STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2019 AP 2296-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BILLY JOE CANNON,

Defendant- Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED ON APRIL 4, 2014, AND A DECISION AND ORDER ENTERED ON NOVEMBER 26, 2019, IN THE CIRCUIT COURT OF MILWAUKEE COUNTY
The Honorable Stephanie Rothstein, Presiding
Trial Court Case No. 2011 CF 924

Respectfully submitted:

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I. DOUBLE JEOPARDY.

Ignoring, but not disputing, that Cannon was allegedly involved in an ongoing cocaine conspiracy spanning the same three-year period from which the State pretended to extract two separate conspiracies, the State tries to reframe Cannon's position as believing his 2011 acquittal "g[a]ve him a free pass to commit drug conspiracies for the rest of his life . . . ." (State's Brief, pp. 5-6). This argument, of course, is absurd. It is the State that believes it can shape the overt acts charged in each indictment and, under the guise of prosecutorial discretion, advance the proposition of one conspiracy being capable of proof in several prosecutions requiring different evidence for each conviction. *U.S. v. Castro*, 629 F.2d 456, 461 (7th Cir. 1980).

Attempting to rebuff Cannon's position, the State leans heavily on the idea that the state and federal conspiracy statutes are different. (State's Brief, pp. 7-10). Citing *State v. Jackson*, 2004 WI App 190, 276 Wis.2d 697, 688 N.W.2d 688, and through sleight of hand, the State tries to shed *Castro* by arguing it "interpreted [a] materially different federal statute." (State's Brief, p. 10). Of course, the State does not reveal that *Jackson* never mentioned *Castro,* nor does the State examine *Jackson*; it only superficially references that statement. Presumably, the State knows *Jackson* addressed two different conspiracies for two different offenses – arson and murder – but does not want to have this important factual distinction get in the way of an otherwise superficially attractive argument.

In *Jackson*, the defendant conspired to firebomb a police officer's home, so two others could shoot people fleeing from the building. A jury found Jackson guilty of two counts of conspiracy, one for arson and another to commit murder. Citing a 1942 Supreme Court case - *Braverman v. United States*, 317 U.S. 49 (1942) - Jackson argued that a conspiracy statute punishes the criminal agreement to commit a crime, not the criminal goals of the agreement, and since the only crime committed was the agreement itself, he could only be punished with one conspiracy conviction. *Jackson* responded:

> We disagree. *Braverman* is inapplicable here because the underlying conspiracy statute differs from the federal conspiracy statute. Unlike the federal conspiracy statute, Wis. Stat. § 939.31 permits the charging of multiple offenses.

Id. at ¶ 6.

The problem with relying on *Jackson*, and by extension, *Braverman*, is that the federal conspiracy statute in those cases (18 U.S.C. 371) was a different federal conspiracy statute than that examined by *Castro* (21 U.S.C. 846). Here, both section 939.31, Stats. (the state conspiracy statute under which Cannon was charged) and 21 U.S.C. 846 (the federal statute examined by *Castro*) are substantially the same. Both establish that an individual who engages in a conspiracy to commit a crime can be sentenced to the same maximum sentence provided for the completed crime in question. The conspiracy statute in *Braverman,* by contrast, provided a maximum penalty of five years. *Jackson,* fn 3. When *Jackson* therefore got to the nub of the matter and stated, "the penalty for conspiracy under § 939.31 is tied to the underlying crime," *id.* at ¶ 10, such was a holding with no application here. The rationale of *Castro*, not *Braverman* or *Jackson*, applies here.

The State does not dispute the cocaine conspiracy count in each case arose from the same ongoing cocaine conspiracy investigation by the same task force overseen by the same district attorney. Nor, likely because of its experience and institutional knowledge, does it dispute that a hallmark of an ongoing conspiracy is that different members enter the conspiracy while others leave. It also tacitly concedes that both prosecutions collectively covered the same time frame. And it does not dispute that members of the conspiracy other than Cannon remained subjects of the investigation throughout (e.g., McGhee). The State, however, relies on its putative ability to have "shaped" the second charge, by leaving out co-conspirators from the first charge, such as McGhee, even though he continued to help Cannon move "TVs."

