STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP002150-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

VALIANT M. GREEN,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Count of Appeals
Affirming a Judgment of Conviction
Entered in the Kenosha County Circuit Court,
the Honorable Bruce E. Schroeder, Presiding.

BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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ISSUE PRESENTED

1. Mr. Green was arrested for operating while intoxicated and his blood was taken pursuant to a search warrant. The warrant affidavit alleged only that Mr. Green drove on the private driveway at his home, not on a public highway. 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 answered no, concluding that suppression was not the proper remedy. The court of appeals also answered no, concluding that the affidavit did state probable cause.

STATEMENT OF THE CASE

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

[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 § 346.65(2)(am)4m was repealed after Mr.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.

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 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 25-26). The affidavit generally stated the affiant's qualifications as a police officer. (29:1; App. at 25). 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 25). 3207 45th Street in Kenosha was Mr. Green's home address at the time. (4:1).

The affidavit also stated that Mr. Green had been arrested for OWI as a second or subsequent offense, that his driving "at [the] driveway" was observed by a police officer and by a citizen witness, that Mr. Green admitted to drinking alcohol at his house, and listed a number of indicators of impairment that the arresting officer observed in Mr. Green. (29:1-2; App. at 25-26). 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).

On February 16, 2015, the case proceeded to trial and a jury found Mr. Green guilty of both charges the next day. (156:112). On February 27, 2018 he was granted a new trial by the circuit court on the OWI charge after filing a postconviction motion. (86:1). The circuit court granted a new trial based on a

misstatement of the law in the jury instructions that were given at the first trial, as well as for ineffective assistance of counsel because trial counsel failed to cross examine a citizen witness about her basis of knowledge on a relevant issue. (86:1; 80:8-9).

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.[2] (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 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.

[2] 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).

(161:22-23; App. at 23-24). 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 7, 12-17). 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 8).

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 8-9). 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 12-17). The court also suggested that the search for Mr. Green's blood would have been justified even without a search warrant. (161:18, 20-21; App. at 19, 21-22). 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 19-20).

After the court denied Mr. Green's motion to suppress, this case again proceeded to jury trial. 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). Following 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; App. at 5). 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, renewing his argument that the blood evidence should have been suppressed because the affidavit in support of the search warrant failed to state probable cause. In a summary disposition order, the court of appeals affirmed. *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. (App. at 30). The court of appeals did not address the circuit court's conclusion that suppression was not the appropriate remedy in this case.

ARGUMENT

I. The affidavit in support of the search warrant did not state probable cause and as a result the blood evidence must be suppressed.

A. Legal principles and standard of review.

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 common-sense test. *Id.*, ¶ 11.

The United States Supreme Court has stated that:

> The task of the issuing magistrate is simply to make a practical, common-sense 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.

Illinois v. Gates, 462 U.S. 213, 238 (1983) (emphasis added). 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*, 2001 WI App 219, ¶ 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." *State v. Higginbotham*, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991).

This Court reviews a circuit court's decision on a suppression motion using a two-step standard of review. *State v. Sloan*, 2007 WI App 146, ¶ 7, 303 Wis. 2d 438, 736 N.W.2d 189. First, the circuit court's findings of historical fact will be upheld unless clearly erroneous. *Id.* Second, this Court applies constitutional principles to those facts *de novo*. *Id.*

B. The affidavit in support of the search warrant did not state probable cause to believe that Mr. Green had committed a crime.

The affidavit in this case failed to state probable cause because it only alleged that Mr. Green drove while intoxicated on a private driveway, which is not a crime. To violate Wisconsin's OWI or operating with a prohibited alcohol concentration laws, a person must drive or operate a motor vehicle while intoxicated or with a prohibited concentration of alcohol and the driving or operating must occur on a highway, or on a

> …premises held out to the public for use of their motor vehicles, [a] premises provided by employers to employees for the use of their motor vehicles, [or a] premises provided to tenants of rental housing in buildings of 4 or more units for the use of their motor vehicles.

Wis. Stat. § 346.61. "Highway" is defined as:

> [A]ll public ways and thoroughfares and bridges on the same. It includes the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel. It includes those roads or driveways in the state, county or municipal parks and in state forests which have been opened to the use of the public for the purpose of vehicular travel and roads or driveways upon the grounds of public schools, as defined in s. 115.01 (1), and institutions under the jurisdiction of the county board of supervisors, but does not include private roads or driveways as defined in sub. (46).

