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

REPLY BRIEF OF DEFENDANT-APPELLANT

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REPLY ARGUMENT

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

A. Vannieuwenhoven had a Reasonable Expectation of Privacy in his DNA

As a starting point, an individual has a reasonable expectation of privacy in his or her own biological material. *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); *State v. Randall*, 2019 WI 80, ¶ 38, 387 Wis. 2d 744, 930 N.W.2d 223 (concluding that an individual has a privacy interest in her blood); *United States v. Davis*, 690 F.3d 226, 246 (4th Cir. 2012). The *Davis* court recognized "the general issue of a person's reasonable expectation of privacy in his DNA is a developing and unsettled area of the law one that has not yet been addressed by the Supreme Court." *Id.* at 240.

The State does not appear to take issue with this general principle. *See* State's Br. at 29-35. Instead, the State focuses on whether Vannieuwenhoven had an expectation of privacy in his DNA[1] *after* he licked the envelope and handed it over to police–after he "abandoned" his DNA as the State calls it. *Id.*

[1] The State cleverly uses the term "saliva" instead of DNA throughout its brief. While the State did obtain Vannieuwenhoven's saliva, it also isolated his DNA from the envelope and developed an "autosomal DNA profile." R. 422 at 125; R. 343.

B. The Abandonment Doctrine did not Eliminate Vannieuwenhoven's Privacy Interest in his DNA

While the circuit court analyzed this issue under the consent doctrine (R. 156 at 7, 14), the State agrees with Vannieuwenhoven that this is not a consent case. State's Br. at 23; Vannieuwenhoven's Br. at 8. Instead, the State argues this case under the abandonment doctrine. State's Br. at 29-32.

The State asserts that Vannieuwenhoven abandoned any privacy interest he had in his DNA when he licked the envelope and handed it over to police. *Id.* The State explains that by doing so, Vannieuwenhoven relinquished any interest or control over the envelope and his biological material contained therein, relying on *Tentoni*. State's Br. at 30; *State v. Tentoni*, 2015 WI App 77, 365 Wis. 2d 211, 871 N.W.2d 454.

Tentoni is very different because it involved a *physical* item: text messages retrieved from the recipient's phone, whose evidentiary value is apparent from its outward appearance. 365 Wis. 2d 211, ¶¶ 3, 4, 11. With technological advances, it is critical that these bedrock doctrines be reexamined. A physical item whose evidentiary value was apparent on its face can now offer police a portal into one's most private details, such as an innocuous envelope that could contain one's entire genetic makeup, family history, medical conditions, etc. The same can be said for modern day smart phones[2]- while the item itself may look like just a piece of glass encased in metal, it can offer a portal into the "'privacies of life.'" *Riley v. California*, 573 U.S. 373, 403 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

[2] *Tentoni* was not a smart phone case. In that case, police "retrieved" text messages from the victim's phone and used that information to obtain a warrant for copies of the messages. 365 Wis. 2d 211, ¶¶ 3-4.

As cited by the State, critical to the abandonment doctrine is the principle that "[w]hat a person *knowingly exposes* to the public . . . is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351 (1967)(emphasis added); State's Br. at 31. Unlike the things of trash, mailed letters, etc., one's DNA is never actually visible to the public and we unintentionally and unavoidably shed our DNA everywhere we go.[3]

C. Lawful Police Possession does not Convey the Right to Search

The State relies on the *Petrone*, *Reidel*, and *VanLaarhoven* line of cases for the premise that "[o]nce evidence is lawfully seized, either by a warrant or an exception to the warrant requirement, police do not need a warrant to examine it." State's Br. at 16. However, *Riley* and *Randall* teach us that lawful possession does not equate to an unrestricted right to search. Police may lawfully *seize* an individual's cell phone incident to arrest to ensure it cannot be used as a weapon and to prevent the destruction of evidence, but police must obtain a warrant to *search* the phone. *Riley*, 573 U.S. at 387-88. Similarly, in *State v. Randall*, the court made clear that the State's examination of the blood was limited to the purpose of taking the sample–to determine whether Randall was intoxicated when she operated a motor vehicle. 2019 WI 89, ¶ 35, 387 Wis. 2d 744, 930 N.W.2d 223. The State's *possession* of Randall's blood did not confer the authority to perform additional tests–for instance, analysis that would reveal her genetic or medical information. *Id.*

[3] The Court should not look to the DNA cases cited by the State as persuasive authority. State's Br. at 34-35. Nearly all of these cases were decided over a decade ago, and with rapid technological advancements, a lot has changed. *Riley v. California* made clear that old law needs to be evaluated in light of new technology. 572 U.S. 373 (2014).

D. The State Obtained Vannieuwenhoven's Full DNA Profile

The State attempts to limit the testing conducted in this case, claiming that it "was solely for a specific sequence of 13 non-coding genetic markers. . ." citing to R. 421 at 149. State's Br. at 13. This testimony, however, was of Karen Doerfer Daily Zander, the microbiologist from the state crime lab who attended the autopsies of the victims in 1976 and conducted subsequent analysis of the samples taken from the *victim*. R. 421 at 118, 149. As to Vannieuwenhoven, the testing was not so limited. The record is plain that the State isolated Vannieuwenhoven's DNA by swabbing the seal of the envelope and that it developed an "autosomal DNA profile." R. 422 at 125; R. 343.

As to the State's public interest argument, society's interest in "solving serious crimes" should not outweigh an individual's expectation of privacy in the vast amount of highly sensitive information contained within our DNA.

Also, there is no need to remand this case for further factfinding should the Court conclude that a Fourth Amendment violation occurred. The State has not proffered what additional facts are necessary, and it had ample opportunity to address the good faith doctrine below.

Like in *Davis*, while Vannieuwenhoven may not have had an expectation in the outward appearance of the envelope itself, once police extracted his DNA from the envelope, the Fourth Amendment was triggered. *United States v. Davis*, 690 F.3d 226, 244 (4th Cir. 2012).

CONCLUSION

Vannieuwenhoven requests that this Court reverse the judgment of conviction.

Dated this 16th day of December 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 1,134 words.

Dated this 16th day of December 2022

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