STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Appeal No. 2022AP002060-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN J. DRACHENBERG,

Defendant-Appellant.

On Appeal from the Judgment of Conviction Entered in the Circuit Court for Wood County, the Honorable Todd P. Wolf, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

The search of Drachenberg's computer files was in violation of Wis. Stat. § 968.15 because it was conducted more than five days after the search warrant was issued. As such, the warrant was void at the time of the search and all evidence from the computer must be suppressed.

The State asserts that the dictionary definition of "execute" does not require completion. (State Br. 12). However, the ordinary and common understanding of "execute" is to bring something to completion, and the dictionary indeed supports this. Webster's Third New International Dictionary 794 (1993) defines "execute" as "[to] carry out *fully* and *completely*." (emphasis added). Similarly, Merriam-Webster's Collegiate Dictionary (11th Edition, 2003) defines "execute" as "to carry out *fully*; put *completely* into effect." (emphasis added).

The term "execute" is naturally understood to cover any activity contributing to the carrying out and completion of a task. If football players execute a play, they complete the entire play. If the quarterback throws the ball to a wide receiver who misses it, the play was not executed because it was not completed. If you execute a plan, you complete the entire plan. You have not executed the plan if parts of the plan are not carried out. If you execute a piece of music, you play the entire song. Executing a search warrant means to carry out the directives of the warrant fully and completely. An officer is required to execute a warrant – that is, perform the authorized or required searches and seizures – within five days. Here, one of the directives of the warrant was to search the computer, and this was not completed until past the five-day deadline.

The State has not alleged that the language of the statute is ambiguous. The language of § 968.15 is clear and unambiguous. Since there is no ambiguity to clarify, there is

therefore no need to consult extrinsic sources such as legislative history. *See State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110 ("Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history.")

The use of the term "execute" in reference to search warrants is not consistent throughout Chapter 968 and Wisconsin case law. Citing §§ 968.12(3)(f) and 968.16, the State asserts that "execution" of a warrant means the initial entry into a protected area, and it uses those statutes to argue that execution of a warrant is not a lasting, ongoing process. (St. Brief at p. 18).

Wisconsin case law belies the argument that execution of a warrant is the moment of initial entry for all purposes. For example, in *State v. Herrmann*, 2000 WI App 38, 233 Wis. 2d 135, 608 N.W.2d 406, police were executing a search warrant in one apartment when they opened what they thought was a closet door and found incriminating evidence. 2000 WI App 38, ¶ 4. However, the room they thought was a closet turned out to be another apartment that was not part of the search warrant. *Id*. ¶¶ 4-5. The court of appeals explained that "there is no dispute that the officers were *in the process of executing a valid search warrant* on [the resident's] apartment when they entered [the defendant's] apartment. *Id*. ¶ 14 (emphasis added). The court held that "it was reasonable for the officers, *in the continued execution of the warrant* on [the resident's] apartment, to unchain and enter the door into what they mistakenly, but reasonably, believed was another room in [the resident's] apartment." *Id*. ¶ 17.

Furthermore, in *State v. Sveum*, 2010 WI 92, 328 Wis. 2d 369, 787 N.W.2d 317, our Wisconsin Supreme Court discussed execution of a warrant in terms of a thirty-five day search and did not speak of the execution as the initial

installation of the GPS or the first day of a multi-day search. The court noted:

> After monitoring Sveum's vehicle for 35 days, the officers removed the GPS device. *Execution in this manner* stayed well within the confines of the authority granted by the order, which authorized law enforcement to 'install, use, [and] maintain' a GPS tracking device on Sveum's vehicle and to subsequently 'remove' such device.

Sveum, 2010 WI 92, ¶ 59 (emphasis added).

This is the meaning of execute in Wis. Stat. § 968.15. If "execution" of a warrant meant the exact moment of initial entry into a protected area for purposes of Wis. Stat. § 968.15, then searches and seizures authorized by a warrant could be accomplished at any time after the initial entry. This does not accord with common sense. If that were indeed the rule, then under § 968.15, officers possessing a warrant to search a home could continue to search the home for months on end, as long as they made initial entry within five days.

The State then argues that a warrant is executed "when law enforcement performs or carries out the acts it authorizes." (State Br. at p. 18). It cites to secondary sources stating that executing a search warrant means "[t]he process of carrying out a search or seizure pursuant to a search warrant..." (State Br. at p. 19). Indeed, this was precisely Drachenberg's point. One of the acts explicitly authorized by the search warrant in the instant case was to search and analyze the digital devices at another location. Thus, law enforcement was still carrying out ("executing") that act well beyond the five-day limit.