Instead, the State takes the ongoing conspiracy, cherry-picks and isolates overt acts, and then purports to break it into *two* conspiracies because of perceived factual differences

between the overt acts. This leads the State to claim there were two conspiracies because, *inter alia,* in 2005 Cannon was running the operation out of his "rental property," while in 2008 Cannon was running the operation out of his "house." (State's Brief, p. 11). What is not disputed is that throughout this entire time, Cannon allegedly bought cocaine from suppliers and distributed it to customers. Some new customers may have come. Others may have dropped out. Some (e.g., McGhee) remained throughout, and the same may be said of the suppliers, as the State does not claim Varela was not supplying Cannon in 2005, but merely assumes he just materialized in 2008. Under the State's stilted view, the State could have broken up what it fancies the "2005" conspiracy into one involving McGhee, and then, following acquittal, charged him with another "2005" conspiracy involving Lamont Powell.[1]

What makes the State's actions here particularly egregious is that when the State tried Cannon for the first cocaine conspiracy case in 2011, it sat on all the evidence it used to retry Cannon for a cocaine conspiracy in 2014. Why, it must be asked, and given the State's view of the law, did it not try Cannon for *two* cocaine conspiracies in 2011? The State's answer – because it did not have to – betrays its belief that it was free to "shape" the conspiracy as it pleased, and without regard for the principles of finality, the repeated burdens of trial, the risks of erroneous conviction, and the rehearsals of prosecutions, all of which the double jeopardy clause was designed to promote and preclude.

In the end, the State continues to rely on double jeopardy cases (e.g., *Blockburger*) applied to discreet offenses, while ignoring the body of case law recognizing that double jeopardy analysis differs in conspiracy cases. (State's Brief, pp. 6-12). And it continues to rely on multiplicity cases involving the charging of discreet acts, rather than ongoing conspiracy cases. (*Id.*). It is out of this latter subset of cases that the State borrows the concept of "volitional departure." (State's Brief, p. 7), *citing State v. Anderson,* 219 Wis. 2d 739, 580 N.W.2d 329 (1998).

[1] An alleged co-conspirator may be included in an overall agreement without even knowing all the conspiracy's participants. *Castro*, at 464.

Anderson involved a defendant still on bail after pleading to substantial battery, but before sentencing. While awaiting sentencing, police were called to the battery victim's home where they found the intoxicated defendant who admitted he was residing there. There was also a third-party present who had apparently been in an altercation with the defendant as both had bleeding lacerations. Consequently, Anderson was charged with three counts of bail jumping. Each bail jumping count was based on a violation of a different term of Anderson's bond. *Anderson*, 219 Wis. at 743–45.

Anderson held the three bail jumping charges were not multiplicitous or violative of the double jeopardy clause. When Anderson chose to reside with his victim, and when he chose to consume alcohol, and when he chose to fight with the third party, each involved "a new volitional departure. *Anderson*, at 750-51. This square peg of discreet offenses does not fit in the round hole of Cannon's ongoing conspiracy.

Had Cannon been charged with discreet deliveries of cocaine - PTAC, the multiplicity cases would be relevant to examine whether a double jeopardy problem existed. That is not, however, how the State charged Cannon. The State charged Cannon with a conspiracy to distribute cocaine. Section 939.31, Stats., on its face, contemplates the possibility of multiple overt acts in furtherance of a single conspiracy. Accordingly, the double jeopardy issue must be adjudicated based on double jeopardy *conspiracy* cases. When that law is applied to this case, the double jeopardy violation is clear.

The State has now tacitly conceded it had no justification for holding back on the 2011 case evidence when it tried Cannon in the 2009 case. And it offers no explanation for why it withheld that evidence only to deploy it just a few weeks after Cannon was acquitted. It does not deny it had a "full and fair opportunity to litigate" the identical issue (cocaine conspiracy) in the prior action, an action which reached final adjudication on the merits (an acquittal). The State should therefore be precluded from relitigating the issue of Cannon's involvement in a cocaine conspiracy. *Peffer v. Bennett*, 523 F.2d 1323, 1325 (10th Cir. 1975).