Wis. Stat. § 340.01(22).

Finally, the test for whether a premise is held out to the public for use of their motor vehicles "is whether, on any given day, potentially any resident of the community with a driver's license and access to a motor vehicle could use the parking lot in an authorized manner." *City of La Crosse v. Richling*, 178 Wis. 2d 856, 860, 505 N.W.2d 448 (Ct. App. 1993).

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 25-26). The officer wrote 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 25). Beyond this information, the affidavit stated Mr. Green was arrested for OWI as a second or subsequent offense, that "[t]he arrestee was observed to drive/operate the vehicle by a police officer" and "[t]he arrestee was observed to drive/operate the vehicle by a citizen witness named [N.A.T.]," that Mr. Green admitted to drinking alcohol at his house, and that a police officer observed that Mr. Green exhibited a number of indicators of intoxication. (29:1-2; App. at 25-26).

This information fails to establish probable cause that Mr. Green was committing a crime or that his blood may contain evidence of a crime. The address listed in the affidavit, 3207 45 Street in Kenosha, Wisconsin, was Mr. Green's private residence at the time of the incident. (4:1; 165:29-31, 75; 80:23). The only location the affidavit indicates Mr. Green was driving or operating a motor vehicle was the driveway of that residence. (29:1; App. at 25). It is not a crime or

violation of OWI laws to drive or operate a motor vehicle while intoxicated in a private driveway. Wis. Stat. § 346.61.

Typically, review of whether an affidavit in support of a search warrant states probable cause involves highly fact-intensive cases where the probable cause determination is not so clear. For example, in *Sloan*, the defendant attempted to ship a box containing marijuana via UPS to an address in Florida. *Sloan*, 2007 WI App 146, ¶¶ 2-3. The return address on the package was the defendant's address in West Allis, Wisconsin. *Id.*, ¶ 2. After police were alerted and recovered the marijuana, they investigated and confirmed that the defendant was the sender of the package and that he lived at the return address. *Id.*, ¶ 5. Police used this information to apply for a search warrant for the defendant's West Allis home, which was granted and the subsequent search revealed evidence that the defendant was manufacturing marijuana there. *Id.*, ¶ 6.

On review, the court of appeals concluded that while the affidavit established that the defendant had possessed marijuana at the UPS shipping facility where he attempted to ship the marijuana,

> Nothing in the affidavit provides a reasonable factual basis upon which to conclude that a crime had been or likely would be committed at the [West Allis] residence, or that there was evidence of a crime at the residence.

Id., ¶¶ 32, 34. Thus, the *Sloan* Court concluded that the affidavit failed to state probable cause that evidence of a crime would be found at the West Allis

residence and reversed the circuit court's decision to the contrary. *Id.*, ¶ 38.

Similarly, in *Marquardt*, the court of appeals reversed the circuit court's determination that a search warrant affidavit stated probable cause to search the defendant's cabin. *Marquardt*, 2001 WI App 219 ¶ 19. In that case, the affidavit stated that the defendant's mother had been found dead at her home with a sheet covering her body, that she had been stabbed and shot, that there were footprints at the scene that may be suitable for comparison, that the victim's husband told police that he had not heard from their son, the defendant, since the victim's death, and that the defendant may be at his cabin. *Id.*, ¶¶ 14, 16. The court concluded that these facts were insufficient to establish probable cause that the defendant was involved in the crime or that evidence of the crime would be found at his cabin. *Id.*, ¶ 19.

Thus, in *Sloan* and *Marquardt*, the probable cause analysis involved consideration of a number of facts and whether the sum of those facts were sufficient to "excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that they will be found in the place to be searched." *Id.*, ¶ 13.

In this case the probable cause analysis does not call for such a weighing of various facts. It only requires the application of the law to the only fact alleged in the warrant affidavit: Mr. Green was driving or operating a motor vehicle while intoxicated in a private driveway. The law clearly states that this is not a crime. Therefore, the affidavit in support of the

search warrant exhibits a complete absence of probable cause to believe that Mr. Green committed a crime.

