts, the Court found proof of each element of the crime in Count 1 of the information beyond a reasonable doubt and adjudged Beyer guilty. (R.72:7).

The State now wants to construe the "admissions" recited in the stipulated facts as a quasi-plea when they are largely just references to confessions he had previously made to law enforcement. The fact that criminal prosecutions do not generally proceed from custodial confessions directly to sentencing tells us that these types of confessions are not the functional equivalent of a guilty plea. A plea is a formal admission of guilt to the crime charged, which is distinct from Beyer's admission that he made a series of inculpatory statements upon which a finding of guilt could be predicated. Just because he relieved the State from the burden of putting on its full case in order to convict him does not mean that his conviction was attended by the affirmative admission of guilt required in order to warrant application of the guilty-plea-waiver rule.

The State cites *State v. Riekkoff*, 112 Wis. 2d 119, 332 N.W.2d 744, (1983), in support of its contentions regarding the guilty-plea-waiver rule, but that case is inapposite as it concerned an attempt to expressly reserve a right to appeal an issue in tandem with the formal entry of a guilty plea, which never occurred in Beyer's case. Rather, as in *United States v. Schmidt*, 760 F.2d 828, 830 (7th Cir. 1985), which the State also alluded to, Beyer simply submitted his case to the trial court for decision on the basis of stipulations of fact. Stipulated bench trials of this sort are not as novel phenomena in American jurisprudence as the States makes them out to be, and most controversies that arise in cases involving them concern whether

a stipulation of facts imposes the same procedural requirements upon a court that a plea of guilty or nolo contendere does. See *Adams v. Peterson*, 968 F.2d 835 (9th Cir. 1992); *United States v. Lyons*, 898 F.2d 210 (1st Cir. 1990); *United States v. Robertson*, 698 F.2d 703 (5th Cir. 1983); *Witherspoon v. United States*, 633 F.2d 1247 (6th Cir. 1980). Somewhat ironically, the defendants in these cases generally attempted to avail themselves of certain procedural protections by arguing as the State does here—that stipulations are tantamount to de facto guilty pleas—only to have those arguments summarily rejected by the courts.

Beyer believes that the discussion in *Adams* is particularly instructive here because the circumstances which presented in that case are similar to those in his own. There, a written stipulation tracked the language of the indictment and provided that

> 'the evidence of the State would establish the following facts beyond a reasonable doubt': on September 7, 1981, (1) Adams, without consent, legal authority, or other justification, entered and remained in the residence of one Marylee Donley with the intent to commit the crimes of rape, sodomy, and sexual abuse (Count I); (2) Adams unlawfully and knowingly caused his penis to penetrate Donley's vagina, and at the time of this sexual intercourse, Donley was subjected by Adams to forcible compulsion (Count II); and (3) Adams unlawfully and knowingly caused his penis to contact Donley's anus, and at the time of this deviate sexual intercourse, she was subjected by Adams to forcible compulsion (Count III). Stipulation at 1, State v. Adams, No. 10–81–10777 (Or.Cir.Ct., Lane County) (Jan. 18, 1982) [hereinafter "Stipulation"]. The stipulation concluded that "[b]ased on this stipulation, it is

> the expectation of the parties that the defendant will be found guilty of Count I, Count II, and Count III." Id. at 2.

968 F.2d at 837.

In determining that this stipulation did not amount to a de facto guilty plea, the Court explained that

> Adams and the state agreed "that the evidence of the State would establish the [facts in question] beyond a reasonable doubt." Stipulation at 1. Following the recitation of facts, the stipulation stated, "[b]ased on this stipulation, it is the expectation of the parties that the defendant will be found guilty of Count I, Count II, and Count III." Id. at 2.
>
> Adams never stipulated that he was guilty of the crimes of burglary, rape, and sodomy; in fact, Adams pled not guilty to all three counts on which he was convicted by the trial court. Adams only stipulated that the enumerated facts were supported beyond a reasonable doubt by the evidence that the state possessed and would present at trial. A stipulation to facts from which a judge or jury may infer guilt is simply not the same as a stipulation to guilt, or a guilty plea.

*Id.* at 839.

After referencing a number of other cases which "declined to treat inculpatory stipulations of fact as equivalent to guilty pleas," the Court ultimately held

> that a plea of not guilty in combination with a stipulated facts trial is simply not equivalent to a guilty plea for

> *Boykin* purposes[1], even if the stipulation is to all elements necessary to a conviction and even if it might appear to a reviewing court that the stipulation serves little purpose.

*Id*. at 840, 842.

Beyer submits that the stipulation in this case should be treated as functionally distinct from a guilty plea just as was the case in *Adams*—an inculpatory stipulation of fact should not trigger the guilty-waiver-plea rule just as it does not require guilty-plea treatment as discussed in the aforementioned federal cases.

