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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP002150-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

VALIANT M. GREEN,

Defendant-Appellant-Petitioner.

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# PETITION FOR REVIEW

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## ISSUE PRESENTED

> Mr. Green was arrested for operating while intoxicated and his blood was taken pursuant to a search warrant. Did the affidavit in support of that search warrant fail to state probable cause to believe that Mr. Green had committed a crime and thus require suppression of the blood test result?

The circuit court and Court of Appeals answered no.

## CRITERIA FOR REVIEW

In reviewing a circuit court's issuance of a search warrant, the law is clear that the standard of review is not de novo, and that the issuing court's probable cause determination is owed great deference. *Illinois v. Gates*, 462 U.S. 213, 236 (1983); *see also State v. Higginbotham*, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991). The reviewing court's job is to ensure that the issuing court had a "*substantial basis"* for concluding that probable cause existed. *Id.* Furthermore, in reviewing probable cause, "[e]laborate specificity is not required, and the officers are entitled to the support of the usual inferences which reasonable people draw from facts." *State v. Sloan*, 2007 WI App 146, ¶ 24, 303 Wis. 2d 438, 736 N.W.2d 189 (citation omitted).

Despite this deferential standard of review, in this case, the circuit court concluded, and the State conceded on appeal, that the search warrant for Mr. Green's blood failed to state probable cause. (161:6, 16); *see 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). That warrant sought to collect a sample of Mr. Green's blood and indicated that the police believed he had been operating his motor vehicle while intoxicated. (29:1-2). However, the warrant only stated that Mr. Green was driving his car "at driveway of 3207 45 Street in Kenosha County Wisconsin." (29:1). That location was entirely on Mr. Green's private property at the time. (4:1).

In the face of the circuit court's conclusion and the State's concession that the warrant failed to state probable cause, the Court of Appeals affirmed Mr. Green's OWI conviction, concluding that it was reasonable to infer from the warrant that Mr. Green was driving his vehicle on a highway near the driveway located on his private property.

This case presents a real and significant question of federal and state constitutional law: what are the bounds of the reasonable inference standard when reviewing a circuit court's issuance of a search warrant and when has the reviewing court gone too far in making inferences from facts listed in the affidavit?

## STATEMENT OF FACTS

On May 27, 2014, the State charged Valiant Green with operating a motor vehicle while intoxicated (OWI), as a fourth offense with a prior in the past five years, contrary to Wis. Stat. §§ 346.63(1)(a) and 346.65(2)(am)4m,[1] and resisting or obstructing an officer, contrary to Wis. Stat. § 946.41(1). (4:1-2).

The complaint alleged that on May 25, 2014, Mr. Green was arrested for OWI at his home in the City of Kenosha. (4:2). Mr. Green's neighbor called the police to report that Mr. Green was intoxicated and driving his truck. (4:2). When the arresting officer arrived at Mr. Green's home, he observed Mr. Green seated in the driver's seat of his truck, which was located within his private driveway. (4:2). The officer saw that the truck was at the edge of the driveway and he believed that Mr. Green was waiting to drive onto the street. (4:2). The officer then observed Mr. Green reverse the truck further back into the driveway, pull forward again, and then reverse again without ever leaving the private driveway on his property. (4:2).

The officer exited his squad car and contacted Mr. Green, who exhibited classic signs of alcohol intoxication. (4:2). The officer attempted to administer standardized field sobriety tests but Mr. Green would

[1] All statutory references will be to the 2013-2014 versions unless otherwise noted. Wis. Stat. § 346.65(2)(am)4m was repealed after Mr. Green's arrest in this case. *See* 2015 Wis. Act 371, § 6.

either not follow instructions or failed to understand them. (4:2). Mr. Green was then arrested and he refused to submit to a chemical test of his breath as requested by the officer. (4:2). Mr. Green had three prior OWI convictions and his most recent offense occurred in December of 2010. (4:3).

Police also received a statement from Mr. Green's neighbor indicating that before police arrived, she observed Mr. Green drinking beer and that he appeared to be intoxicated. (4:3). The neighbor further told police that she observed Mr. Green drive his truck from his driveway onto the public street before returning to his driveway again. (4:3).

