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SUPREME COURT

No. 2019AP1983-CR

IN THE SUPREME COURT OF WISCONSIN

STATE OF WISCONSIN, PLAINTIFF-RESPONDENT,

v.

JACOB R. BEYER, DEFENDANT-APPELLANT.

On Appeal from the Dane County Circuit Court,
The Honorable William E. Hanrahan Presiding,
Case No. 2017CF2831

REPLY BRIEF OF DEFENDANT-APPELLANT, JACOB R. BEYER

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ARGUMENT

Insofar as the certified question is concerned, Beyer would submit that this case is fundamentally about preserving the ability to present a coherent challenge on appeal without needlessly expending judicial resources at the trial court level. For all practical intents and purposes, Beyer's principal "defense" in this case turned on the question of whether the inculpatory evidence against him should be suppressed pursuant to the Fourth Amendment. While he believes and has argued that suppression was warranted due to a number of defects in the search warrant in its own right pursuant to *Franks*, he also believes that there exists a reasonable probability that the supplementary discovery he sought (a forensic analysis of the State's computer) would have revealed additional information which would have changed the outcome of his suppression motion in the trial court per *Bagley* and *Maday*, thereby requiring its disclosure.[1] Again, even in the absence of the sought disclosure, the trial court itself stated that the question of whether suppression was warranted here was "a very, very close call." (R:71:82-83). That being the case, Beyer maintains that it stands to reason that the revelation of any additional information (via the requested forensic analysis) which tended to put the reliability of either the State's undercover investigative software ("UIS") or the warrant affiant further into question would have been sufficient to tip the proverbial suppression scales in his favor.

So ultimately, while Beyer has applied for relief on two separate grounds—the wrongful denial of discovery and the defective warrant—he believes that the substantive analysis of each issue bears upon and informs the other. He submits that both the warrant and the affiant's subsequent testimony

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[1] See *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978); *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985); *State v. Maday*, 179 Wis.2d 346, N.W.2d 365 (Ct. App. 1993). In conjunction with his motion challenging the search warrant's validity, Beyer renewed his discovery request to analyze the State's computer. At the motion hearing which eventuated, the trial court permitted testimony and argument touching upon both issues.

raised serious questions about the reliability of the UIS, but also that meaningful evaluation of the UIS would likely raise further questions about the veracity of representations made in the warrant. In short, he believes that his discovery motion and his suppression motion are conceptually entwined.

However, once the trial court dismissed his contentions pertaining to each of these issues, he submits that he was left with only one viable avenue of recourse in order to retain the opportunity to present this entire intervolved defense for review by a higher court—he had to go to trial.[2] Taking into consideration the nature of his chief contentions as well as his chances at acquittal given the entire case's orientation at that juncture, he subsequently agreed to jointly present a set of stipulated facts upon which the trial court could base a finding of guilt rather than force all parties involved to endure the trouble of a full presentation of the State's case against him. He did not formally admit guilt by entering a plea—nor did the State insist that he did so—but rather conceded that the State could prove its case based on the stipulated facts in light of the trial court's previous rulings.

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[2] Beyer considers himself somewhat akin to the hypothetical defendant contemplated by the Court in *U. S. ex rel. Rogers v. Warden of Attica State Prison*, 381 F.2d 209, 214 (2d Cir. 1967):

> [a] defendant may well have no desire to go to trial once his pre-trial suppression motion has been denied, and thereafter may lose heart for any defense to the charges. If, however, the defendant is confronted with state law which decrees that a plea of guilty bars him from appealing the denial of his motion, then he [may] well be presented with a fait accompli and be forced to proceed to trial just so that he can preserve his right to appeal.

He would further submit that the likelihood of an interlocutory appeal being heard is so marginal (30 of 157 granted leave to appeal in 2019; 16 of 129 in 2018) that he would almost certainly have been eventually presented with the same Hobson-esque scenario even if he would have first made an attempt at interlocutory relief as the State suggests. Court of Appeals Annual Report 2019, https://www.wicourts.gov/ca/DisplayDocument.pdf?content=pdf&seqNo=289144; Court of Appeals Annual Report 2018, https://www.wicourts.gov/ca/DisplayDocument.pdf?content=pdf&seqNo=239772.