The court of appeals disagreed, concluding that the issuing circuit 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. The court of appeals' reasoning is deficient. While the word "at" can be used to mean "near," there are at least two reasons why the affidavit in this case does not reasonably imply 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, a different meaning is conveyed: 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 even 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 "driveway" was a word actually written by the officer and "at" was already preprinted on the form. Again, had the officer simply meant that Mr. Green was driving on a highway near his home, his insertion of the word "driveway" would have been 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 Mr. Green was driving in his own driveway. (161:6, 16; App. at 7, 17). And, it is significant that the judge who reviewed the search warrant was the same judge who issued the warrant, 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 appeals is alone in its conclusion that it was reasonable to infer from the affidavit that Mr. Green committed a crime.

C. The good faith exception does not apply because the affidavit is so lacking in indicia of probable case that it was unreasonable for the officer to rely on the search warrant.

Where a search warrant fails to state probable cause, as in this case, the test to apply to determine if the exclusionary rule should apply was articulated in *United States v. Leon*, 468 U.S. 897, 913 (1984). In that case, the United States Supreme Court recognized an exception to the exclusionary rule in cases where the police reasonably rely on a search warrant issued by a detached and neutral magistrate. The basis for this exception was that, in the ordinary case, an officer could not be expected to question the judge's determination of probable cause. *Id.* at 921. The Court focused on the exclusionary rule's deterrent effect on the actions of police officers. *Id.* at 907-909. The Court concluded that in cases where the police reasonably relied on a warrant later determined to be invalid, there would be little deterrent effect if that evidence were suppressed as a result. *Id.* at 922.

The Court also stated, however, that "deference to the magistrate…is not boundless." *Id.* at 914. To that end, the Court articulated four circumstances under which the good faith exception does not apply:

> (1) The magistrate or judge issuing the warrant 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 issuing judge wholly abandoned his judicial role;
>
> (3) The warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable;
>
> (4) The warrant is so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.

Id. at 923.

In *State v. Eason*, 2001 WI 98, ¶ 74, 245 Wis. 2d 206, 629 N.W.2d 625, this Court adopted the good faith exception to the exclusionary rule as articulated in *Leon*. The *Eason* Court also added two additional requirements that the State must prove before the good faith exception would apply. *Id.* First, the application for the search warrant must have been the product of significant police investigation. *Id.* Second, the application for that warrant must 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. *Id.*

Here, the good faith exception to the exclusionary rule does not apply because the affidavit in support of the warrant was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Leon*, 468 U.S. at 923.

In *State v. Marquardt*, 2005 WI 157, ¶ 31, 286 Wis. 2d 204, 705 N.W.2d 878, this Court discussed the "indicia" requirement articulated in *Leon*, and noted that it is "grounded in Justice Byron White's concurrence in…*Gates*…, in which [he] explained that 'the good-faith exception would not apply if the material presented to the magistrate or judge is…so clearly lacking in probable cause that no well-trained officer could reasonably have thought that a warrant should issue.'"

Thus, this Court in *Marquardt* 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 (quoting *Leon*, 468 U.S. at 922 n.23).

That principle applies here and means the good faith exception cannot save the deficient warrant affidavit. A reasonably well-trained officer would have known that it was not a crime or violation of OWI laws to drive or operate a motor vehicle while intoxicated in a private driveway. Therefore, a reasonably well-trained officer would have known that the warrant was illegal despite the fact that the judge authorized it.

The good faith exception would also be precluded in this case because it failed to meet the additional requirements articulated in *Eason*. In particular, the application for the warrant was not reviewed by a knowledgeable government attorney or by a police officer trained and knowledgeable in the requirements of probable cause and reasonable suspicion. In fact,

there is no indication that this warrant application was reviewed by anyone other than the officer who drafted it. It cannot be argued that he was a police officer trained and knowledge in the requirements of probable cause because anyone satisfying that standard surely would have known that the warrant application was insufficient.

Additionally, a careful reading of *Eason* shows that for the good faith exception to apply, a review by someone other than the officer that drafted it is required. In support of its additional good faith requirements, the *Eason* Court recognized 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, this Court was contemplating a review by someone other than the drafting officer. Here, it appears that no one reviewed the search warrant application before it was forwarded to the judge for approval.