After Mr. Green refused the breath test, police applied for a search warrant. (28:3). Attached to the application for the search warrant was a sworn affidavit from the arresting officer. (29; App. at 123-124). The affidavit generally stated the affiant's qualifications as a police officer. (29:1; App. at 123). With regard to probable cause that Mr. Green had committed a crime, the affidavit simply stated that on May 25, 2014 at 1:19 p.m., Mr. Green "drove or operated a motor vehicle at driveway of 3207 45 Street in Kenosha County Wisconsin." (29:1; App. at 123). 3207 45th Street in Kenosha was Mr. Green's home address at the time. (4:1; 165:29-31, 75; 80:23).

The affidavit also stated that Mr. Green had been arrested for OWI as a second or subsequent offense, that his driving was observed by a police officer and by a citizen witness, that Mr. Green

admitted to drinking at home, and listed a number of indicators of impairment that the arresting officer observed in Mr. Green. (29:1-2; App. at 123-124). After reviewing this affidavit, the Honorable Bruce E. Schroeder signed the search warrant authorizing the police to draw Mr. Green's blood. (28:3).

Police took Mr. Green to a hospital for the blood draw and during that time he tried to physically pull away from the officers and also tried to bite and kick them. (4:3). Mr. Green ultimately had to be handcuffed to the hospital bed. (4:3).[2]

On March 28, 2018, the State filed an amended information adding a charge of operating with a prohibited alcohol concentration, as a fourth offense with a prior in the past five years, contrary to Wis. Stat. §§ 346.63(1)(b) and 346.65(2)(am)4m.[3] (95:1-2).

On May 11, 2018, Mr. Green filed a pre-trial motion to suppress the blood evidence based on the fact that the affidavit supporting the search warrant failed to state probable cause that Mr. Green had

[2] On February 17, 2015, a jury found Mr. Green guilty of both charges but he was granted a new trial by the circuit court on the OWI charge after filing a postconviction motion. (86:1).

[3] On June 12, 2018, the State filed another amended information containing the exact same charges. The only difference between the two amended informations appears to be how Mr. Green's blood alcohol content is reported: as .214 in the March amended information and as 0.214g/100ml in the June amended information. (*See* 95:1-2 and 101:1-2).

committed a crime. (99). The motion argued that the affidavit in support of the search warrant failed to state probable cause that Mr. Green committed a crime because it only alleged that Mr. Green was driving or operating a motor vehicle in a private driveway. (99:3).

The circuit court held a hearing on Mr. Green's suppression motion on June 4, 2018. (161). No evidence was taken during the hearing but the parties made brief oral arguments. (161:3-6). The court, the Honorable Bruce E. Schroeder presiding, then denied Mr. Green's motion to suppress in an oral ruling. (161:22-23; App. at 121-122). While the court indicated that it thought Mr. Green was correct in his assertion that the affidavit in support of the search warrant was deficient for failing to state probable cause, it did not believe that suppression was the remedy. (161:6, 11-16; App. at 105, 110-115). The court noted that while the affidavit failed to state probable cause, the officer had probable cause based on facts not included in the affidavit. (161:7; App. at 106).

The court further stated that the exclusionary rule was only meant to deter police misconduct and in this case the officer "acted quite properly." (161:7-8; App. at 106-107). The court cited *Herring v. United States*, 555 U.S. 135 (2009), *Arizona v. Evans*, 514 U.S. 1 (1995), and *Hudson v. Michigan*, 547 U.S. 586 (2006) in support of its conclusion that the exclusionary rule was not appropriate in this case because there was no police misconduct to deter. (161:11-16; App. at 110-115). The court also seemed to suggest that the search

for Mr. Green's blood would have been justified even without a search warrant. (161:18, 20-21; App. at 117, 119-120). The court briefly discussed exigent circumstances but cited none, other than the dissipation of alcohol from the blood over time. (161:18-19; App. at 117-118).

