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STATE OF WISCONSIN

COURT OF APPEALS

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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The affidavit in support of the search warrant failed to state probable cause and suppression of the blood evidence is the proper remedy in this case.

A. The good faith exception to the exclusionary rule does not apply in this case.

As a starting point, it is important to note that the State does not argue that the affidavit in support of the search warrant states probable cause to believe that Mr. Green had committed a crime. Thus, the State has conceded the affidavit fails to articulate probable cause. *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct.App. 1979)(unrefuted arguments are deemed conceded).

What the State does argue is that "none of the four *Leon* disqualifying factors apply," and thus, the good faith exception to the exclusionary rule allows for the admission of the results of Mr. Green's blood test into evidence. (State's Response at 7). The State's arguments are unpersuasive.

As Mr. Green argued in his brief-in-chief, the *Leon* good faith exception does not apply in this case because the search warrant affidavit was so lacking in indicia of probable cause that the officer's reliance

on it was unreasonable. (BIC at 13-14). The State contends that the officer's reliance on the warrant was reasonable because in addition to the statement in the affidavit that Mr. Green was driving in the private driveway of his residence, it also states that "[Mr. Green] was observed to drive/operate the vehicle by a citizen witness named [N.A.T.]." (29:1).

While it is true that N.A.T.'s statement to police included the assertion that she had seen Mr. Green operate his vehicle on the highway in front of his house, none of that information was included in the search warrant affidavit. All the affidavit stated was that N.A.T. saw Mr. Green drive or operate his vehicle; it does not state where N.A.T. saw him drive. Thus, the only conclusion that can be reasonably drawn from the affidavit is that N.A.T. saw Mr. Green drive in the same place as the officer: his own private driveway.

In deciding whether probable cause exists, the issuing court considers only those facts presented by police in the supporting affidavit, along with any reasonable inferences from those facts. *State v. Marquardt*, 2001 WI App 219, ¶ 12, 247 Wis. 2d 765, 635 N.W.2d 188. The reviewing court is "confined to the record that was before the warrant-issuing judge." *State v. Higginbotham*, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991).

Here, the record before the issuing court only stated that Mr. Green drove in his own private driveway and that the driving was observed by

N.A.T. (29:1-2). The affidavit does not state that Mr. Green was driving anywhere else and a reasonable inference that he was driving anywhere but his driveway cannot be drawn. Thus, this affidavit was "so lacking in indicia of probable cause" that the officer's reliance on it was unreasonable.

As Mr. Green pointed out in his brief-in-chief, "the *Marquardt* Court concluded that the exclusionary rule will apply when a reasonably well trained officer would have known that the search warrant was illegal despite the magistrate's authorization." *Id.*, ¶ 33 (internal quotes and authority omitted).

In this case, a reasonably well-trained officer would have known that it is not illegal to drive intoxicated within a private driveway and that the search warrant therefore was not valid and thus the *Leon* good faith exception does not apply.

B. The *Eason* good faith requirements apply in this case and where not met.

With regard to the additional good faith requirements articulated by the Wisconsin Supreme Court in *State v. Eason*, 2001 WI 98, 245 Wis. 2d 206, 629 N.W.2d 625, the State makes several arguments, none of which are convincing.

First, the State argues that the additional *Eason* requirements do not apply in cases like Mr. Green's "where the error is not a lack of probable cause but an omission in the warrant affidavit."

(State's Response at 8-9, n.4). The State provides no authority or argument as to why the *Eason* requirements should not apply in a case such as Mr. Green's. To the contrary, there is no indication that the *Eason* requirements should not apply. The requirements were crafted to apply to search warrants where the police are involved in the process. *State v. Hess*, 2010 WI 82, ¶ 57, 327 Wis. 2d 524, 785 N.W.2d 568.

The requirements encourage law enforcement to obtain as many facts as possible before seeking a search warrant and to have people check their work because those practices will reduce mistakes like the one made in Mr. Green's case. Therefore, the *Eason* requirements apply to all search warrant cases involving the police and the State cites no authority to the contrary. Indeed, had the officer in this case followed the *Eason* requirements, the government attorney or the officer specially trained in the legal vagaries of probable cause and reasonable suspicion likely would have noticed the mistake and corrected it.

That leads to the State's second argument regarding the *Eason* requirements: that they were met in this case. (State's Response at 8-10). The State is wrong. As Mr. Green argued in his brief-in-chief, the *Eason* requirements were not met because at a very minimum, the warrant was not reviewed by a government attorney or by an officer trained or knowledgeable in the legal vagaries of probable cause and reasonable suspicion. The warrant does not

indicate that it was reviewed by anyone other than the drafting officer himself.

Contrary to the State's argument, Mr. Green does contend that *Eason* requires review by someone other than the drafting officer. In support of its additional good faith requirements, the *Eason* Court cited scholarly work on the exception stating that a well-trained police officer would not seek a warrant without a thorough investigation and "internal screening by a police supervisor or a government lawyer." *Id.*, 245 Wis. 2d 206, ¶ 63. Thus, the Court was contemplating a review by someone other than the drafting officer.