Furthermore, in *State v. Tye*, 2001 WI 124, 248 Wis. 2d 530, 636 N.W.2d 473, this Court made it clear that when a circuit judge issues a warrant in the absence of one of the basic constitutional requirements, the good faith exception does not apply and the evidence must be excluded.

In *Tye*, a veteran police officer drafted an affidavit in support of a search warrant for the defendant's residence. *Id.*, ¶ 4. The affidavit was presented to an assistant district attorney, who approved it. *Id.* The officer submitted the affidavit to a circuit court judge, who reviewed it and issued the

search warrant. *Id.*, ¶ 5. However, what none of these officials noticed was that the officer had failed to sign and swear to the truth of the affidavit. *Id.*

The circuit court ordered all evidence obtained as a result of the defective warrant suppressed, even though it was undisputed that the unsworn affidavit stated probable cause to believe that the defendant had committed a crime and that evidence of that crime may be found in his residence. *Id.*, ¶¶ 2, 7.

This Court affirmed, concluding that the oath or affirmation requirement was not a technicality but rather a basic tenet of the Fourth Amendment and that the exclusionary rule applied because "it is plainly evident that a magistrate or judge had no business issuing a warrant." *Id.*, ¶¶ 19, 24 (quoted authority omitted).

Similarly, in this case it is plainly evident that the circuit court had no business issuing a warrant because the affidavit exhibited a complete absence of the basic constitutional requirement that it state probable cause. Therefore, the good faith exception to the exclusionary rule does not apply and the evidence in this case should be suppressed.

D. Other cases holding that suppression of evidence is not the remedy where there is no police misconduct do not apply because there was police misconduct as required under *Leon*.

The exclusionary rule is a "prudential doctrine" created by the United States Supreme Court "to compel respect for the constitutional guaranty." *Davis*

v. United States, 564 U.S. 229, 236 (2011)(internal quotes and citations omitted). It does not apply to all cases where a Fourth Amendment violation occurred. *Id.* at 237. The sole purpose of the rule is to deter such violations, and thus, any application of the rule must have actual deterrent value. *Id*. Additionally, when determining whether the rule applies, courts must account for the "substantial social costs" generated by the rule. *Id.* Therefore, "[f]or exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs." *Id.*

If the police conduct in a particular case shows a deliberate, reckless, or grossly negligent violation of the Fourth Amendment, the costs of exclusion are typically outweighed by the deterrent benefit and suppression is appropriate. *Id.* at 238. However, the deterrent value of suppression is lower when "police act with an objectively 'reasonable good-faith belief' that their conduct is lawful" or when isolated simple negligence is involved. *Id.*

Both this Court and the United States Supreme Court have applied these principles in a number of cases that resulted in the conclusion that suppression of the evidence was not appropriate despite a Fourth Amendment violation by police. None of those cases, however, involved police conduct as flagrant as the officer's actions in this case. Additionally, those cases are all factually distinguishable from this case, where a reasonably well-trained officer would have been aware that the affidavit in support of the search warrant completely failed to state probable cause and thus the warrant was illegal. Under the circumstances

in this case, the proper test to apply is the one created in *Leon*.

In *Davis*, the Court considered whether evidence should be suppressed in a case where the police relied on binding judicial precedent to justify their search, which would have been lawful under that precedent. *Id.* at 233-235. That precedent was later overturned, making the officer's actions in that case a violation of the Fourth Amendment. *Id.* In concluding that suppression was not the remedy, the Court heavily emphasized that the officers' actions in that case were "in strict compliance with then-binding Circuit law and [were] not culpable in anyway." *Id.* at 239-240. The Court also stated that the officers followed the legal precedent "to the letter." *Id.* at 239.

Furthermore, the Court stated that the "absence of police culpability dooms [the defendant's] claim." *Id.* at 240. The Court believed that suppressing the evidence in *Davis* would only deter "conscientious police work" and that "[r]esponsible law enforcement officers will take care to learn 'what is required of them' under Fourth Amendment precedent and will conform their conduct to these rules." *Id.* at 241. The Court summed up its holding by stating, "[w]e have stated before, and we reaffirm today, that the harsh sanction of exclusion 'should not be applied to deter *objectively reasonable* law enforcement activity.'" *Id.* (emphasis added).