Reliance on *Currier v. Virginia*, 138 S.Ct.2144 (2018), does not alter this outcome. *Currier* involved a defendant who stipulated to severance of charges into two trials, and then attempted to estop the government from prosecuting the second trial on the grounds he had been convicted in the first. And *Currier*, while emphasizing the test in *Ashe v. Swenson*, 397 U.S. 436, (1970), is a demanding one, went on to observe that *Ashe* forbids a second trial if to secure a conviction the prosecution must prevail on an issue the jury necessarily resolved in the defendant's favor in the first trial. *Currier*, at 2150. This what occurred here.

II. THE FIREARM CHARGE.

The State analyzes the firearm issue solely from the standpoint of ineffective assistance of counsel (IAC). (State's Brief, pp. 17-21). While such an analysis is appropriate, limiting the analysis to that issue is not. The State did not disclose the wiretap orders until during the post-conviction proceedings. This caused the post-conviction court to order supplemental briefing on the wiretap issues. (R211). Since this was a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), the issue should be examined without constraints that might otherwise be posed by the legal standards enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). It is for this reason that, contrary to the State's argument, Cannon is not constrained by a "forfeiture of objection." (State's Brief, p. 18).

Alternatively, it was deficient performance not to obtain and examine the wiretap applications and authorizations. Counsel should have known such were required to use intercepts of non-enumerated offenses. Counsel is expected to know the law applicable to a client's case. *State v. DeKeyser*, 221 Wis.2d 435, 451, 585 N.W. 2d 668 (Ct. App. 1998). And counsel has a duty to make reasonable investigations or make reasonable decisions that make particular investigations unnecessary. *Strickland*, 466 U.S. at 691.

Thus, no matter how the issue is sliced, it turns on the merits of whether the wiretap evidence in question should have been suppressed. The State concedes this point by noting that counsel is not ineffective for not pursuing meritless suppression motions. (State's Brief, p. 19). In other words, if

the evidence would have been suppressed, it does not matter whether it was not suppressed because the State failed to disclose the critical documents or because defense counsel failed to obtain and examine them. Likewise, it does not matter if the inquiry is whether the error was harmless (it was not) or whether Cannon was prejudiced by counsel's deficiency (he was). Absent the wiretap information, Cannon would not have been convicted of the firearm charge.

The State next argues that Cannon failed to adequately develop the IAC issue before the post-conviction court. The State is wrong, though Cannon must rely on this Court's willingness to examine the record, (*see* R189-20-28; R200-9), lest he be unfairly required to devote limited words to this baseless claim.[2]

A. The State Concedes It Used Material Intercepts At Trial That Were Never Authorized; And The Single Authorization Granted Was Based On An Application That Lacked Probable Cause To Believe Cannon Had Committed An Offense.

The State addresses only the April 3rd intercept Judge Sankovitz purported to authorize. Meanwhile, it ignores and thus concedes the record is devoid of *any* authorization by *any* judge for the use at trial of "firearms" calls intercepted on April 4th and 5th. (R245-103-06, 159-162). The absence of any authorization means those intercepts could not lawfully be used. The April 5th intercept, in particular, was very damning. While the April 3rd call outlined the possibility of a transaction, the April 5th intercept established the transaction actually occurred. (R245-160). The State does not dispute this error.

The State notes that section 968.29, Stats., does not specifically require a separate warrant to seize evidence inadvertently collected during a wiretap already authorized by

[2] Contrary to another State argument, the record contains nothing to suggest counsel made a *strategic* decision not to seek suppression of the wiretap evidence. This is because the court did not grant Cannon a *Machner* hearing, the purpose of which is to gauge whether counsel's alleged deficiency was the result of strategy or oversight. *State v. Balliette*, 2011 WI 79, ¶ 94, 336 Wis. 2d 358, 805 N.W.2d 334.

a valid warrant. (State's Brief, p. 21). It is not the *seizure* of the communication, however, that is at issue, but instead, its *use*. Similarly, what matters is not whether there was a *warrant*, but instead, whether *an offense* was established. Fundamental to the ability to "use" the intercept is that it relate to "an offense," and the State agrees the officer must have "probable cause" to believe a criminal offense occurred. (*Id.*); (*see also* State's Brief, p. 29) ("the standard is only probable cause"). The parties therefore agree that "probable cause" is the touchstone for use of the intercept.