After the court denied Mr. Green's motion to suppress, this case again proceeded to jury trial. After a two-day trial, on October 9, 2018, the jury found Mr. Green guilty of both operating a motor vehicle while intoxicated and operating with a prohibited alcohol concentration as charged in the amended information. (165:113). The State moved to dismiss the OWI count and the court entered a judgment of conviction for operating with a prohibited alcohol concentration, as a fourth offense with a prior in the last five years. (165:116; 130:3). During the trial, the results of a chemical analysis of Mr. Green's blood, taken pursuant to the search warrant, were admitted into evidence. (165:66-67).

On January 23, 2019, the court, the Honorable Bruce E. Schroeder presiding, sentenced Mr. Green to 2 years of initial confinement and 7 months of extended supervision for operating with a prohibited alcohol concentration. (166:4, 8).

Mr. Green appealed and reasserted his argument that the search warrant affidavit failed to state probable case that he committed a crime. In a summary disposition order, the Court of Appeals affirmed the circuit court's denial of Mr. Green's

motion to suppress. *State v. Green*, Appeal No. 2019AP2150-CR, unpublished summary disposition order (Wis. Ct. App. March 31, 2021). That court concluded that the affidavit did state probable cause because the issuing court could have reasonably inferred that the statement in the affidavit that Mr. Green was driving his car "at driveway of 3207 45th Street" meant that he was simply near the driveway on a public highway.

## ARGUMENT

### I. This Court should grant review because this case presents a real and significant question of federal and state constitutional law.

The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect citizens against unreasonable searches and seizures. A warrant is generally required when police conduct an investigatory blood draw of a person suspected of OWI. *Missouri v. McNeely*, 569 U.S. 141, 148 (2013); *State v. Kennedy*, 2014 WI 132, ¶ 34, 359 Wis. 2d 454, 856 N.W.2d 834.

For a search warrant to be valid, a neutral and detached magistrate or judge must find probable cause to believe that evidence of a crime may be found in a specific location. *State v. Marquardt*, 2001 WI App 219, ¶ 10, 247 Wis. 2d 765, 635 N.W.2d 188. The existence of probable cause is judged upon

examination of the totality of the circumstances and is a commonsense test. *Id.*, ¶ 11.

The United States Supreme Court has stated that:

> The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

*Gates*, 462 U.S. at 238. Thus, in determining whether probable cause exists, a judge considers only those facts presented by police in the supporting affidavit, along with any reasonable inferences from those facts. *Marquardt*, 247 Wis. 2d 765, ¶ 12.

In reviewing the probable cause determination of the issuing court, this Court must ensure that there was a "substantial basis to conclude that probable cause existed." *Id.*, ¶ 13. This Court must view the record objectively and determine whether it "provided sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime…." *Id.* The issuing judge's decision is given "great deference" and will be upheld unless the defendant can show that the facts were "clearly insufficient" to support probable cause. *Id.* The reviewing court is "confined to the record that

was before the warrant-issuing judge." *Higginbotham*, 162 Wis. 2d at 989.

Here, the affidavit in support of the search warrant was a standard form on which the officer wrote his specific observations in this case by hand. (*See* 29:1-2; App. at 123-124). The affidavit indicated that on May 25, 2014, at 1:19 p.m., Mr. Green drove or operated a motor vehicle at "driveway of 3207 45 Street in Kenosha County, Wisconsin." (29:1; App. at 123). Beyond this information, the affidavit stated Mr. Green was arrested for OWI as a second or subsequent offense, that the alleged driving or operating was observed by both a police officer and a citizen witness, that Mr. Green admitted to drinking at his house, and that a police officer observed that Mr. Green exhibited a number of indicators of intoxication. (29:1-2; App. at 123-124).

Of course, the fact that the officer only stated that Mr. Green was driving in his private driveway matters because a person is only guilty of violating Wisconsin's OWI laws if they drive or operate a motor vehicle while intoxicated on a public highway or premises held out for public use. *See* Wis. Stat. §§ 346.61 and 340.01(22). The private driveway attached to Mr. Green's single-family residence does not qualify as a highway or a premises held out for public use. *See City of La Crosse v. Richling*, 178 Wis. 2d 856, 860, 505 N.W.2d 448 (Ct. App. 1993). As a result, the information in the affidavit fails to establish probable cause that Mr. Green was committing a crime or that his blood may contain evidence of a crime.