Finally, Beyer would note that the State agreed to the stipulation and this particular manner of proceeding in his case. Beyer relieved the State of its burden to call witnesses and put on its case, saving the State from expending resources along with the trial court.[2] Thus, it seems a bit paradoxical for the State to later level accusations about "gaming the system" as both the dominant actor in that system and a willing participant

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1 Adams had argued that he was entitled to be advised by the judge in open court of his constitutional rights (a) against compulsory self-incrimination, (b) to be tried by a jury, and (c) to confront his accusers, and that the court had a constitutional obligation to establish on the record that he voluntarily and intelligently waived these rights pursuant to Fed. R. Crim. P. 11 and *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969).

2 Beyer would note that concerns for judicial economy in this context features prominently in the Court's analysis in *Lefkowitz v. Newsome*, 420 U.S. 283, 95 S. Ct. 886, 43 L. Ed. 2d 196 (1975), which the State cites in its brief. Accordingly, a stipulated trial which prevents the waste of judicial resources would seem to be consistent with the rationale and holding there.

in the immediate process at hand. The State could have refused to partake pursuant to its express prerogative to do so under Wis. Stat. § 972.02(1). See also *State v. Burks*, 2004 WI App 14, ¶ 9, 268 Wis. 2d 747, 755, 674 N.W.2d 640, 644. It did not, however, and so its election to raise this new objection on appeal smacks of the bad faith and flagrant unfairness admonished in *Riekkoff*, although Beyer would again submit that the circumstances in his case do not otherwise bind this Court to application of the guilty-plea-waiver rule, contrary to the situation there. 112 Wis.2d at 129. Accordingly, he would respectfully ask this Court to dispense with the State's argument as to guilty-plea-waiver and decide his discovery claim on its merits.

## II. DUE PROCESS REQUIRES THE DISCOVERY DISCLOSURES BEYER SOUGHT AS HE HAS ESTABLISHED THEIR MATERIALITY TO A PRE-TRIAL PROCEEDING ESSENTIAL TO HIS DEFENSE.[3]

Beyer does not have much to add to the arguments set forth in his initial brief given his own acknowledgment of a dearth of immediately applicable precedent on the matter as well as the precedential inconsistencies and ambiguities referenced by the State. He firmly believes that the broad right to discovery

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[3] Again, see *Lefkowitz*: "[m]any defendants recognize that they cannot prevail at trial unless they succeed in suppressing either evidence seized by the police or an allegedly involuntary confession." 420 U.S. at 292.

endorsed in *State v. Maday*, 179 Wis.2d 346, 507 N.W.2d 365 (Ct. App. 1993), is most consistent with the fundamental guarantees of due process, however, and would urge this Court to apply that reasoning here to allow for discovery material to a pretrial proceeding which, for all practical intents and purposes, offers him his sole opportunity to present a defense against the charges levied against him.[4] He maintains that he should be afforded the chance to interrogate whether the State's UIS actually functioned as it claims rather than being forced to accept the *ipse dixit* testimony of its agents.

As he has been heretofore deprived of that chance, Beyer would submit that the only "gaming" of the system in this case, as in many other similar cases, has been achieved by the State, which continues to deftly avoid any audit or close review of its relevant UIS systems in any given case by simply electing not to issue any charges based on the specific evidence purportedly detected by the UIS so as to ostensibly justify the issuance of a search warrant. As long as the eventuating search turns up other prosecutable evidence for use at trial, the State can wholly avoid scrutiny of the process that begat the search. As Beyer noted in his initial brief, the State is presently permitted to represent that a single file of illicit material was detected through some inscrutable process in order to obtain a warrant, but never required to effectively demonstrate that said detection ever actually occurred despite apparently having the technological wherewithal to do so. This seems at odds with the discussion in

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[4] Though Beyer raises two issues on appeal, he believes that there is substantial overlap between the two and expects that the discovery he seeks would also be consequential with respect to his motion to suppress.

*Maday* and *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed. 2d 481 (1985), as well as any reasonable notion of fundamental fairness, as Beyer has asserted previously.

The State's implicit position on its strategic maneuvering in UIS-initiated investigations and the virtual impunity that selective charging affords it essentially boils down to "the ends not only justify, but also prove, the means," which would seem to be an untenable rationale in any analogous investigative context and otherwise antithetical to any reasonable notion of fair play and due process. The fact that a search ultimately yields contraband does not inherently validate that search from a constitutional standpoint and the fact of the yield itself should not operate to shield the warrant-application process from scrutiny that could ensure that constitutional protections have not been compromised. For those reasons, as well as those set forth in his initial brief, Beyer submits that he should have been allowed to conduct an analysis to ascertain whether the warrant authorizing the search which led to his criminal prosecution was premised on authentic, verifiable information.

## III. THE ERRONEOUS INFORMATION AND MATERIAL OMISSIONS IN THE SEARCH WARRANT APPLICATION SHOULD PRECLUDE A FINDING THAT THE WARRANT WAS SUPPORTED BY PROBABLE CAUSE.[5]

[5] Beyer would renew his argument that the warrant affidavit failed to support probable cause on its face, but will focus on his position in the *Franks*/*Mann* context in reply in concert with the State's brief.

