STATE OF WISCONSIN

IN SUPREME COURT

No. 2022AP2060-CR

STATE OF WISCONSIN,

Plaintiff -Respondent,

v.

JOHN C. DRACHENBERG,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

JOSHUA L. KAUL
Attorney General of Wisconsin

JOHN D. FLYNN
Assistant Attorney General
State Bar #1096413

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7324
(608) 294-2907 (Fax)
flynnjd@doj.state.wi.us

TABLE OF CONTENTS

INTRODUCTION

This Court should deny Drachenberg's petition for review. The issue raised in the petition concerns the interpretation of the word "executed" in Wis. Stat. § 968.15(1). (Pet. 3.) Wisconsin Stat. § 968.15(1) requires that "[a] search warrant must be executed and returned not more than 5 days after the date of issuance." The next subsection provides that a warrant "not executed within the time provided in sub. (1) shall be void." Wis. Stat. § 968.15(2).

Drachenberg argues that "executed" includes later testing and forensic analysis. (Pet. 10–11.) He argues that the resolution of this issue presents a novel question whose resolution will have statewide impact, and the issue will likely recur. (Pet. 3.)

The court of appeal's decision is recommended for publication and is the first case to interpret what executed means in Wis. Stat. § 968.15. However, a petitioner must still show "special and important reasons" for granting review. Wis. Stat. § (Rule) 809.62(1r). None exist here. The court of appeals correctly interpreted the statute, and its decision is well-reasoned, so review is unwarranted.

ARGUMENT

I. This Court should deny the petition.

Drachenberg makes no reference to the court of appeals' decision in his argument. He merely repeats the essentials of his argument. (Pet. 8–11.) He does not explain what, he believes, the court of appeals got wrong or why the decision was in error. He does not inform the Court about the analysis conducted by the court of appeals, nor does he grapple with the court of appeals' reasoning. Without mentioning the court of appeals in any meaningful way, the petition has not provided this Court with a reason why review is necessary.

This Court should decline to review this case, primarily because the court of appeal's decision was correct and there is no reason for this Court to repeat the lower court's proper analysis. *State v. Lee*, 2022 WI 32, ¶ 2, 401 Wis. 2d 593, 973 N.W.2d 764, (Rebecca Grassl Bradley, J., concurring) ("There are much better uses of this court's time than repeating work already done correctly by a lower court."). The court of appeals determined that "execute," as used in Wis. Stat. § 968.15(1) "applies to the search of the places, and seizure of the items, designated in a search warrant and does not apply to later, off-site analysis of those items that is also authorized in the warrant." (Pet-App. 4.)[1] This time limit does not, then, apply to "later, off-site testing and analysis of validly seized items." (Pet-App. 9.) This reading is supported by looking at closely related statutes. (Pet-App. 12–13.)

That warrants may explicitly authorize further off-site testing and analysis does not bring that testing and analysis into the warrant's execution; rather, it "assist[s] the reviewing judge in determining that police had a fair probability of uncovering evidence of crime through a process that would begin with the search of the designated places and the seizure of digital devices." (Pet-App. 18.) The contents of these seized items can become evidence of a crime, "which in turn allowed the judge to tailor the warrant to direct police to maintain a reasonable scope in their searches and to minimize unnecessary intrusions into private areas." (Pet-App. 18.)

Forensic analysis is done to determine whether the seized item is potential evidence at all, and the affidavit in this case "transparently alerted the reviewing judge that the anticipated forensic analysis would be 'complicated and time-

[1] The State will use the pagination assigned to Drachenberg's appendix by efiling, rather than Drachenberg's.

consuming' and therefore would need to be conducted off-site." (Pet-App. 19.)

The court of appeals found Drachenberg's proposed reading of the statute absurd, finding it "difficult to understand how the legislature could have intended to require all of the sometimes complicated and time-consuming tasks involved in carefully analyzing seized evidence be completed within five days in all cases, regardless of the circumstances." (Pet-App. 19.)

The court of appeals found that its interpretation of this statute comported with the purpose behind Wis. Stat. § 968.15—to avoid unreasonable delay in the execution of warrants and to avoid the dissipation of probable cause. (Pet-App. 20–21.)

The court of appeals noted that its reading of this statute aligned with other jurisdictions that have considered the same issue; tellingly, Drachenberg did "not cite a case from any jurisdiction in which the statutory time limit for the execution of a search warrant was deemed to have been exceeded due to the post-seizure analysis of seized items." (Pet-App. 24–25.)

While the court of appeals is primarily an error correcting court, it "also serves a law-declaring function, [but] such pronouncements should not occur in cases of great moment." *State v. Grawien*, 123 Wis. 2d 428, 432, 367 N.W.2d 816 (Ct. App. 1985). This case represents a proper use of the court of appeals' law declaring. This case, of itself, is not of any special or particular importance. The court of appeals had to determine what the law was before they could determine whether there was any error. The rule declared is limited and easy to apply.

Similarly, this case presents only a statutory issue, not a federal or state constitutional issue. *Contra* Wis. Stat. § (Rule) 809.62(1r)(a). The court of appeals noted that

Drachenberg did not raise a constitutional challenge—to the reasonableness of the execution of the warrant, to unreasonable delay in reviewing or analyzing seized data, or that probable cause had dissipated. (Pet-App. 10.) The statutory nature of the issue presented weighs against review by this Court.

