STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2019AP2150-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

VALIANT M. GREEN,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE KENOSHA COUNTY CIRCUIT COURT, THE HONORABLE BRUCE E. SCHROEDER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Did the circuit court erroneously deny Defendant-Appellant Valiant M. Green's motion to suppress evidence obtained by a blood draw performed pursuant to a search warrant where police had probable cause that Green was operating while intoxicated but certain facts establishing that probable cause were omitted from the search warrant application?

The circuit court concluded that even if the warrant was faulty, suppression of the blood test results would not serve the purposes of the exclusionary rule because there was no police misconduct present. The circuit court therefore denied Green's motion to suppress.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The brief fully set forth the parties' arguments, and this Court can resolve this case by applying settled legal principles to the facts.

INTRODUCTION

In May of 2014, a concerned citizen called 911 to report that her neighbor, Green, appeared to be drunk and was driving his blue Chevy Tahoe in the neighborhood, endangering children and obstructing traffic. Kenosha police responded and confronted Green, who refused to perform standard field sobriety tests or provide a preliminary breath test. Police arrested Green and applied for a search warrant to obtain a blood sample from him.

The warrant application failed to specifically mention that witnesses told police they had seen Green driving in the street. Nevertheless, a judge signed the warrant, and police

conducted a blood draw, which revealed Green's blood alcohol concentration to be almost three times the legal limit. During protracted litigation, Green moved to suppress the results of the blood draw, arguing that the search warrant was facially invalid because it failed to state that Green had operated a vehicle on a public highway or roadway. The court denied Green's motion, finding that even if the warrant was invalid, the exclusionary rule did not require suppression because there was no police misconduct to deter. After a one-day jury trial, Green was convicted of operating while intoxicated and related charges.

Green now appeals, arguing again that the search warrant was invalid. But police are entitled to rely on a search warrant as long as their reliance on it is reasonable, which it was in this case. As the circuit court noted, there is no police misconduct to deter here, so the exclusionary rule should not apply. Moreover, even if the good-faith exception to the exclusionary rule does not apply here, the blood draw evidence is still admissible under the doctrine of inevitable discovery. This Court should affirm.

STATEMENT OF THE CASE

On the afternoon of Sunday, May 25, 2014, Nancy Trakas called 911 to report that her neighbor, Valiant Green was drunk and had driven through the front yards of two houses before backing into his own driveway. (R. 4:2.) Kenosha Police Officer Mark Poffenberger responded to the call. (R. 4:2.) When he arrived on the scene, Officer Poffenberger saw a group of children playing near Green's driveway. (R. 4:2.) He also saw Green pull his vehicle forward and back it up in the driveway multiple times. (R. 4:2.)

Officer Poffenberger approached the group of children, who reported that they had seen Green's vehicle driving around the neighborhood for several minutes. (R. 4:2.) Green then approached Officer Poffenberger, who noticed that

Green was having trouble maintaining his balance, had bloodshot and glassy eyes, and smelled strongly of intoxicants. (R. 4:2.) Green admitted to Officer Poffenberger that he had been drinking. (R. 4:2.) Officer Poffenberger asked Green to perform the horizontal gaze nystagmus test and the walk and turn test. (R. 4:2.) Green refused to cooperate, and Officer Poffenberger arrested him for operating while intoxicated. (R. 4:2.) Police then took Green to the jail, where Green refused to provide a sample for a chemical breath test. (R. 4:2.)

Meanwhile, Kenosha Police Officer Casey Apker spoke with Trakas, who recounted that she was sitting in her home when she heard loud music and saw Green outside singing and "making a fool out of himself." (R. 4:3.) She then watched as Green got into his vehicle, drove across her lawn, jumped the curb, and drove away on 32nd Avenue. (R. 4:3.) A few minutes later, Trakas saw Green return. (R. 4:3.) He pulled into the middle of the road and stopped, blocking traffic and leading several cars to honk at him before he backed into his driveway. (R. 4:3.) He then left and repeated the entire routine about six times before Trakas finally called 911. (R. 4:3.) Trakas signed a sworn statement describing her observations. (R. 26:3.)

