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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
Case No. 2022AP882-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,
v.

RAYMAND L. VANNIEUWENHOVEN,
Defendant-Appellant.

On Notice of Appeal to Review the Judgment of Conviction, entered in the Circuit Court for Marinette County, the Honorable James A. Morrison presiding

BRIEF OF DEFENDANT-APPELLANT

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STATEMENT OF ISSUE

I. DID THE WARRANTLESS EXTRACTION OF VANNIEUWENHOVEN'S DNA VIOLATE THE FOURTH AMENDMENT?

The circuit court answered no.

POSITION ON ORAL ARGUMENT AND PUBLICATION

This case involves novel issues of law and is appropriate for oral argument and publication.

STATEMENT OF FACTS

This case involves the murder of a young couple camping at McClintock Park in Marinette County that occurred over four decades ago. R. 1 at 1-2. There was evidence that the female had been sexually assaulted, and police found semen in the female victim's shorts. *Id.* at 2. The shorts were submitted to the crime lab and apparently yielded no results; the shorts were returned to and maintained at the Marinette County Sheriff's Office. *Id.* at 2-3. There was no apparent activity on the case for two decades.

In the mid-nineties, after technological advances in the analysis of DNA, police reopened the case. *Id.* at 3. The shorts were sent to the crime lab and a single male DNA profile was developed from the semen in the shorts. *Id.* The profile was uploaded to CODIS, and over the next couple decades, there was never a hit. *Id.* The case went cold again. *See id.*

In 2018, the case was again reopened. *Id.* After more advances in DNA technology, police learned of "a new genealogical type of DNA program. . . ." R. 421 at 190. The profile was submitted to Parabon Nanoloabs for genealogical analysis. *Id.* at 192. Through their analysis, Parabon was able to identify characteristics of the suspect: the suspect's ancestry was mainly from the norther European area, the suspect has fair to very fair skin, blue eyes, reddish brown hair, and freckles. R. 1 at 3. Parabon was able to develop an image of what the suspect may have looked like at age 25 and at age 65. *Id.*

The Parabon lab was able to identify a possible family name of Vannieuwenhoven. R. 421 at 193. There were four brothers, four grandsons, and four nephews that possibly fit the profile. *Id.* Police then sought to obtain DNA from three of the four brothers: Cornelius, Edward, and Raymand (the fourth brother had passed away). *Id.* Police were able to obtain DNA samples from Cornelius and Edward, and there was not a match. *Id.* at 193-204.

Police then sought to obtain Raymand Vannieuwenhoven's DNA and employed the assistance of Chief Deputy Laskowski from neighboring Oconto County, where Vannieuwenhoven resided. *Id.* Police devised a scheme in which Laskowski would approach Vannieuwenhoven's home and ask him to fill out a survey about local policing. R. 137 at 43. The plan was a ruse. An integral part of the plot was to have Vannieuwenhoven seal the envelope to obtain Vannieuwenhoven's DNA. *Id.* 43, 51-52.

In March 2019, Laskowski went to Vannieuwenhoven's home, was invited inside, and sat down at his table. R. 137 at 44. Laskowski inquired if Vannieuwenhoven was willing to complete a survey about

law enforcement and community-related questions. *Id.* at 45. Vannieuwenhoven completed the survey. *Id.* Laskowski then told Vannieuwenhoven "So what we'll do here is I'll put it in the envelope so these answers can't get changed. Okay? And you seal it. And then we'll sign it." R. 133 at 7. Laskowski then turned the envelope over to Marinette County police. R. 421 at 208. The envelope was then sent to the crime lab. The lab extracted and analyzed Vannieuwenhoven's DNA. *Id.* at 229-30. Vannieuwenhoven's DNA matched to the semen in the victim's shorts. *Id.* at 229-30.

On March 21, 2019, a criminal complaint was issued charging two counts of first-degree murder.[1] On December 2, 2020, Vannieuwenhoven filed a motion to suppress, asserting that his saliva and DNA was obtained through an illegal search and seizure. R. 121. Vannieuwenhoven asserted that any alleged consent was involuntary and that the search and seizure went beyond the scope of any alleged consent. *Id.*

The circuit court denied the motion. R. 156. The court concluded that this was "in every respect voluntary." *Id.* at 8. The court explained that Vannieuwenhoven "gave consent to talk to the police, knew the person he was speaking to was a police officer, agreed to the police officers request that he come in to the house, freely provided information to the police officer about policing and other issues, voluntarily completed the survey, placed his DNA on the envelope when he sealed it and gave that envelope to the police officer." *Id.*

[1] The complaint also charged first-degree sexual assault. That count was later dismissed due to the statute of limitations expiring.