The Court of Appeals concluded that the issuing court could have reasonably inferred that "at driveway of 3207 45 Street" meant that Mr. Green was driving on the public highway near his driveway. While the word "at" can be used to mean "near," there are at least two reasons why the affidavit in this case does not establish a reasonable inference that Mr. Green was driving on a highway and thus committing a crime.

First, if the officer intended to indicate that Mr. Green was driving on a highway near his home, the inclusion of the word "driveway" would be superfluous. Thus, had the affidavit simply stated that Mr. Green was driving "at 3207 45 Street" that would have reasonably conveyed that he was driving on the highway near his home. By inserting the word "driveway" in the statement, it conveys a different meaning: that Mr. Green was driving in his own driveway on his private property. There would be no other reasonable explanation for the addition of the word "driveway" in the statement concerning where Mr. Green was driving his vehicle. Any reasonable interpretation of the officer's statement in the affidavit must give meaning to the word driveway. It would be unreasonable to conclude that the officer included it for no reason.

Second, the format of the affidavit as a fill-in-the-blank form is significant here. It matters that the phrase "drove or operated a motor vehicle at" is part of the preprinted form and that the phrase "driveway of 3207 45 Street" was what the officer added. The actual words written by the officer are more significant.

Therefore, what the officer had to say regarding where the driving took place was that it took place in the driveway of Mr. Green's residence. Essentially, this format means that the word "driveway" has far more significance than the word "at" because the former was a word actually written by the officer and the latter was something already printed on the form. Again, had the officer simply meant that Mr. Green was driving on a highway near his home, the use of the word "driveway" becomes unnecessary.

This conclusion is supported by the fact that the circuit court, upon review of the search warrant pursuant to Mr. Green's pretrial motion to suppress, agreed that the affidavit failed to state probable cause because it only indicated that he was driving in his own driveway. (161:6, 16; App. at 105, 115). It is significant that the judge who reviewed the search warrant was the same judge that issued it because he was admitting that he made a mistake when he first reviewed the warrant. Furthermore, on appeal the State conceded that the search warrant failed to state probable cause. Thus, the Court of Appeal is alone in its conclusion that it was reasonable to infer from the affidavit that Mr. Green committed a crime.

This case presents a significant constitutional question regarding the bounds of the reasonable inference rule in reviewing search warrants. It presents unique and compelling facts that can be used to develop the law in this area. Can a reviewing court disregard words that seem to have a significant meaning and render them surplusage in drawing an

inference from the facts listed in the affidavit for a search warrant? Rarely does a case involving reasonable inferences present such a basic question.

The more common scenario is demonstrated in *State v. Ward*, 2000 WI 3, ¶ 20, 231 Wis. 2d 723, 604 N.W.2d 517, where the question presented was whether it was reasonable to infer that drugs would be found in the defendant's home. The affidavit in that case stated that another man who was a significant drug dealer told police that his supplier was Mr. Ward and where his home was located. *Id.*, ¶¶ 5-6. The warrant sought authorization to search Mr. Ward's home but there were no explicit facts stated in the affidavit to create a nexus between Mr. Ward's drug dealing and his home. *Id.*, ¶ 27. This Court concluded that it was reasonable to infer that drugs would be located in Mr. Ward's home based on the statements in the affidavit that the first drug dealer told police that his supplier was Mr. Ward and that he lived at a specific address. *Id.*, ¶¶ 30, 36. Thus, it was reasonable to infer that Mr. Ward's home was the location where the first dealer received his drugs from Mr. Ward. *Id.*, ¶ 30.

This case is very different in that the reasonable inference relates to whether or not a crime was committed in the first place and thus it provides a good vehicle to develop the law related to reasonable inferences and their limits. Therefore, this Court should grant review in this case in order to address the significant constitutional question about the limits of

the reasonable inference rule when reviewing search warrants.

## CONCLUSION

For the reasons stated above, Mr. Green asks this Court to grant review of the Court of Appeals decision.

Dated this 28th day of April, 2021.

Respectfully submitted,

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## CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 3,200 words.

## CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

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

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

Dated this 28th day of April, 2021.

Signed:

JAY PUCEK
Assistant State Public Defender

# APPENDIX

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