STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP2150-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

VALIANT M. GREEN,

Defendant-Appellant-Petitioner.

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

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

JAY PUCEK
Assistant State Public Defender
State Bar No. 1087882

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
pucekj@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

ARGUMENT

I. The affidavit in support of the search warrant did not contain probable cause that Mr. Green had committed a crime.

The State argues that the affidavit in support of the search warrant in this case states probable cause that Mr. Green was operating his motor vehicle on a highway because the statement that Mr. Green was operating "at driveway of 3207 45th St." could mean that he was driving on the highway near that address. (State's Response at 14-16). The State's arguments are unpersuasive.

If the officer in this case was alleging that Mr. Green was driving on the highway near his home, he would have written that he was driving "at 3207 45th St." That language conveys that meaning. However, adding the word "driveway" before Mr. Green's address also has meaning, and any reasonable interpretation of the warrant affidavit in this case must give meaning to the word driveway. "Words matter." *See State v. Rejholec*, 2021 WI App 45, ¶ 35, 398 Wis. 2d 729, 963 N.W.2d 121. Words have meaning and cannot simply be written off because the meaning they convey is inconvenient.

The court of appeal's decision in this case, and now the State's arguments, rely heavily on definitions of the word "at" to establish that it can mean near to a place. *State v. Green*, Appeal No. 2019AP2150-CR, unpublished summary disposition order (Wis. Ct. App.

March 31, 2021)(State's Response at 14). Indeed, that is why the language "at 3207 45th Street" would clearly convey an allegation that Mr. Green was driving on the highway near his home. However, adding the word "driveway" changes that meaning. Alleging that Mr. Green was driving "at driveway of 3207 45 St. in Kenosha" carries a different meaning, i.e. that Mr. Green was driving in his own private driveway.

Imagine substituting a different word for "driveway" in the affidavit in this case. What if the affidavit alleged that Mr. Green was operating his vehicle "at garage of 3207 N. 45th St." or "at backyard of 3207 N. 45th St." In each case, the location would still be near to a public highway. But if one of those other words were used instead of "driveway" no one would argue that a reasonable inference could be drawn from the statement that Mr. Green was operating his vehicle on the pubic highway nearest to his garage or backyard. The same is true for the location actually stated in the affidavit, "at driveway of 3207 N. 45th St." It does not reasonably convey the meaning that Mr. Green was operating his vehicle on the public highway near his home, but rather that he was operating his vehicle in his own private driveway.

The State also argues that use of the term driveway could be useful in describing a location on a rural highway. However, this is not such a case. Here, the street in question is a residential city street in an urban area in the City of Kenosha. Thus, no such use of the word driveway was necessary to describe the location. What happened here was that the officer described in the affidavit what he personally observed:

Mr. Green driving in his own private driveway. That is clearly not enough to establish probable cause of a law violation.

II. The good faith exception to the exclusionary rule does not apply in this case and the evidence must be suppressed.

The State argues that neither the exceptions to the good faith doctrine articulated in *Untied States v. Leon*, 468 U.S. 897 (1984), nor the additional requirements this Court set out in *State v. Eason*, 2001 WI 98, 245 Wis. 2d 206, 629 N.W.2d 625, should apply to this case and invites this Court to conclude that those requirements simply provide a "guide" for courts reviewing search warrant cases and that their mandates need not be strictly adhered to. (State's Response at 18-19). The State suggests that the focus should instead be more generally on whether there was police misconduct in the case. The State is wrong.

In *Leon*, the sole issue before the Court was whether to modify the judicially created exclusionary rule to allow for evidence to be used when officers acted in reasonable, good faith reliance on a judicially issued search warrant. *Id.* at 905. The *Leon* Court ultimately created such an exception, and in doing so recognized that the exclusionary rule "operates as a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *Id.* at 906 (internal quotes omitted). Thus, the Court recognized that the primary purpose of the rule was to deter police officers

from violating the Fourth Amendment, and that the exclusionary rule should not apply in some cases where there is little chance of accomplishing deterrence. The Court made it clear that in creating the good faith exception to the exclusionary rule, it was emphasizing that the rule functions to deter police misconduct.

While the *Leon* Court's clear mandate that the exclusionary rule must deter police misconduct to be applicable, it also made it clear that there were limits to its application:

> Nevertheless, the officer's reliance on the magistrate's probable cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable, and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued.

Id. at 922-923 (cleaned up). The Court went on to delineate four circumstances where the good faith exception would not apply. *Id.* at 914-915, 923. One of those exceptions was that "an officer [would not] manifest objective good faith in relying on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Id.* at 923 (internal quotes omitted).