Following a 6-day trial in July 2021, Vannieuwenhoven was found guilty. R. 267-68. He was sentenced to life in prison. R. 387. On May 24, 2022, Vannieuwenhoven filed a notice of appeal. Vannieuwenhoven passed away in prison on June 17, 2022. R. 439.[2]

ARGUMENT

I. THE WARRANTLESS EXTRACTION OF VANNIEUWENHOVEN'S DNA VIOLATED THE FOURTH AMENDMENT

A. Standard of Review

This Court's review of a decision on a motion to suppress presents a question of constitutional fact, and the Court engages in a two-step inquiry. *State v. Robinson*, 2010 WI 80, ¶ 22, 327 Wis. 2d 302, 786 N.W. 2d 463. The Court reviews the circuit court's finding of historical facts under a clearly erroneous standard. *Id.* The Court reviews the application of facts to constitutional principles de novo. *Id.*

B. DNA Reveals Highly Sensitive Information

DNA is not just a double helix visible only through a microscope, it is a portal into the most sensitive information about us. Private companies purport to be able to use DNA to determine whether someone likes sweet v. salty, has a unibrow, is lactose intolerant, is a deep sleeper, is predisposed for anxiety or irritable bowel syndrome, and a litany of deeply private information.[3] This case is a prime example of the depths of information that can be drawn from

[2] "A defendant who dies pending appeal, irrespective of the cause of death, is no less entitled to [his right to appeal.]" *State v. McDonald*, 144 Wis 2d. 531, 537, 424 N.W.2d 411 (1998).

[3] 23andMe, *Compare DNA Tests,* https://www.23andme.com/compare-dna-tests/

one's DNA: the suspect's ancestry was mainly from the norther European area, the suspect has fair to very fair skin, blue eyes, reddish brown hair, and freckles. R. 1 at 3. Parabon was able to develop an image of what the suspect may have looked like at age 25 and at age 65. *Id.*

C. Vannieuwenhoven Had a Reasonable Expectation of Privacy in His DNA

The Fourth Amendment generally requires that police obtain a warrant before conducting a search. *State v. Randall*, 2019 WI 80, ¶ 10, 387 Wis. 2d 744, 930 N.W.2d 223. To constitute a "search" for Fourth Amendment purposes, it must have occurred in an area in which an individual has a reasonable expectation of privacy. *United States v. Davis*, 690 F.3d 226, 241 (4th Cir. 2012). An individual has a reasonable expectation of privacy in their DNA and the genetic information contained therein. *See Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 616 (1989) (concluding that an individual has an expectation of privacy in the "physiological data" derived from biological samples); *Randall*, 387 Wis. 2d 744, ¶ 38 (concluding that an individual has a privacy interest in her blood).

D. The Extraction and Subsequent Analysis of the Defendant's DNA Were Illegal Searches

As an initial matter, Vannieuwenhoven does not claim a privacy interest in the envelope itself. The Fourth Amendment was triggered once law enforcement extracted Vannieuwenhoven's saliva and DNA from the envelope. A second search occurred when the government analyzed the DNA.

For the past decade, courts have grappled with how to apply bedrock Fourth Amendment principles to evolving technology. In *Riley*, the Supreme Court analyzed the Fourth Amendment as applied to modern day smart phones, noting that they "differ in both a quantitative and qualitative sense" from physical objects. *Riley v. California*, 573 U.S. 373, 393 (2014). The Court concluded that cell phones contain "the privacies of life" (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886) such as medical information, financial data, location data, etc. *Riley*, 573 U.S. at 394-96. Thus, even if the phone is lawfully in police custody, a warrant is required to search its contents. *Id.* at 403.

