STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2021AP000485-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BROOKE K. EDER,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in the Barron County Circuit Court, the Honorable James C. Babler, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

DAVID J. SUSENS
Assistant State Public Defender
State Bar No. 1099463

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2124
susensd@opd.wi.gov

Attorney for Defendant-Appellant

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ARGUMENT

This case involves three consecutive government intrusions into the privacy of Brooke Eder's home on April 25, 2019 and two motions to suppress the fruits of those searches. The facts leading to the first search and the sequence of events that followed raise novel Fourth Amendment questions.

On April 19, 2019, Barron County Detective Carroll saw Joshua Estes outside of Eder's three-story apartment complex in Brill, Wisconsin. (R.21:3). Detective Carroll was aware of an active warrant to arrest Estes for bail jumping but declined to arrest him that day. (R.21:3). Detective Carroll suspected that Estes may be living and keeping methamphetamine at Eder's home. (R.21:3). But Detective Carroll's suspicions apparently did not rise to the level of probable cause because he did not seek a search warrant to authorize entry into Eder's home to arrest Estes or search for drugs. Instead, on April 24, 2019, Detective Carroll sought a warrant to enter Eder's home and search for Estes. (R.21:1). In the affidavit, as a basis for the warrant, Detective Carroll declared that Joshua Estes was "now located and concealed" at Eder's home and "may constitute evidence" of felony bail jumping. (R.21:1).

Seeking a warrant to search Eder's home for Estes was a creative solution to Detective Carroll's probable cause problem. But issuing the warrant based on the facts in the affidavit meant it was an unconstitutional solution. Because the first search was

based on a warrant issued without probable cause and the second and third searches could not have occurred without the first, each search was unreasonable and the evidence should be suppressed under the Fourth Amendment.

I. The first search warrant was unsupported by probable cause and the evidence discovered as a result should be suppressed.

The state concedes that the purpose of the search warrant was to enter Eder's home to look for Estes and arrest him for bail jumping. (Resp. Br. 1). But, according to the state, because the "issues in this case do not involve the entry into a residence to execute an arrest warrant," the affidavit need not "set forth facts that Joshua Estes actually would be in the apartment on April 24, 2019," (Resp. Br. 10). Even ignoring that this case involves the functional equivalent of police entry into a home to execute an arrest warrant, the state's claim disregards the fundamental purpose of the Fourth Amendment's search warrant requirement.

A search warrant "safeguards an individual's interest in the privacy of [their] home and possessions against the unjustified intrusion of the police." *Steagald v. United States,* 451 U.S. 213 (1981). This safeguard requires "a showing of probable cause to believe that the legitimate object of a search is situated in a particular place." *Id.* To support a determination that probable cause for a search warrant exists, the

issuing magistrate must be "apprised of sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and the objects sought will be found in the place to be searched." *State v. Higginbotham,* 162 Wis.2d 978, 989, 471 N.W.2d 24 (1991) (internal citations omitted).

It is also "fundamental that the element of time is crucial to the concept probable cause." *United States v. Johnson,* 461 F.2d 285, 287 (10th Cir.1972). The facts in the affidavit must be "so closely related to the time of the issue of the warrant so as to justify a finding of probable cause *at that time*." *Sgro v. United States,* 287 U.S. 206, 210 (1932) (emphasis added). Thus, the state's claim ignores the fundamental Fourth Amendment principles requiring that Detective Carrol's affidavit establish probable cause that Estes (the object of the search) was linked to the commission of a crime and would be at Eder's home (the particular place) on April 24, 2019 (the time the warrant was issued).

Without sufficient information to establish probable cause that Estes and evidence of a crime would be found at Eder's home then, the search warrant was merely a "pretext for entering a home in which the police have a suspicion, but not probable cause to believe, that illegal activity is taking place." *Steagald,* 451 U.S. at 215. Whether this pretext was intentional or a coincidence, the Fourth Amendment is "designed to prevent" this type of unjustified intrusion. *Id.*

When reviewing the probable cause finding, this court considers only the facts presented to the magistrate. *State v. Ward,* 2000 WI 3, ¶26, 231 Wis. 2d 723, 604 N.W. 517. The April 24, 2019, affidavit contains the only facts presented to the magistrate. The state's response focuses solely on the information in the affidavit that purports to support probable cause is in paragraphs 12, 13, and 15 of the affidavit.[1] (Resp. Br. 9; R.21:3-4). While probable cause may be based on reasonable inferences drawn from those facts, those inferences must lead to a belief "that evidence of criminal activity would be found at [Eder's] residence." *Ward,* 231 Wis. 2d 723, ¶28.