The statute is clearly written and means what it says. There is no limiting language in the statute; there is nothing in the statute or surrounding statutes that limits or creates an exception for executing a search of computers or electronic

devices. It would have been a simple matter for the Legislature to have added a definition of "execute" to exclude the search of electronic devices if it had wanted to. "We will not read into the statute a limitation the plain language does not evidence." *State v. Kozel*, 2017 WI 3, ¶ 39, 315 Wis. 2d 1, 889 N.W.2d 423 (quoting *Cty. Of Dane v. LIRC*, 2009 WI 9, ¶ 33, 315 Wis. 2d 293, 759 N.W.2d 571); *see also State v. Lopez*, 2019 WI 101, ¶ 21, 389 Wis. 2d 156, 936 N.W.2d 125. If the five-day time limit would create burden on the courts or prosecution, then that is a matter for the Legislature. This Court should not create a version of the law that the Legislature could have, but did not, enact.

The State cites to legislative history indicating that the Legislature wanted to ensure that warrants were not held indefinitely and that the period in which a warrant is executed is reasonable. (State Br., p. 18). While the state's interpretation goes a long way to ensure the prompt search of *non-digital* evidence, it does nothing to ensure a prompt, reasonable search of computer evidence, thus leaving a gaping hole in the statutory law. If § 968.15 is construed as the State argues, nothing in the statutes requires government investigators to complete the computer search at any time. Under the statute, investigators could take all of the computer equipment and hold it for weeks, months, or years without even beginning the search of the computer. Furthermore, interpreting "execution" to mean completion of the search, including the search of computers, would ensure that probable cause not only exists upon seizure of the computer, but also throughout the entirety of the search.

In response to Drachenberg's argument that officers needed a new warrant if they wanted to search the computer beyond the five-day time limit, the State cites to *State v. VanLaarhoven*, 2001 WI App 275, and *State v. Petrone*, 161 Wis. 2d 530, which state that the examination of evidence seized pursuant to a search warrant is an essential part of the

seizure and does not require another warrant. (State Br., pp. 22-23). However, these cases are inapposite because they do not deal with a violation of § 968.15 and the mandatory directive in § 968.15(2) that a warrant is void if the five-day execution is not complied with. The arguments in both cases were that officers needed a new warrant because a second, separate search was being conducted when they analyzed the items. Drachenberg is not alleging that the search of the computer required a new warrant because it was a separate search; rather, a new search warrant was needed because their time limit ran out which voided the warrant entirely.

Sveum, which did involve a violation of § 968.15, is distinguishable because it did not involve the search and seizure of tangible evidence and therefore property rights were not implicated. 2010 WI 92, ¶ 70. Here they were, as Drachenberg's computer was a tangible piece of evidence. To say that § 968.15(2) can simply be disregarded in any instance when a search cannot be completed within five days would render the Legislature's directive in § 968.15(2) meaningless.

The State argues that even if this Court holds that "executed" within § 968.15 does include further testing and analysis, suppression is not automatic. This argument completely ignores the mandatory directive in § 968.15(2) that expressly voids a search warrant not executed within five days. If the use of suppression as a remedy for statutory violations is infrequent, as the State argues, that is merely because other statutes infrequently contain a mandatory, pointed directive like the one contained in § 968.15.

In stating, "any search warrant not executed within the [five-day time period] *shall* be void…," the Legislature has essentially exempted a violation of the five-day execution

period from § 968.22's "technical irregularity" status.[1] (emphasis added).

When a warrant is void, the evidence must be suppressed. "[S]uppressing evidence obtained as a result of [an] unauthorized, defective warrant is necessary to preserve the integrity of the judicial process." *State v. Hess*, 2010 WI 82, ¶ 3, 327 Wis. 2d 524, 785 N.W.2d 568.

CONCLUSION

WHEREFORE, for the reasons stated above, Drachenberg respectfully asks this Court to remand with directions to grant suppression of evidence found on Drachenberg's desktop computer and to allow Drachenberg to withdraw his plea.

Dated this 13th day of April, 2023.

Electronically signed by:
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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b), (bm) and (c) for a brief

[1] In contrast, a violation of the *return* provisions of §§ 968.15(1) and 968.17 is not subject to the mandatory directive to void the warrant pursuant to § 968.15(2).

in proportional serif font. The length of the brief is 1,714 words.

Dated this 13th day of April, 2023.

Electronically signed by:
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Attorney for Defendant-Appellant

CERTIFICATION OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 13th day of April, 2023.

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