After Green refused to cooperate with the breath test, Officer Poffenberger completed an affidavit for a blood draw search warrant. (R. 28:3; 29:1–2.) The affidavit listed the many indicia of intoxication that Officer Poffenberger had observed. (R. 29:1.) It stated that Green "drove or operated a motor vehicle at driveway of 3207 45th St." (R. 29:1.) It also noted that Green "was observed to drive/operate the vehicle by a citizen witness named Nancy A. Trakas." (R. 29:1.) Circuit Court Judge Schroeder signed the search warrant, and police took Green to Kenosha Memorial Hospital for medical staff there to draw Green's blood. (R. 26:3.) Chemical analysis of two separate blood draws, taken an hour apart,

revealed Green's BAC to be .237 and .214 g/100 mL, respectively. (R. 116:1.)

The State charged Green with one count of operating while intoxicated, one count of operating with a prohibited alcohol concentration, and one count of resisting an officer. (R. 101:1–2.) Green moved to suppress the results of the blood draw. (R. 99:1.) He argued that the warrant affidavit lacked a factual basis for the search because it did not describe Green driving on a "highway" as required under Wis. Stat. § 346.61. (R. 99:3.) The Kenosha County Circuit Court, the Honorable Bruce E. Schroeder, presiding, denied Green's motion. The court referenced Trakas's statement to police that Green had been driving in "the street" and reasoned that there was clearly enough probable cause for a warrant. (R. 161:7.) The court concluded that because there was no police misconduct to deter, suppression was not warranted. (R. 161:21–23.)

Green proceeded to a jury trial, where he was convicted as charged of operating while intoxicated and operating with a prohibited alcohol concentration. (R. 165:113.) The State moved to dismiss the OWI count and the court entered a judgment of conviction on the PAC charge.[1] (R. 165:116.) On January 23, 2019, the court sentenced Green to two years of initial confinement and seven months of extended supervision. (R. 166:8.) Green now appeals.

STANDARD OF REVIEW

Review of a decision denying a motion to suppress evidence presents an appellate court with a question of constitutional fact that requires a two-step analysis. *State v. Iverson*, 2015 WI 101, ¶¶ 17–18, 365 Wis. 2d 302, 871 N.W.2d 661. First, the court applies a deferential standard to the circuit court's findings of historical fact, "upholding them

[1] Pursuant to Wis. Stat. § 346.63(1)(c).

unless they are clearly erroneous." *Id.* ¶ 18. Second, the court independently applies the relevant constitutional principles to these facts. *Id.*

ARGUMENT

The circuit court properly denied Green's motion to suppress the results of the blood draw.

A. Legal principles

The Fourth Amendment to the United States Constitution "contains no provision expressly precluding the use of evidence obtained in violation of its commands." *Arizona v. Evans*, 514 U.S. 1, 10 (1995). Rather, courts exclude such evidence pursuant to a judicially created rule designed to deter future Fourth Amendment violations by police. *See id.* at 11–15. To that end, the exclusionary rule is not generally applicable to judicial errors because a judicial officer has no stake in the outcome of any particular case. *United States v. Leo*n, 468 U.S. 897, 917 (1984). "Thus, the threat of exclusion of evidence could not be expected to deter such individuals from improperly issuing warrants, and a judicial ruling that a warrant was defective [is] sufficient to inform the judicial officer of the error made." *Illinois v. Krull*, 480 U.S. 340, 348 (1987).

The "good-faith" exception to the exclusionary rule is derived from these principles. The exception provides that the exclusionary rule does not apply when police act with "objectively reasonable reliance" on a warrant that is later determined to be invalid. *Leon*, 468 U.S. at 922 & n.23. Courts should not apply the good-faith exception if: (1) the court "was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth"; (2) the court "wholly abandoned [its] judicial role in the manner condemned" by the

Court in *Lo–Ji Sales*[2]; (3) "no reasonably well trained officer should rely on the warrant" because the affidavit is "so lacking in indicia of probable cause"; or (4) the warrant is "so facially deficient" "that the executing officers cannot reasonably presume it to be valid." *Leon*, 468 U.S. at 923 (citation omitted). "[U]nder *Leon*'s good-faith exception, [the Court has] 'never applied' the exclusionary rule to suppress evidence obtained as a result of nonculpable, innocent police conduct." *Davis v. United States*, 564 U.S. 229, 240 (2011) (citation omitted).