The state claims that, because there is a "reasonable inference that Eder and Estes were in an ongoing relationship," there was "also a reasonable inference that if Mr. Estes was there on April 19, 2019, it is probable that he might be there on April 24, 2019." (Resp. Br. 9). This argument tracks the circuit court's rationale for denying Eder's first motion to suppress. (R.29:3). Both the state and court rely on a sentence plucked from *Johnson*, to support the idea that the passage of time between Detective Carroll's observation of Estes outside of Eder's building is insignificant due to the "ongoing nature" of Eder's relationship with Estes. (Resp. Br. 9; R.29:2-3).

[1] The circuit court found—and the state concedes—that the information in paragraph 14 was unreliable and should not be considered to support a finding of probable cause. (Resp. Br. 9; R.35:24).

Johnson does instruct courts to assess probable cause based on both "the passage of time" and "the nature of the unlawful activity." *Johnson,* 461 F.2d at 287. And according to *Johnson,* the passage of time "becomes less significant" when the unlawful activity is "of a protracted and continuous nature." *Id.* But, "[w]here the affidavit recites a mere isolated violation, it would not be unreasonable to imply that probable cause dwindles rather quickly with the passage of time." *Id.* The nature of the activity is also not the only focus. Rather, the court must look to "factors like the nature of the *criminal activity under investigation* and the nature of *what is being sought*" to determine "where the line between stale and fresh information should be drawn in a particular case." *State v. Ehnert,* 160 Wis. 2d 464, 469, 466 N.W.2d 237 (Ct. App.1991) (emphasis added).

In focusing solely on Eder's ongoing relationship with Estes, both the state and court ignore that, by nature, people are highly mobile. A complete reading of *Johnson* suggests that any probable cause based on a single observation that Estes was outside Eder's home "dwindles quickly" and is of limited value five days later. *Johnson,* 461 F.2d at 287. And even if the affidavit does establish a reasonable inference that Eder and Estes maintain an "ongoing relationship" after the DHS order, the inference that Estes would be present at Eder's home is unreasonable and relies only on speculation that Estes did not obey that order.

The court also relied on *Johnson* without evaluating probable cause and staleness based on the

"nature of the criminal activity under investigation." (R.21:1-3). The bulk of the affidavit makes clear that the impetus behind the investigation was Detective Carroll's suspicion that Estes was engaged in drug-related criminal activity. (R.21:1-3). But no reasonable inference can be drawn from the affidavit to support a belief that "evidence of criminal activity" would be found at Eder's home on April 24, 2019. *Ward,* 231 Wis. 2d 723, ¶28.

Because a finding of probable cause "cannot be based on the affiant's suspicions and conclusions," the circuit court erred by finding that the April 24, 2019, warrant was justified. *Id.* The court also erred by denying the motion to suppress because the warrantless search of Eder's basement—which formed the factual basis for the April 25, 2019, warrant—could not have occurred if Detective Carroll had not executed the unlawful first warrant. Nothing in the state's response establishes that "no information gained from the illegal entry affected either the law enforcement officer's decision to seek a warrant or the magistrate's decision to grant it." *State v. Carroll,* 2010 WI 8, ¶45, 322 Wis. 2d 299, 778 N.W.2d 1. The state's claim that the search of the basement was independent of the execution of the warrant is fantasy.

Thus, this court should reverse and remand with instructions to suppress all the evidence obtained as a result of the first warrant, including the drugs that led to Eder's conviction.

II. Eder had a legitimate expectation of privacy in the basement, and its warrantless search violated her Fourth Amendment rights.

Even if this court agrees that the first warrant was supported by probable cause, this court should reverse and remand for an evidentiary hearing on to determine whether the warrantless search of the basement was lawful. Based on the totality of the circumstances, Eder had standing to challenge that search based on a subjective expectation of privacy in the basement that was legitimate and reasonable. *State v. Dixon,* 177 Wis. 2d 461, 468-69, 501 N.W.2d 442 (1993).

The circuit court found that Eder had a subjective expectation of privacy in the basement. (R.65:10). The state did not contest this finding in the circuit court or in its response brief. Thus, the sole question for this court is whether society is willing to recognize Eder's expectation of privacy as reasonable. *Id.* at 468.

Dixon describes the six factors commonly considered by Wisconsin appellate courts in evaluating the reasonableness of a privacy expectation: "(1) whether the accused had a property interest in the premises; (2) whether the accused is legitimately (lawfully) on the premises; (3) whether the accused had complete dominion and control and the right to exclude others; (4) whether the accused took precautions customarily taken by those seeking

privacy; (5) whether the property was put to some private use; (6) whether the claim of privacy is consistent with historical notions of privacy." *Id.* at 469. The circuit court evaluated the same six factors in this case.