The State argues that the search warrant adequately stated probable cause by simply alleging that Agent Lenzner found child pornography in a publicly shared file named "Sarah Footjob" at an IP address assigned to Beyer and coupling that allegation with "information about the peer-to-peer network and law enforcement's experience therewith." (State's Br. 31). It then goes on to emphasize that the affidavit "also provides information regarding the capabilities of computers and the proclivities of those persons interested in child pornography," reciting the affidavit portions indicating that "data related to the possession of a file can be recovered for an extended period of time" and that "individuals who have an interest in child pornography...tend to retain any images or videos they obtain that depict such activity." (State's Br. 32).

The State eventually concludes that what really "matters is law enforcement's direct detection of child pornography in a file named "Sarah Footjob" on a device tied to Beyer, and claims that Beyer "completely ignores" the information in the warrant affidavit regarding a computer's ability to retain a file even after a user deletes it. (State's Br. 33-34).

The problem with the State's argument is that all of the information that it points to as support for a finding of probable cause was shown to be inaccurate and misleading by the testimony of its very own agent. The whole thrust of Beyer's case is that Agent Lenzner's testimony largely contradicted the boilerplate representations in the warrant application that viewers of child pornographers tended to be "collectors" that retained contraband data. (R.71:22-25). Agent Lenzner admitted that there were different types of offenders and that in reality, files were often not retained. (R.71:23-24). He implied that the timing between the detection and search was a better indicator

as to whether a given file might be recovered than any theoretical propensity to hoard given the different behavior patterns of offenders and in spite of plainly conflicting representations in the warrant. (R.71:23). Moreover, Agent Lenzner also conceded that he had no reason to believe Beyer himself was a collector at the time of application. (R.71:26-27). The trial court, after hearing this testimony, stated that the boilerplate application "seems to be coming up short in terms of the veracity of the affidavit." (R.71:71).

Contrary to the State's suggestion, Beyer is challenging the trial court's credibility determination as to Agent Lenzner as part and parcel of his larger claim that suppression was warranted here under *Franks*/*Mann*. (See State's Br. 27). It is logically inconsistent to find a witness credible after being presented with numerous instances wherein the witness has presented inaccurate or misleading information. Beyer is ultimately arguing that, once you remove the false or misleading information about both collectors and Beyer from the affidavit and incorporate the omitted information about the recoverability rate of illicit material detected by UIS, you are left with little else to base a finding of probable cause upon other than an attestation that a single specific file was detected by UIS from an agent who has been shown to have provided inaccurate information elsewhere in the affidavit. If the Agent could not be relied upon to provide accurate information in other sections of the affidavit, why should his representations pertaining to a purported detection of contraband—the most crucial piece of information contained in the affidavit— be given the benefit of

the doubt?[6]

Beyer submits that the trial court's finding that there was "no misconduct" was clearly erroneous given the testimony of Agent Lenzner on record. On balance he believes that the inaccuracies and omissions that he has highlighted—the misrepresentations about the expected tendencies of offenders, the misrepresentation that there was reason to believe that Beyer fell into a certain category offender, and the failure to include critical information about the preeminence of temporal considerations in determining the likelihood of recovering detected contraband—warranted suppression under *Franks*/*Mann*. He believes that the record supports a finding that a *Franks*/*Mann* violation was proven and accordingly asks this Court to find that the trial court erred in denying his motion to suppress.

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Again, Beyer would submit that the unreliable information in the affidavit also militates strongly in favor of permitting the discovery he has sought in this case. The fact that the single UIS-detected file was never recovered, and that the individual who vouches for that detection has proven to be incredible on several key points, would seem to bolster Beyer's contention that due process demands more exacting scrutiny of the UIS system at issue. Whether or not an inceptive detection can be authenticated without reliance on a unreliable source seems highly material to whether justice is effectively administrated in this case.

## CONCLUSION

For all of the reasons articulated above, as well as all of those set forth in his initial brief that are renewed and incorporated herein, Beyer respectfully asks this Court to find that the decision to deny his request for forensic analysis of the computer which purportedly detected a single, non-recoverable file of alleged pornography so as to justify issuance of a search warrant was constitutionally infirm and otherwise denied him due process. Further, he asks this Court to find that the search warrant application in this case failed to establish probable cause and therefore any evidence seized through the execution of the defective warrant should be suppressed.

Dated this 1st day of June, 2020.

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CERTIFICATION OF BRIEF

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 3,703 words.

I further certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

Dated this 1st day of June, 2020.

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CERTIFICATION OF COMPLIANCE WITH
§ 809.19(12), WIS. STATS.

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), Wis. Stats.

I further certify that the electronic brief is identical in content and format to the printed form of the brief filed as of 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 1st day of June, 2020.

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