While other United States Supreme Court cases have concluded that the exclusionary rule was inapplicable in contexts different from this case, none of those cases have altered the mandates of *Leon*. In

cases that involve deficient search warrants, the law still requires that the evidence be suppressed if the facts of the case place it into one of the four exceptions articulated by the *Leon* Court. The Sixth Circuit United States Court of Appeals summed it up best: "Thus, the *Leon* Court determined, *ad initium*, that officers can never assert reasonable reliance, nor courts find good faith, under these four scenarios." *United States v. Hodson*, 543 F.3d 286, 292 (6th Cir. 2008).

The State also argues that it would be incongruous to require them to satisfy six factors for good faith to apply in cases with defective search warrants, but only one factor, the absence of police misconduct, in cases where the police did not obtain a search warrant. (State's Response at 18). But the State's argument is misleading; while there are a number of factors to consider in search warrant cases, as laid out in *Leon* and *Eason*, the ultimate inquiry in all cases involving the potential application of the exclusionary is the same: did the officers act in reasonable reliance on the authority they believed initially justified their actions.

The State next argues that "none of the four disqualifying *Leon* scenarios are present," and the good faith exception applies here. (State's Response at 19-20). Again, the State's arguments are unpersuasive. The good faith doctrine 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. 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.

Additionally, the subjective mental state of the officer is irrelevant: "Moreover, the objective reasonableness determination does not examine the subjective states of mind of the particular law enforcement officers conducting this particular search, rather it inquires whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's decision." *Hodson*, 543 F.3d at 293 (cleaned up).

Furthermore, 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 initial brief, "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. Despite the State's arguments to the contrary, Mr. Green made clear in his initial brief that the police misconduct at issue in this case was the officer's unreasonable reliance on a search warrant that utterly failed to state probable cause that a crime was committed. A fair reading of *Leon* establishes that relying on a warrant that is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable" amounts to police misconduct that

should be deterred by application of the exclusionary rule. *Leon*, 469 U.S. at 923.

Finally, the State argues that the *Eason* requirements should not apply in this case, and even if they do, the State has met them here. (State's Response at 20). As to the first argument, nothing in the *Eason* Court's decision suggests that the additional good faith requirements mandated by Article I, Section 11 of the Wisconsin Constitution should not apply to cases like this one.

To the contrary, those requirements represent good practice in any police investigation because they require officers to thoroughly investigate a case before seeking a warrant and also require that the warrant is reviewed by a police supervisor or government attorney to ensure that the requirements of probable cause are established by the officer's affidavit and warrant application. *See Eason*, 245 Wis. 2d 206, ¶ 63. The State provides no authority 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.

As to the State's second argument, that they have met the *Eason* good faith requirements, the State is simply wrong. They have not met the second requirement because there is no evidence that anyone reviewed the officer's warrant affidavit in this case

prior to its submission to the judge. The State argues that the drafting officer's own review of the affidavit should qualify to meet this requirement, but that is clearly not acceptable.

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. Indeed, the State's argument that the drafting officer's review should satisfy the second *Eason* requirement makes little sense. If that were the case, there would be no point in requiring review of the affidavit because every affidavit is arguably reviewed by the drafting officer, and arguably, every officer is trained in the requirements of probable cause. *Eason* clearly requires more.

Therefore, because the affidavit in this case was "so lacking in indicia of probable cause as to render official belief in its existence unreasonable," the good faith doctrine does not apply and the evidence in this case must be suppressed.

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

The State argues that the evidence should not be suppressed in this case because Mr. Green's blood inevitably would have been lawfully discovered by the police. (State's Response at 25-27). Their argument is

that if the warrant had been rejected for failing to state probable cause, the officer simply would 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. Instead, what happened here was that the officer drafted a deficient search warrant affidavit that was so lacking in indicia of probable cause that no reasonable officer would rely on it. Therefore, the State is not entitled to rely on the *Leon* good faith doctrine. In such a situation, the *Leon* Court made it clear that the remedy is suppression, not the application of the inevitable discovery rule.

Furthermore, application of the inevitable discovery rule to cases like this one 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 initial brief, 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

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 violated the law. Furthermore, the good faith exception to the exclusionary rule does not apply because the officer

could not reasonably rely on that warrant. Finally, the inevitable discovery doctrine does not apply.

This Court should reject the court of appeal's 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 13th day of January, 2022.

Respectfully submitted,

JAY PUCEK
Assistant State Public Defender
State Bar No. 1087882

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
pucekj@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

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 2,850 words.

Dated this 13th day of January, 2022.

Signed:

JAY PUCEK
Assistant State Public Defender