Similarly, in *Arizona v. Evans*, a police officer stopped the defendant and ran a record check of his name and discovered an arrest warrant. *Evans*, 514 U.S. 1, 4. The officer arrested him and discovered

illegal drugs. *Id.* It was later learned that the arrest warrant had been quashed prior to the arrest, but due to a clerical error by a court employee, the warrant was not removed from the police computer system. *Id.* at 4-5. Relying on its decision in *Leon*, the Court concluded that the good faith exception applied to the illegal arrest because "there is no indication that the arresting officer was not acting objectively reasonably when he relied upon the police computer record." *Id.* at 15-16. Therefore, the Court held that the exclusionary rule did not apply in that case.

The facts in *Herring v. United States* were very similar to those in *Evans*, except that in *Herring* the invalid warrant was mistakenly left in the system by law enforcement personnel, not a court employee. *Herring*, 555 U.S. 135, 137 (2009). In concluding that suppression was not the remedy for the Fourth Amendment violation in that case, the Court again cited *Leon*'s holding that "when police act under a warrant that is invalid for lack of probable cause, the exclusionary rule does not apply if the police acted 'in objectively reasonable reliance' on the subsequently invalidated warrant." *Id.* at 142 (quoting *Leon*, 468 U.S. at 922). It is important to note that the police negligence in *Herring* involved an administrative failure by police personnel that were not directly engaged in the arrest or investigation of the defendant. *Id.* at 137-138. The *Herring* Court noted that the officers who were involved in investigating and arresting the defendant "did nothing improper." *Id.* at 140.

In *State v. Kerr*, 2018 WI 87, ¶ 6, 383 Wis. 2d 306, 913 N.W.2d 787, this Court held that the only

purpose of the exclusionary rule is to deter police wrongdoing and not to correct judicial error. In that case, the defendant was arrested based on an arrest warrant that was allegedly issued contrary to state statutes, and thus invalid. *Id.*, ¶ 12. The search incident to that arrest produced illegal drugs for which the defendant was charged. *Id.*, ¶¶ 10-11.

The defendant filed a motion to suppress and the circuit court concluded that the warrant had been issued contrary to law and was thus invalid and suppressed the evidence. *Id.*, ¶ 16. The circuit court noted that there was no police wrongdoing or misconduct but that suppression was appropriate to deter systemic judicial misconduct. *Id.* This Court disagreed and reversed, stating that the exclusionary rule only serves to deter police misconduct and because there was none present in that case, exclusion was inappropriate. *Id.*, ¶ 23.

This Court also addressed the applicability of the exclusionary rule in *State v. Burch*, 2021 WI 68, ___ Wis. 2d ___, 961 N.W.2d 314. In that case, in investigating a homicide, police focused their investigation on the defendant because his DNA was found on the victim's body. *Id.*, ¶¶ 4, 7. The local sheriff's department was leading the investigation and detectives searched the police records from a city police department. *Id.*, ¶ 7. There, they discovered data that was downloaded from the defendant's cellphone. *Id.* That data was received from the defendant during an unrelated criminal investigation by the city police. *Id.*, ¶¶ 5-6.

In that investigation, city police had obtained the defendant's written consent to download and search his phone data because they wanted to review his text messages. *Id.*, ¶¶ 5-6. When the sheriff's detectives discovered the cellphone data in city police custody, they also discovered the written consent form signed by the defendant allowing for the download and search of the phone and a police report indicating that the defendant consented. *Id.*, ¶ 7.

Review of the cellphone data showed that the defendant conducted numerous internet news searches related to the victim's murder and email information associated with the defendant. *Id.*, ¶ 8. Sheriff's detectives used the email information to obtain a search warrant for additional data from the defendant's email provider. *Id.* That data included location information showing that the defendant's phone was in the location of the victim's house, and where her body and clothes were found on the night of the murder. *Id.*

The defendant was charged with the homicide and sought to suppress this evidence, claiming that the download and search of his entire cellphone exceeded the scope of the search that he consented to because the city police officer originally indicated that all he wanted the defendant's phone for was to look at his text messages. *Id.*, ¶ 10. The circuit court denied the motion and the defendant appealed. *Id.*

This Court affirmed, concluding that even if there had been a Fourth Amendment violation, suppression was not the remedy. *Id.*, ¶ 26. To support this conclusion, this Court repeatedly emphasized that

the sheriff's detectives did nothing wrong, but rather "acted by the book." *Id*., ¶ 22. They searched the city police records, found a consent form signed by the defendant indicating that he consented for the city police to search his phone, with no limitation listed. *Id*. They also found the police report confirming this consent and allowing for the city police to download the data from the phone. *Id*. Furthermore, the sheriff's detectives found the actual data and viewed it "having every reason to think it was lawfully obtained with [the defendant's] unqualified consent." *Id*.