Beyer could have easily elected to forego this abridged process, sat back, and required the State to flesh out all of its evidence in order to convict him. After being presented with another workable option that the State found acceptable, however, he chose not to—out of both an awareness and understanding of his central "defense" thesis as well as respect for the time and resources of both the trial court and the prosecution.[3] Though the State has now spurned that courtesy after-the-fact by invoking the guilty-plea-waiver rule and citing a number of inchoate concerns that have apparently not proven problematic enough in other jurisdictions that recognize the procedure to warrant reference or discussion beyond the mere hypothetical, Beyer would again urge this Court to sanction the trial proceeding in question here as a matter of judicial economy. More specifically, he would respectfully ask the Court to find that his conviction at a stipulated trial in this case merits the same treatment on the whole as that which may have attended a more traditionally contested trial, and to then decide the remaining issues presented on their merits.

I. BEYER PRESENTED A "DEFENSE" AND ANY AMBIGUITY IN THE RELEVANT SUBMISSIONS TO THE TRIAL COURT SHOULD NOT BE CONSTRUED AGAINST HIM AS THE QUESTION OF PLEA-EQUIVALENCE IS CONCERNED.

Beyer has previously contended that a stipulated trial proceeding such as that conducted in this case is intrinsically distinct from a guilty plea and he would renew those arguments herein.[4] The State's response, however, goes so

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[3] The State makes much of the "consideration" that Beyer received via this jointly proposed disposition to suggest an equivalence to a plea bargain, but Beyer would submit that the prosecution's endorsement just as readily reflects an appreciation of Beyer's core defense on appeal and a recognition of his lack of any prior criminal history.

[4] Beyer would also reiterate that the assessments of comparable situations across jurisdictions are disparate even where the factual scenario is analogous. For instance, the

far as to suggest that the guilty-plea-waiver rule should be applied here on the grounds that Beyer did not actually present a defense, which he contends is neither factually correct or consistent with precedent from which the State's argument seems to have been derived.

As aforementioned, Beyer's primary defense in the trial court was his case for suppression which involved both his motion for discovery and his motion to invalidate the search warrant. In the context of stipulated bench trials and the question of whether such a proceeding is tantamount to a guilty plea, Beyer would submit that this a legitimate "defense" which should remove his stipulation from any such association insofar as the invoked precedent is implicated here. According to *People v. Horton*, 143 Ill.2d 11, 21, 570 N.E.2d 320 (Ill. 1991), which the State cites for instruction, a stipulated bench trial is not tantamount to a guilty plea "if the defendant presented and preserved a defense...e.g. the suppression of evidence."[5]

In spite of that pronouncement, Beyer acknowledges that the *Horton* Court went on to issue a confusing ruling wherein it held that a stipulation to evidence coupled by counsel's statement during perfunctory argument that the defendant "[was] not contesting the sufficiency of the evidence to convict" was not tantamount to a guilty plea while counsel's subsequent statement (at a second stipulated trial) that "[i]n terms of [the] sufficiency of the evidence, we are stipulating" was just such an equivalent. *Id.* at 17-18; 21-22. Beyer submits that this was an unduly strict interpretation of the proceedings which erroneously voided the parties' intentions that appeared to be otherwise clearly demonstrated aside from counsel's remarks. He would ask the Court to ignore

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State has cited *Kemp v. State*, 61 Wis.2d 125, 211 N.W.2d 793 (1973), as standing for the proposition that a stipulated trial based on the record of a preliminary examination is a functional "trial" and thereby distinguishable from the case at hand, while the Court of Appeals noted in its certification that the holding of *In Re Mosley*, 464 P.2d 473, 476-79 (Cal. 1970), also concerning a stipulation premised upon a preliminary examination record, suggested just the opposite.