The State claims the application established probable cause to believe Cannon had constructive possession of a firearm, by exercising control over it jointly with someone he knew to be a convicted felon. (State's Brief, p. 31). The State has the facts wrong. The application never alleged that Cannon *knew* Page was a convicted felon. This missing fact, alone, is fatal to the idea there was probable cause for the intercept authorization.

Presumably recognizing that problem, the State floats an alternate offense never referenced in the application: felon in possession of a firearm - PTAC. (*Id.*). This gets no traction either because Cannon did not possess a firearm, did not aid or abet Page in possessing the firearm he already possessed, nor engage in a conspiracy with Page to possess a firearm. As for constructive possession, the application did not aver that Cannon *instructed* Page to transfer a firearm to a non-felon. The application noted Cannon *asked* Page if he would be willing to do so. This lacks the requisite dominion and control for constructive possession. In the end, the application alleged Cannon asked someone *he did not know was a felon*, and who already had a firearm, if he would be willing to lend a firearm *to someone who was not a felon*. This did not establish probable cause that Cannon had committed an offense.

B. Improper Authorization to Use Wiretap.

Regarding Judge Sankovitz's purported authorization of the firearm intercept, the State tries to construe the problem as a "technical defect." (State's Brief, p. 25). The issue here, however, goes not to a technical defect in the application or the form of the authorization, but instead, to *the authority* to issue

the authorization in the first place. These arguments are therefore misplaced.

An extension of this flawed argument is the idea that Cannon was not harmed by the error, (*Id.* at 26), an argument easily refuted. If there was no authority to authorize the use of the firearm intercept, it would not have been introduced at trial. The intercepts prejudiced Cannon because they were the linchpin of the firearm charge. They were deployed to use Cannon's own words, in Cannon's own voice, against him.[3]

As for the propriety of the Judge Sankovitz order, the State's response is more remarkable for it does *not* dispute than what it does. For example, the State does not dispute that the record is devoid of anything to establish that Judge Brennan ever deputized Judge Sankovitz to act in her stead. Nor does it dispute that only Judges Kremers and Flanagan were authorized to act for that purpose. The State also appears to have largely abandoned its argument that Judge Sankovitz was a Deputy Chief Judge pursuant to SCR 70.26.

The latest incarnation of the argument depends on substituting the phrase "Acting Chief Judge" for "Deputy Chief Judge" and then taking SCR 70.21, 70.23, and 70.265 for a test drive. SCR 70.21 adds nothing to the analysis because it only clarifies that the Chief Judge has the authority to authorize law enforcement to intercept communications, which has never been disputed. SCR 70.23 is irrelevant because all it does is authorize a Chief Judge to fill a vacancy or temporary vacancy in one of his or her branches. Finally, SCR 70.265 allows for a "Presiding Judge," but Judge Sankovitz did not purport to act in that capacity. These are all just more distractions.[4]

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[3] For the same reasons, the State's "good faith exception" argument, (State's Brief, pp. 29), gets no traction here. While the trial court may need to address what that rule might mean for any derivative evidence, it would not save the firearm intercepts from suppression at trial. As the State points, the problem here is not police misconduct. (*Id.* at 26).

[4] The State improperly tries to visit on Cannon, its own failure to establish the requisite authority of Judge Sankovitz to act. (State's Brief, p. 24). In fact, Cannon obtained *all* the Chief Judge Directives for the calendar year 2008 and made them part of the record. (216). No directive authorized Judge Sankovitz to act as he did. (*Id.*). The State did not respond then, but now pretends to task Cannon with proving a negative.

Conclusion and Relief Requested

For all the foregoing reasons, Cannon respectfully requests this Court vacate his convictions, and remand with instructions that the cocaine conspiracy charge be dismissed, and the firearm charge scheduled for trial without use of the firearm intercepts or any evidence derivative thereof.

Dated this 5th day of October, 2020.

/s/ Rex Anderegg
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CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, minimum 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,989 words, as counted by Microsoft Office 365.

Dated this 5th day of October, 2020.

/s/ Rex Anderegg
REX R. ANDEREGG

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that I have submitted an electronic copy of the appellant's reply brief in *State of Wisconsin v. Billy Joe Cannon,* 2019 AP 2296-CR, which complies with the requirements of s. 809.19 (12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 5th day of October, 2020.

/s/ Rex Anderegg
Rex Anderegg