Similarly in *Davis*, the Fourth Circuit analyzed how the Fourth Amendment applies to DNA evidence, given the recent technological advances allowing police to extract and uncover of wealth of personal information. *Davis*, 690 F.3d at 240. The defendant in *Davis* claimed to be the victim of a shooting, and police collected his clothing at the hospital to investigate the alleged crime. *Id.* at 230. Nothing came of it, and the police held the clothing in the property room. *Id.* Subsequently, the defendant became a suspect in an unrelated murder, and police realized that they had his clothing in evidence from the prior investigation. *Id.* at 231. Police retrieved the clothing, extracted the defendant's DNA, and created a DNA profile. *Id.* The defendant's DNA profile did not connect him to the murder, but police uploaded the profile into their DNA database for potential future use. *Id.* In yet another murder investigation, the defendant's sample in the database provided a hit. *Id.* at 232.

The court held that the police lawfully acquired the clothing, and that the defendant had no expectation of privacy in the *outward appearance* of the clothing itself. *Id.* at 244. However, once the police extracted the defendant's

DNA from the clothing, the Fourth Amendment was triggered. *Id.* The court explained that lawful possession of the item did not give police authority to search the item again in an unrelated investigation. *Id.* at 243. The defendant maintained a reasonable expectation of privacy in his DNA on the clothing and thus extracting the DNA constituted a search. *Id.* at 243.

A second search occurred when the police analyzed the defendant's DNA. *Id.* at 243-44. The court reasoned that given the physiological data and private medical information contained in DNA, society recognizes an expectation of privacy. *Id.* at 243.

The facts of this case fit squarely within the analysis in *Davis*. Vannieuwenhoven concedes that he had no expectation of privacy in the outward appearance of the envelope itself. However, like in *Davis*, once police extracted his DNA from the envelope, the Fourth Amendment was triggered. *Id.* at 244. And a second search occurred when police analyzed Vannieuwenhoven's DNA. *Id.* at 243-44.

In short, Vannieuwenhoven maintained a reasonable expectation of privacy in his DNA and the information revealed therein; thus, the warrantless searches of this information violated the Fourth Amendment.

E. The Consent Exception to the Warrant Requirement Does not Apply

There are exceptions to the warrant rule including that the individual consented to the search. *Randall*, 387 Wis. 2d 744, ¶ 10.

As a technical point, Vannieuwenhoven did not actually consent to anything. Consent must be freely and voluntarily given; it is not enough to show mere "acquiescence to a claim of authority." *State v. Reed*, 2018 WI 109, ¶ 58, 384 Wis. 2d 469, 920 N.W.2d 56. The interaction between Chief Deputy Laskowski and Vannieuwenhoven went as follows:

> So what we'll do here is I'll put it in the envelope so these answers can't get changed. Okay? *And you seal it*. And then we'll sign it.

R. 133 at 7 (emphasis added). Vannieuwenhoven simply complied with the officer's directives.

But the envelope itself is of little consequence. To the extent Vannieuwenhoven's compliance constituted consent, the subsequent searches went far beyond the scope of that consent. "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness- what would the typical reasonable person have understood by the exchange between the officer and the suspect"? *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). The scope of consent is limited by its authorization. *Walter v. United States*, 447 U.S. 649, 656-57 (1980). For example, "[c]onsent to search a garage would not implicitly authorize a search of an adjoining house; a warrant to search for a stolen refrigerator would not authorize the opening of desk drawers." *Id.* at 656-57.

Assuming Vannieuwenhoven gave some form of consent, a reasonable person would not have understood this exchange as giving consent to extract Vannieuwenhoven's DNA and to sequence it to generate a DNA profile. A reasonable person would have thought he was consenting to

police taking the completed, signed, and sealed survey to the Sheriff, as he was told. R. 421 at 259.

While the law does tolerate some deceit on behalf of the police (e.g., police can sometimes make misrepresentations during an interrogation *See State v. Triggs*, 2003 WI App 91, ¶ 15, 264 Wis. 2d 861, 663 N.W.2d 396) trickery has no place when it comes to voluntary consent.

CONCLUSION

Vannieuwenhoven requests that this Court reverse the judgment of conviction.

Dated this 9th day of September 2022

Electronically signed by:

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CERTIFICATION BY ATTORNEY

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm) and (c) for a brief. The length of this brief is 2,094 words.

I further certify that filed with this brief is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 9th day of September 2022

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APPENDIX

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Decision and order of the circuit court (R. 156).....1