In *Eason*, the Wisconsin Supreme Court adopted the good-faith exception to the exclusionary rule under article I, section 11 of the Wisconsin Constitution, but added additional requirements. *State v. Eason*, 2001 WI 98, ¶¶ 63, 66, 74, 245 Wis. 2d 206, 629 N.W.2d 625. First, "the State must show that the process used attendant to obtaining the search warrant included a significant investigation and a review by a police officer trained in, or very knowledgeable of, the legal vagaries of probable cause and reasonable suspicion, or a knowledgeable government attorney." *Id.* ¶ 63. Second, the court must consider whether "a reasonable, well-trained officer would not have relied upon" the defective warrant. *Id.* ¶ 66; *see also State v. Scull*, 2015 WI 22, ¶ 37, 361 Wis. 2d 288, 862 N.W.2d 562. It is the State's burden to demonstrate that these factors are met and the good-faith exception to the exclusionary rule applies. *Eason*, 245 Wis. 2d 206, ¶ 63.

Another well-established exception to the exclusionary rule is the inevitable discovery doctrine. *See Nix v. Williams*, 467 U.S. 431, 444 (1984). Under that doctrine, evidence that police seize that "is tainted by some illegal act may be admissible" if police would have discovered that tainted evidence by lawful means. *State v. Jackson*, 2016 WI 56, ¶ 47, 369 Wis. 2d 673, 882 N.W.2d 422 (citing *State v. Lopez*, 207

[2] *Lo–Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979).

Wis. 2d 413, 427, 559 N.W.2d 264 (Ct. App. 1996)). In order to establish the applicability of the inevitable discovery doctrine, the State must show by a preponderance of the evidence that it inevitably would have discovered the evidence sought to be suppressed even in the absence of the constitutional violation. *Id.* ¶ 66.

B. The police officers' reliance on the signed search warrant was objectively reasonable, so the exclusionary rule does not mandate suppression of the evidence under these circumstances.

Even if the affidavit in support of the search warrant in this case failed to list all of the facts constituting probable cause,[3] suppression is not the appropriate remedy. Here, none of the four disqualifying *Leon* factors apply, and the State can arguably satisfy the additional *Eason* requirements.

First, as to the *Leon* factors, the warrant-issuing judge was not misled by information in an affidavit that the affiant knew was false. *See Leon*, 468 U.S. at 923. This is not a case in which the police sought a warrant and attempted to hide a questionable probable cause determination. Rather, Green's argument is that information was missing from the affidavit. Even if Officer Poffenberger's affidavit was faulty for what it did not contain, it was not meant to mislead the judge into believing probable cause existed where there was none.

Second, the issuing court did not abandon its judicial role in the manner condemned by the Court in *Lo-Ji Sales*. *See Leon*, 468 U.S. at 923. In *Lo-Ji Sales*, the warrant-issuing magistrate himself became a member, if not the leader, of the search party that executed the warrant. *Lo-Ji Sales*, 442 U.S. at 327. Nothing comparable occurred here, and there is no

[3] Green concedes that these facts were sufficient to establish probable cause. (Green's Br. 16.)

suggestion that the judge who issued the warrant was not neutral or had any sort of conflict.

Third, the affidavit was not so lacking in indicia of probable cause that a reasonably well-trained officer could not rely on the warrant. *See Leon*, 468 U.S. at 923. Green is correct that the affidavit mentioned Green operating his vehicle in his driveway. (R. 98:1.) But the affidavit also noted that "[t]he arrestee was observed to drive/operate the vehicle by a citizen witness named Nancy A. Trakas." (R. 98:1.) When Trakas spoke to Officers Poffenberger and Apker about Green, she said that Green had driven across her lawn and onto 32nd Avenue, then returned and obstructed traffic while attempting to back into his driveway multiple times. (R. 4:3.) The mention of Trakas as a witness in the affidavit was an implicit reference to these facts relevant to the probable cause analysis. A reasonably well-trained officer thus would not view the affidavit as so lacking in probable cause that the warrant was unreliable.

Fourth, the warrant was not facially deficient. *See Leon*, 468 U.S. at 923. It was issued by a neutral and detached court and described the object of the search—a draw and test of Green's blood. Even if the affidavit did not include all of the facts constituting probable cause, the warrant was requested, signed, and returned using the usual police procedures; on its face, the warrant gave police no reason to question its validity.