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See also *People v. Daminski*, 80 Ill.App.3d 903, 905, 400 N.E.2d 708 (5th Dis. 1980)("the defendant in the instant case utilized the stipulated bench trial procedure to preserve any legal defenses he had" so as to not require plea admonitions).

any similar inconsistencies in his own case and hold that the trial court properly rendered a guilty trial verdict based on the evidence that was duly presented by stipulation.

As for the State's more speculative argument that judicial recognition of the stipulated trial as a viable form of adjudication would risk the creation of a slippery precedential slope bottomed by a formidable can of collateral worms, Beyer would submit that these fears are unfounded for a fairly basic reason: any stipulation inherently requires the assent of two parties. If the State is concerned about prospective proliferation of this process and the potential havoc which may ensue, it would seem to be within the powers of the Attorney General to issue statewide guidance that would largely curb its employment. Moreover, in response to the State's specific concerns regarding jeopardy, colloquy, collateral liability, sentencing, and plea integrity, Beyer would again offer the same simple refrain: treat this procedure and subsequent trial conviction the same as any other. Jeopardy should attach when the stipulated evidence is submitted; admonitions should be administered as in any other bench trial; the civil effects of a resulting criminal conviction should remain unchanged; sentencing courts should deem a stipulated conviction as short of a full acceptance of responsibility in accord with common sense; and plea withdrawal would only be warranted where counsel failed to convey a specific proposal to stipulate to his or her client.

In sum, and though it might be otherwise convenient to claim, Beyer submits that he has not inadvertently stumbled upon some innovative device that threatens to disrupt the effective administration of justice in Wisconsin henceforth. The extant legal structure will prevent the widespread use of stipulated trials, let alone abuse, even if the State chooses to make it an occasional feature of its prosecutions.

For all of the foregoing reasons, as well as those set forth in his initial brief, Beyer would ask the Court to find that the guilty-plea-waiver rule does not apply to the stipulated trial that occurred in his case.

II. A DUE PROCESS RIGHT TO DISCOVERY APPLIES IN THE CONTEXT OF A SUPPRESSION HEARING AND REQUIRES THE REQUESTED DISCLOSURES SOUGHT HERE.

The State argues that Beyer asserts too broad of a right to pretrial discovery and that the disclosure pertaining to the missing file described in the search warrant which he sought was not required by virtue of the fact that the State elected not to utilize that evidence at trial. Thus, while accusing Beyer of exploiting a loophole in order to have his case heard, the State simultaneously contrives to ensure that its own stratagems are not seen. Beyer submits that this is offensive to any reasonable notion of fairness or justice and incommensurate with due process besides.

Moreover, beyond the authority which he has previously cited, he would note that at least some courts have expressly held that "the failure to disclose information material to a ruling on a Fourth Amendment suppression motion can constitute a *Brady* violation," suggesting that the mere fact that the State does not intend to produce warrant-initiating evidence at trial in the context presented here is not dispositive on the issue of whether discovery regarding the means by which that evidence was purportedly procured is either permissible or required.[6] See *Biles v. United States*, 101 A.3d 1012 (D.C. App. 2014). Beyer would again submit that so long as a defendant demonstrates materiality by proffering information sufficient to establish a reasonable probability that the potential discovery would have affected the result of a suppression hearing, due process requires disclosure. He believes he made a sufficient proffer in this case by virtue of the testimony elicited at the motion hearing of import.

To wit, Beyer introduced expert testimony explaining how the State's UIS could have malfunctioned or erroneously alerted based on his knowledge of the relevant Torrent systems; his expert also indicated how relatively simple the process of confirming the alleged detection of the single illicit file at the time and date the warrant indicated would be. (R.71-27-41; 45-48; 54-55). Agent Lenzner, the State's witness, generally confirmed both that the Torrent

[6] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

systems at issue were susceptible to malware and that verification of the purported detection was likely feasible via the means articulated by Beyer's expert. (R.71:31-36). Essentially, all Beyer sought to do here was perform a straightforward forensic analysis to determine whether that verification could be made. Despite being a champion of truth-finding when it comes to trial stipulations, the State continuously refuses to permit any effort at clear ascertainment when the means by which that can be accomplished involve even the most basic examination of its investigative processes. Beyer would again submit that this obstinate refusal should give this Court pause—permitting the State to operate in such a furtive manner and evade meaningful scrutiny is tantamount to an invitation to abuse.