As noted above, the court of appeals' decision accords with the decisions of every other jurisdiction to consider the issue. (Pet-App. 24.) Federal courts consider a warrant "executed" when the item is seized or removed from the premises. *United States v. Cleveland*, 907 F.3d 423, 431 (6th Cir. 2018) (footnote omitted) ("Execution of the warrant occurred when the cell phone was removed from its location and shipped to the analytics laboratory—an act that occurred prior to the warrant's deadline. It is not relevant for compliance with that deadline that the subsequent extraction occurred after the warrant's execution date."); *United States v. Huart*, 735 F.3d 972, 974 n.2 (7th Cir. 2013) ("We do note that, under Federal Rule of Criminal Procedure 41(e)(2)(B), a warrant for electronically stored information is executed when the information is seized or copied—here, when . . . the phone [was seized]. Law enforcement is permitted to decode or otherwise analyze data on a seized device at a later time.").

State courts agree. *See State v. Monger*, 472 P.3d 270, 276 (Or. Ct. App. 2020) ("[I]t would be anomalous to conclude that a seizure of an electronic device within five days was permissible but that the subsequent search or analysis of the same electronic device that had been stored in an evidence room after weeks had elapsed somehow effected staleness concerns."); *State v. Sanchez*, 476 P.3d 889, 894 (N.M. Ct. App. 2020) ("[A] warrant to search an electronic device is executed when the device is seized or the data from the device is copied on site. In other words, a device must be in the custody of police within ten days after the police obtain a warrant to search that device."); *Ramirez v. State*, 611 S.W.3d 645, 651–

52, (Tex. App. 2020) ("[T]he three-day requirement for the execution of a search warrant sets the limit for the actual search for and seizure of the evidence by a peace officer, not the timing for any subsequent forensic analysis that may be conducted on the seized evidence."); *People v. Shinohara*, 872 N.E.2d 498, 518 (Ill. App. Ct. 2007) (declining to apply Illinois' 96 hour time limit for the execution of warrants to forensic analysis of a computer, emphasizing that the statute was enacted "well before the computer age"); *State v. Nadeau*, 1 A.3d 445, 463 (Me. 2010) ("The execution of a search warrant is the act of lawfully searching for and taking possession of property as authorized by the warrant.").

In short, if this Court accepts review and reverses the circuit court and court of appeals, that decision would make Wisconsin an outlier. There is no need for this Court to accept review, but if it does, it should affirm, consistent with the decisions of every other jurisdiction to consider the issue.

The court of appeal's decision is well-reasoned and reaches the correct interpretation of Wis. Stat. § 968.15(1). Because of that, its decision does not merit review. This Court should deny Drachenberg's petition.

II. If this Court accepts review, it may have to address an alternative ground for affirming the court of appeals.

Finally, even assuming this Court grants review, and even assuming this Court were to disagree with the court of appeals' interpretation of "executed," there is still a basis to affirm. Wis. Stat. § (Rule) 809.62(3)(d). The court of appeals noted the State's alternative basis to affirm but declined to address it because it agreed with the State's interpretation of Wis. Stat. § 968.15(1). (Pet-App. 9.) If this Court disagrees with the court of appeals and holds that Wis. Stat. § 968.15(1) means that all testing and analysis need to be completed within five days, it would then have to decide whether

suppression is available as a remedy, and if so, whether it is warranted in this case.

Drachenberg argues that suppression is automatic if Wis. Stat. § 968.15(1) five-day rule is violated. (Pet. 11.) This ignores Wis. Stat. § 968.22, which provides that: "[n]o evidence seized under a search warrant shall be suppressed because of technical irregularities not affecting the substantial rights of the defendant." Case law demonstrates that "substantial rights" is linked to prejudice. *See State v. Popenhagen*, 2008 WI 55, ¶ 120–25, 309 Wis. 2d 601, 749 N.W.2d 611 (Prosser, J., concurring). There are no constitutional defects with the warrant, and Drachenberg cannot show that it was executed unreasonably, so he cannot show any prejudice to a substantial right. The affidavit for the warrant states probable cause, was validly attested to, and was notarized. Police acted reasonably, and probable cause had not dissipated before police finished analyzing the seized computer. Therefore, if this Court grants Drachenberg's petition for review and agrees with his interpretation of "executed," it will have to determine whether suppression is available as a remedy at all, and whether Drachenberg is entitled to it in this case.

CONCLUSION

This Court should deny Drachenberg's petition for review.

Dated this 30th day of October 2023.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

John D. Flynn
JOHN D. FLYNN
Assistant Attorney General
State Bar #1096413

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7324
(608) 294-2907 (Fax)
flynnjd@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this petition or response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition or response produced with a proportional serif font. The length of this petition or response is 1,738 words.

Dated this 30th day of October 2023.

Electronically signed by:

John D. Flynn
JOHN D. FLYNN

CERTIFICATE 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 Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 30th day of October 2023.

Electronically signed by:

John D. Flynn
JOHN D. FLYNN