Contrary to Green's arguments on appeal, the facts here also arguably satisfy the additional *Eason* requirements.[4]

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[4] It is not clear, however, that the *Eason* requirements should even apply to a situation like this one, where the error is not a lack of probable cause but an omission in the warrant affidavit. To preserve the issue for possible supreme court review, the State contends that the *Eason* requirements do not apply

Law enforcement engaged in a significant investigative process before seeking the warrant. *See Eason*, 245 Wis. 2d 206, ¶ 63. As detailed in the police reports from Officers Poffenberger and Apker, police spoke with eyewitnesses who said that Green had driven in the street. (R. 4:2.) Police also attempted to conduct field sobriety tests to determine Green's level of intoxication. (R. 4:2–3.) And indeed, as Green freely admits, the police investigation established probable cause that Green had driven drunk. (Green's Br. 16.)

A reasonable, well-trained officer would not have believed that the search was illegal despite the court's issuance of the warrant. *See Scull*, 361 Wis. 2d 288, ¶ 37. Again, Officer Poffenberger's affidavit relayed the details he discovered when he investigated the incident, including Green's apparent intoxication and the report by the citizen witness. While that reference might not have met the threshold necessary to establish probable cause in the warrant affidavit itself, the affidavit was not so lacking in the indicia of probable cause that it was unreasonable for the officers executing the warrant to rely on it.

Green's argument that the State cannot establish the applicability of the good-faith exception is unavailing. He argues that the affidavit could not have been reviewed by "a knowledgeable government attorney or by a police officer trained and knowledgeable in the requirements of probable cause and reasonable suspicion" because such a person would have realized that the probable cause statement was lacking. (Green's Br. 15.) But the logic underpinning this reasoning would read the good faith exception out of existence entirely. If police can rely in good faith on a warrant issued in the absence of probable cause only if it was reviewed by an appropriately trained officer or attorney, and if courts

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where it is undisputed that police had probable cause to obtain a warrant.

assume—as Green would have them do—that an officer or attorney who fails to identify the probable cause error was not adequately trained, the good faith exception would never apply. Myriad cases, including *Eason*, say otherwise. *See, e.g.*, *Eason*, 245 Wis. 2d 206, ¶ 72; *Scull*, 361 Wis. 2d 288, ¶ 44; *State v. Dearborn*, 2010 WI 84, ¶ 49, 327 Wis. 2d 252, 786 N.W.2d 97; *State v. Marquardt*, 2005 WI 157, ¶ 55, 286 Wis. 2d 204, 705 N.W.2d 878.

Green does not argue that *Eason* requires someone other than the affiant to review an affidavit for the good-faith exception to be available to the State. (Green's Br. 15.) Nevertheless, the State acknowledges that *Eason* can be interpreted as including such a requirement. *See Eason*, 245 Wis. 2d 206, ¶ 63 (quoting Donald Dripps, *Living With Leon*, 95 Yale L.J. 906, 932 (1986)). On the other hand, *Eason* also expressly stated that review by the magistrate, court commissioner, or judge issuing the warrant was not sufficient, but it made no similar pronouncement regarding the ability of an officer trained in the Fourth Amendment to review his own affidavit. *See Eason*, 245 Wis. 2d 206, ¶ 63 n.29. It is thus at least arguable that review by the affiant himself meets this requirement, as long as the affiant is an officer or attorney trained in Fourth Amendment law.[5]

In sum, probable cause supported the issuance of the warrant, and the police officers' reliance on that warrant was reasonable. Even if the totality of the facts supporting a probable cause determination were not included in the

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[5] Although Officer Poffenberger's training and experience appear not to have been discussed at any of the hearings related to Green's motion to suppress, he testified in the 2018 trial that he had been an officer with the Kenosha Police Department for "over 11 years." (R. 165:39.) If further factual findings related to Officer Poffenberger's training and experience are necessary, this Court should remand for an evidentiary hearing rather than ordering the circuit court to grant Grant's suppression motion.

affidavit in support of the warrant, the good-faith exception to the exclusionary rule should apply.

C. Even if the good-faith exception to the exclusionary rule does not apply, the blood draw evidence was admissible under the doctrine of inevitable discovery.