Therefore, it was central to this Court's conclusion that the sheriff's detectives had no reason to think their conduct was illegal and thus, there was no police misconduct to deter by applying the exclusionary rule. *Id*., ¶ 23. This Court concluded that there was simply no bad police behavior to deter through suppression because the sheriff's detectives did nothing wrong. *Id*., ¶ 25.

The central theme running through each of the above cases is that the investigating officers did absolutely nothing improper. In each case, the officers took reasonable actions based on information that they were provided and generally rely on in the course of their work. In *Davis*, the officers conformed their behavior to comply with the law as it existed at the time they conducted the search. In *Evans*, *Herring*, and *Kerr*, the officers reasonably relied on arrest warrants that were mistakenly left in the system but later turned out to be invalid. And in *Burch*, the detectives relied on their conscientious review of police documents that showed that the defendant consented

to a download and search of his cellphone without limitation.

Because the officers in those cases did nothing wrong, suppression was inappropriate in each case. "The test of whether the officers' reliance was reasonable is an objective one, querying whether a reasonably well trained officer would have known that the search was illegal in light of all the circumstances." *State v. Dearborn*, 2010 WI 84, ¶ 36, 327 Wis. 2d 252, 786 N.W.2d 97 (quoting *Leon*, 468 U.S. at 922 n.23)(cleaned up). In each of the above cases, a reasonably well-trained officer would have acted in the same fashion as the officers did in those cases and thus those officers acted in reasonable reliance.

Not so in this case. Here, a reasonably well-trained officer would have known that the affidavit in support of the search warrant was so lacking in probable cause that it failed to state a crime. Official reliance on it was thus unreasonable. Therefore, suppression is appropriate because "a reasonably well trained officer would have known that the search was illegal in light of all the circumstances." *Leon*, 468 U.S. at 922 n.23.

Officers cannot be permitted to rely on and execute search warrants that they reasonably should know are invalid because the warrant affidavit on its face utterly fails to state probable cause. The *Leon* Court recognized as much by stating that "deference to the magistrate…is not boundless" and that suppression would still be appropriate in cases where "the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in

its existence entirely unreasonable." *Leon,* 468 U.S. at 914, 923.

None of the above cases changed the good faith analysis the United States Supreme Court articulated in *Leon*: that an exception to the exclusionary rule applies only in cases where the officers acted in *reasonable* reliance on a warrant issued by a detached and neutral magistrate.

Thus, in cases like *Davis*, *Herring*, and *Burch*, suppression was not appropriate because investigating officers acted reasonably. But in a case like this one, suppression is appropriate because the investigating officer acted unreasonably; he drafted a deficient search warrant affidavit that was so lacking in probable cause that official belief in its existence was unreasonable. Under these circumstances, *Leon* demands that the good faith exception should not apply and the evidence should be suppressed. This Court could not have been clearer when it stated in *Marquardt* 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.*, 2005 WI 157, ¶ 33 (quoting *Leon*, 468 U.S. at 922 n.23).

For all these reasons, the exclusionary rule is the appropriate remedy for the illegal search in this case.

CONCLUSION

The search warrant authorizing the blood draw from Mr. Green in this case was invalid because the affidavit in support of that warrant failed to state probable cause to believe that Mr. Green had committed a crime. Furthermore, the good faith exception to the exclusionary rule does not apply because the officer could not reasonably rely on that warrant. This Court should reject the court of appeals conclusion that the affidavit stated probable cause as well as the circuit court's conclusion that suppression is not the appropriate remedy, 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 28th day of October, 2021.

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 (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,818 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, including 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 28th day of October, 2021.

Signed:

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