Mr. Green's point in his brief-in-chief was simply that no one reviewed the search warrant other than the drafting officer, and there could be no argument that he had special training or knowledge in probable cause or reasonable suspicion because he would not have drafted such an obviously insufficient affidavit if he did. The State argues that this logic would preclude application of the good faith exception in all cases because in all cases where the exception is being considered, the reviewer necessarily missed the fact that the warrant failed to state probable cause. (State's Response at 9-10).

This is not the case. In most situations, like in *Marquardt* and *State v. Sloan*, 2007 WI App 146, ¶ 7, 303 Wis. 2d 438, 736 N.W.2d 189, the probable cause determination is extremely fact intensive and reasonable minds may differ about whether a given

collection of facts amount to probable cause. In those cases, even if a court later determines that probable cause did not exist, as long as the good faith requirements have been met, then the evidence should not be excluded. In those cases, it is understandable that a knowledgeable officer or government attorney may approve a warrant when a reviewing court disagrees and it could not be argued that the fact that they miscalculated probable cause is evidence that they lack the appropriate knowledge or training.

However, Mr. Green contends that in cases like his, where the indicia of probable cause is so lacking and obviously absent, then it is relevant to the question of whether any person reviewing the search warrant is a person specially trained or knowledgeable in probable cause or reasonable suspicion.[1]

Furthermore, in a case like Mr. Green's, the *Eason* requirements would never really be implicated because application of the good faith exception fails under *Leon*. Meaning, if the affidavit is so lacking in indicia of probable cause that it was not reasonable

[1] Mr. Green is not suggesting a per se rule but rather that the fact that a reviewing person missed such an obvious lack of probable cause can be used as evidence that the person is not a knowledge person as *Eason* requires. However, if an affidavit states that it had been reviewed by an assistant district attorney, even in a case like this, that would meet the requirement because review by a government attorney is enough.

for the officer to rely on it, then good faith is foreclosed without giving consideration to the *Eason* requirements.

C. The inevitable discovery doctrine does not apply in this case.

The State argues that the exclusionary rule should not be applied in this case because Mr. Green's blood inevitably would have been lawfully discovered by the police. (State's Response at 11-13). Their argument is that if the warrant had been rejected for failing to state probable cause, they simply could have fixed the problem and reapplied for the warrant, which would then have been issued lawfully. In the State's view, this is a proper application of the inevitable discovery doctrine. The State is wrong.

The State cites no authority or other cases where the inevitable discovery doctrine was applied to a case like Mr. Green's. That is because the doctrine does not apply here. The Wisconsin Supreme Court noted that:

> *Nix* [*v. Williams*, 467 U.S. 431 (1984)]…speaks in terms of *proof* by a preponderance of the *evidence* that the government would have discovered the challenged evidence through lawful means.… Inevitable discovery is not an exception to be invoked casually, and if it is to be prevented from swallowing the Fourth Amendment and the exclusionary rule, courts must take care to hold the government to its burden of proof.

State v. Jackson, 2016 WI 56, ¶ 72, 369 Wis. 2d 673, 882 N.W.2d 422 (quoting *United States v. Jones*, 72 F.3d 1324 (7th Cir.1995)(emphasis in the original). The *Jackson* Court went on to state that "[p]roof of inevitable discovery turns upon demonstrated historical facts, *not conjecture*. *Id.* (emphasis added).

The United States Supreme Court also emphasized that in order to carry its burden for application of the inevitable discovery doctrine, the State cannot rely on "speculative elements." *Id.* at 444, n.5. Thus, the State cannot speculate, like they do in this case, that had the warrant been rejected for lack of probable cause, that they would have been able to properly fix the problem and obtain a legally sufficient warrant. Indeed, if this were allowed, then evidence would almost never be excluded as a result of sloppy police work.

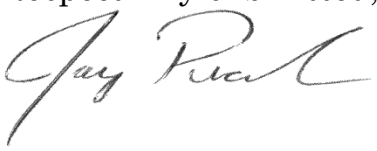
It would certainly make the result in *State v. Tye*, 2001 WI 124, 248 Wis. 2d 530, 636 N.W.2d 473 unnecessary. As noted in Mr. Green's brief-in-chief, in that case the Wisconsin Supreme Court held that suppression was the proper remedy when police sought a warrant based on a sufficient affidavit that stated probable cause but the officer forgot to swear to the contents thereof. *Id.*, ¶¶19, 24. If inevitable discovery applied to the circumstances of this case as the State argues, then surely the same doctrine would have also saved the evidence in *Tye*. It did not because the inevitable discovery doctrine is inapplicable in such cases and does not apply here.

CONCLUSION

Neither the good faith doctrine nor the inevitable discovery doctrine applies to prevent exclusion from being the proper remedy for the defective search warrant in this case. This Court should reverse the circuit court's decision that the exclusionary rule does not apply in this case, vacate Mr. Green's conviction for operating with a prohibited alcohol concentration, and remand with instructions to suppress the results of the blood test.

Dated this 2nd day of June, 2020.

Respectfully submitted,



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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,942 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 2nd day of June, 2020.

Signed:

JAY PUCEK
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