Finally, it is clear that police would have been able to legally obtain a sample of Green's blood even in the absence of the unlawful warrant. If the court had denied the warrant application because the affidavit lacked an allegation that Green had driven in the street, Officer Poffenberger easily could have updated the affidavit with the relevant facts and resubmitted it. There is no question that the court would have issued the warrant, and there is no question that a warrant issued on all of the probable cause in this case would have been valid.

The Wisconsin Supreme Court most recently addressed the inevitable discovery doctrine in *Jackson*. There, the court held that, for the inevitable discovery doctrine to apply, the State must prove by a preponderance of the evidence that law enforcement would have inevitably discovered by lawful means the evidence sought to be suppressed. *Jackson*, 369 Wis. 2d 673, ¶ 66. To meet that burden, the *Jackson* court explained, the State need not prove that police were actively pursuing alternate lines of investigation or the absence of bad faith in the officer's illegal conduct. *Id.* ¶¶ 66, 70.

In *Jackson*, police illegally interrogated Jackson during a murder investigation. After that interrogation, Jackson led police to her home, where police were already executing a valid warrant, and led her interrogators to incriminating evidence. *See Jackson*, 369 Wis. 2d 673, ¶ 2. The court held that the State showed that, had police done everything correctly and not violated Jackson's rights, they would have

still found the evidence in executing the valid search warrant. *Id.* ¶¶ 87–89.

The supreme court's decision in *Jackson* brought the inevitable discovery doctrine in closer alignment with a "closely related" doctrine, independent source. *See id.* ¶ 52; *State v. Carroll*, 2010 WI 8, ¶¶ 43–44, 322 Wis. 2d 299, 778 N.W.2d 1. The independent source doctrine is borne from the principle that "[w]hen the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation." *Murray v. United States*, 487 U.S. 533, 537 (1988) (quoting *Nix*, 467 U.S. at 443)). "So long as a later, lawful seizure is genuinely independent of an earlier, tainted one . . . there is no reason why the independent source doctrine should not apply." *Id.* at 542; *accord Carroll*, 322 Wis. 2d 299, ¶ 44.

When a warrant is involved, under either an independent-source or inevitable-discovery inquiry, the State may satisfy its burden by showing that law enforcement possessed probable cause to obtain a warrant absent the tainted evidence. *See Jackson*, 369 Wis. 2d 673, ¶¶ 76–77; *see also Carroll*, 322 Wis. 2d 299, ¶ 44 ("As applied to circumstances where an application for a warrant contains both tainted and untainted evidence, the issued warrant is valid if the untainted evidence is sufficient to support a finding of probable cause to issue the warrant."). Under this inquiry, courts may review the untainted portions of a warrant affidavit to determine if such probable cause existed. *Jackson*, 369 Wis. 2d 673, ¶¶ 76–77; *Carroll*, 322 Wis. 2d 299, ¶ 44.

Here, although the facts do not implicate the independent-source doctrine, the lessons of *Jackson* and its references to *Carroll* are still apt. As in *Jackson*, police could have—and certainly would have—discovered the evidence even in the absence of any constitutional violation because if

the court rejected the initial warrant application for failing to allege Green drove on a highway, police could have corrected the error and obtained a lawful warrant based on probable cause. (R. 161:6–7.) Police established this probable cause without the aid of any tainted evidence. (R. 161:7–8.) There is no reason to "put the police in a worse position than they would have been in absent any error or violation." *See Nix*, 467 U.S. at 443.

Green's argument that the circuit court incorrectly determined that suppression was not an appropriate remedy (Green's Br. 16–19) is unavailing.[6] Even if the cases cited by the circuit court do not directly address all of the factors relevant to this case, for the reasons discussed above, the circuit court correctly determined that suppression was not necessary. This Court can affirm a circuit court's decision on grounds independent of those used by the circuit court. *State v. Earl*, 2009 WI App 99, ¶ 18 n.8, 320 Wis. 2d 639, 770 N.W.2d 755. It should do so here.

[6] The State does not view this section of Green's brief as making an independent argument, but rather, as merely disputing the circuit court's basis for its ruling.

CONCLUSION

For the reasons set forth, this Court should affirm Green's judgment of conviction.

Dated this 15th day of May 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,722 words.

Dated this 15th day of May 2020.

_____
JOHN A. BLIMLING
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 Wis. Stat. § 809.19(12).

I further certify that:

This 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 15th day of May 2020.

_____
JOHN A. BLIMLING
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