Dixon also unambiguously states that those six factors are "relevant" but "not controlling or exclusive." *Id.* Rather, "[t]he totality of the circumstances is the controlling standard." *Id.* But rather than employing the controlling totality of the circumstances standard, the circuit court erred by holding that Eder did not have standing because she did not meet the "requirement that all six factors must be found." (R.65:8, 13).

In its response, the state does not acknowledge that the totality of the circumstances is the controlling standard and does not develop an argument to establish Eder must meet all six factors. Instead, the state argues that the Eder did not have standing either way. (Resp. Br. 16).

The circuit court held that Eder met the first, second, fourth, and fifth factors. (R.65:11-12). The state concedes that Eder met the second factor. On the remaining factors, the state does not dispute the circuit court's particular findings of fact. Instead, the state makes a general argument that Eder and Estes did not have a reasonable expectation of privacy because the only other tenant in the building, Mr. Johnson, also had access to the basement. The state's

argument is unpersuasive under the controlling totality of the circumstances standard.

Under the totality of the circumstances, the court's findings of fact establish that Eder's expectation of privacy in the basement was reasonable. The apartment had three units but Johnson, Eder, and Estes occupied two units and were the only residents. (R.65:9). The court found that the basement was part of Johnson's lease but Eder and Estes had permission to use it and paid rent to Johnson for its use. (R.65:9-10). Johnson had access to the basement through his apartment but he did not use it. (R.65:10). Eder and Estes regularly used the basement for storage and to work on projects. (R.65:9-11). Estes installed a lock on the outside door to the basement, locked it, and gave Johnson the only other key. (R.65:9).

The state suggests that to have a reasonable expectation of privacy, Eder and Estes must exclude all others including Johnson. (Resp. Br. 14-15). But while Eder admittedly did not exercise "complete" dominion and control over the basement, shared access and control does not negate the reasonableness of her expectation of privacy. *State v. Trecroci,* 2001 WI App 126, ¶¶39-40, 246 Wis. 2d 261, 630 N.W.2d 555. By placing a lock on the outer door where there was previously no functioning lock, Eder and Estes could and did exclude others from the basement. (R.65:11).

The state attempts to distinguish *Trecroci* by arguing that the defendant's use of the common stairway to access their living quarters in that case made that stairway part of their home. (Resp. Br. 15-16). The state claims that Eder's basement is instead like the basement in *Eskridge,* a "common area" in a 4-unit apartment complex that was unlocked and "open to all tenants." *State v. Eskridge,* 2002 WI App. 158, ¶¶1-3, 256 Wis. 2d 314, 647 N.W.2d 434. But unlike the basement in *Eskridge,* Eder's basement was part of Johnson's lease and not a "regular common area of an apartment building." (R.65:13). Eder and Estes paid Johnson for what was effectively their exclusive use of that space. (R.65:9-11). And knowing that Johnson controlled the only other entrance to the basement, they installed a lock on the outer door to exclude all others. (R.65:11)

Contrary to the state's claim, Eder's "home" extends beyond the four walls of her apartment to the areas of the property "associated with the sanctity of a [person's] home and the privacies of life." *State v. Davis,* 2011 WI App 74, ¶9, 333 Wis. 2d 490, 798 N.W.2d 902. Those areas are "considered part of the home itself for Fourth Amendment purposes." *Id.* For Eder and Estes, the basement was a private a place where they could store personal property without outside intrusion. In other words, under *Trecroci* and *Davis,* the basement was part of their home. Based on the totality of the circumstances, Eder has standing to challenge the warrantless search of the basement and the court erred by denying her motion to suppress without requiring the state to establish the

reasonableness of that intrusion under the Fourth Amendment.

CONCLUSION

For the reasons stated above and in the appellant's brief, Brooke K. Eder respectfully asks this court to reverse the circuit court's denial of Eder's first motion to suppress with instructions to suppress all evidence obtained as a result of the illegal search. In the alternative, Eder asks this court to reverse the circuit court's denial of Eder's second motion to suppress and remand for further proceedings.

Dated this 1st day of February, 2022.

Respectfully submitted,

Electronically signed by David J. Susens

DAVID J. SUSENS
Assistant State Public Defender
State Bar No. 1099463

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2124
susensd@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in rule 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,499 words.

Dated this 1st day of February, 2022.

Signed:

Electronically signed by David J. Susens

DAVID J. SUSENS
Assistant State Public Defender