Given the precise circumstances—where the defendant has moved to suppress and otherwise invalidate a search warrant which was issued almost entirely due the supposed detection of a single illicit (and subsequently, missing) file approximately six weeks prior and where, by all accounts, definitive confirmation of that detection was possible through forensic analysis—Beyer maintains that due process demanded that the latter analysis in service of the former motion should have been allowed.

III. THE EVIDENCE PRESENTED AT THE RELEVANT MOTION HEARING RENDERED THE SEARCH WARRANT INVALID IN THIS CASE.

The crux of Beyer's argument as relates to the search warrant is that the testimony of Agent Lenzner at the motion hearing effectively undermined the warrant's validity through both direct contradictions and divulgences which evinced intentional or reckless disregard for the truth and/or constituted material omissions pursuant to *Franks* and *Mann*.[7] Specifically, he maintains that said testimony demonstrated that Agent Lenzner had baselessly insinuated in the search warrant that Beyer was a "collector" of child pornography; made wholesale misrepresentations about the tendencies and proclivities of such collectors; and deliberately omitted pertinent information regarding the reliability of the UIS in terms of recoverable detected files—all of which tends

[7] *State v. Mann*, 123 Wis. 2d 375, 367 N.W.2d 209 (1985).

to assail the State's broad contentions that staleness and particularity in terms of "collector" classification are of little consequence in the presented context by virtue of the wonders of computer technology.

The State explicitly asserts that a "computer's ability to retain a file even after its deletion" is so remarkable that this capability "alone" supported probable cause in this case, but Beyer would submit that this asseveration is neither borne out by the facts (the file in question here was never found, even though only forty days had passed since the alleged detection), nor by Agent Lenzner's own testimony (Lenzner explicitly testified that the probability of recovering a supposedly detected file decreased over time and surmised that the file in Beyer's case must have been deleted). (State's Br. 37; R.71:23). On the whole, Beyer submits that Agent Lenzner's testimony demonstrated a clear awareness that much of the warrant boilerplate referring to collectors and the likelihood of recovering evidence after only a relatively short amount of time had passed was tremendously misleading at best, if not outdated in general and outright fictive as applied to him.[8] In light of that, Beyer would submit that the trial court's finding that there was no misconduct on Lenzner's part which would warrant application of the exclusionary rule for its deterrent effect on his part was clearly erroneous and demands rectification on appeal.

In sum, once the misrepresentations and distortions in the warrant are either removed or qualified by Agent Lenzner's own testimony, Beyer submits that the allegation that a single illicit file was detected at IP address associated with him forty days prior cannot reasonably support a finding of probable cause so as to validate the search warrant.

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[8] See *United States v. Clark*, 668 F.3d 934, 939 (7th Cir. 2012): "[b]oilerplate language about the tendencies of child pornography collectors supports probable cause for a search when the affidavit also includes facts that suggest the target of the search 'has the characteristics of a prototypical child pornography collector.'" See also *United States v. Pappas*, 592 F.3d 799, 803–04 (7th Cir.2010)("[W]here evidence indicates that an individual has uploaded or possessed multiple pieces of child pornography, there is enough of a connection to the 'collector' profile to justify including the child pornography collector boilerplate in a search warrant affidavit.")

CONCLUSION

For all of the reasons articulated above and in his initial brief, Beyer respectfully asks this Court to find that (1) the guilty-plea-waiver rule is inapplicable in this case; (2) the trial court's decision to deny his request for forensic analysis of the State computer of concern violated due process; and (3) the search warrant at issue was defective and therefore any evidence recovered by way of its execution should be suppressed.

Dated this 5th day of February, 2021.

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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 2,997 words.

Dated this 5th day of February, 2021.

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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 5th day of February, 2021.

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