STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2008AP658 CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

MICHAEL A. SVEUM,
Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION MOTIONS ENTERED IN DANE COUNTY CIRCUIT COUNT, THE HONORABLE STEVEN EBERT, PRESIDING.

REPLY BRIEF OF DEFENDANT-APPELLANT

Submitted by:
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ARGUMENT

I. The trial court erred when it denied motions to suppress evidence obtained using GPS devices.

a. The court order authorizing the use of a GPS device violated the Fourth Amendment.

A Fourth Amendment search occurs when police enter a vehicle, so a warrant is required. And the use of a GPS device to monitor the location of a vehicle in "a location not open to visual surveillance" also requires a warrant. U.S. v. Karo, 468 U.S. 705, 714 (1984). Here, police obtained a court order authorizing these actions (A:29-30).[1] Then they entered Sveum's vehicle and electronically monitored its location in locations not open to visual surveillance – inside his place of employment on May 26-27, 2003 (A:35),[2] and inside a 3-car garage at 6685 Highway K in Blue Mounds from May 13, 2003 through May 21, 2003 (A:2-6).* Therefore, evidence obtained using the GPS device was admissible only if the court order authorizing its use satisfied Fourth Amendment requirements.

The State does not dispute Sveum's assertion at pages 1-4 that the court order violated the Fourth Amendment. By not presenting any opposing argument, the State concedes the issue. State ex rel. Blank v. Gramling, 219 Wis. 196, 199 (1935). None of the eight cases the State cites at pages 10-11

[1] The appendix was filed with Sveum's brief-in-chief. An * denotes the appendix of this brief.

[2] Sveum parked his vehicle there on May 26, 2003, and the police were unable to locate it until he told his probation agent where it was after his arrest (A:35).

involved police either entering a vehicle or monitoring its location in locations not open to visual surveillance.

Further, "the Fourth Amendment protects people, not places." Katz v. U.S., 389 U.S. 347, 351 (1967).

> A person has a right to expect that when he drives his car into the street, the police will not attach an electronic surveillance device to his car in order to track him. Although he can anticipate visual surveillance, he can reasonably expect to be "alone" in his car when he enters it and drives away.

U.S. v. Holmes, 521 F.2d 859, 866 (5th Cir. 1975).

> Ordinarily we can protect our privacy by insuring that we are not being followed, and that others do not know where we are going. The beeper [and GPS device] destroys our ability to protect the privacy of our movement.

U.S. v. Bailey, 628 F.2d 938, 949 (6th Cir. 1980).

In addition, "citizens have a right to think that the government will not track them for months on end by resort to the latest electronic gadgetry." U.S. v. Cofer, 444 F.Supp. 146, 149 (W.D. Tex. 1978). Here, police employed a GPS device for 35 days. "This is simply too long a period of surveillance to be justified by a single showing of probable cause." Id.; Berger v. New York, 388 U.S. 41, 59 (1967). Without judicial oversight there is "no assurance that the Government will not continue to monitor the [vehicle's movements] long after its probable cause to do so has ceased to exist." Bailey, 628 F.2d at 947. Therefore, police must obtain judicial approval to use a GPS device.

Moreover, as the Washington Supreme Court pointed out:

> We do not agree that the use of the GPS devices to monitor Mr. Jackson's travels merely equates to following him on public roads where he has voluntarily

> exposed himself to public view....[W]hen a GPS device is attached to a vehicle, law enforcement officers do not in fact follow the vehicle. Thus, unlike binoculars or a flashlight, the GPS device does not merely augment the officers' senses, but rather provides a technological substitute for traditional visual tracking. Further, the devices in this case were in place for approximately two and one-half weeks. It is unlikely that the sheriff's department could have successfully maintained uninterrupted 24-hour surveillance throughout this time by following Jackson[3]....Additionally,...when the GPS data was downloaded, it provided a record of every place the vehicle had traveled in the *past*. Sense enhancement devices like binoculars and flashlights do not enable officers to determine what occurred in the past.

State v. Jackson, 150 Wn.2d 251, 261-262 (2003)(footnote added; emphasis in original).

> The fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment.

Kyollo v. U.S., 533 U.S. 27, 35 n. 2 (2001).

Surely the Seventh Circuit does not believe that police can actually "observe [a vehicle's] route by means of cameras mounted on lampposts or of satellite imaging as in Google Earth." U.S. v. Garcia, 474 F.3d 994, 996 (7th Cir. 2007). While it is true that a vehicle traveling on public roads may occasionally be momentarily recorded by a business security camera, there are not enough "cameras mounted on lampposts" in Wisconsin (nor will there ever be) to observe a vehicle's entire travel route, especially in a rural area, which a GPS device records. Likewise, "satellite imaging as in

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[3] The police admit that a GPS device "lessens the risk of visual detection by the suspect" and "is generally considered more reliable since visual surveillance often results in the loss of sight of the Target Vehicle." (A:28).

Google Earth" cannot observe a vehicle's entire travel route due to a satellite's inability to see through trees, canyon walls, tall buildings, clouds, fog, and in the dark (A:7).*

Further, these methods do not guarantee that any image captured will include the license plate number, or permit a positive identification of the vehicle without it, concerns a GPS device alleviates. Nor do they guarantee that any image will include the date and time, or that it will be accurate, another concern a GPS alleviates (A:2-3).* Finally, a GPS device is not susceptible to concealing, altering, swapping or removing the license plates. In short, if these were actually viable surveillance options police would employ them rather than taking the time to obtain judicial approval to use a GPS device, especially since these methods may also yield the identity of the vehicle's operator, which the GPS device does not.

b. The electronic communication intercepted by the GPS device was obtained in violation of the Wisconsin Electronic Surveillance Control Law.

The State argues at page 12 that the WESCL does not govern the use of GPS devices because they are "tracking" devices and the "electronic communication" governed by the WESCL does not include any communication from a tracking device. The State cites no case that holds a GPS device is a tracking device *for purposes of §968.27(4)(d)*. Nor offers any explanation why this is so. As Judge Shelley Gaylord noted, "calling something a tracking device doesn't make it a tracking device" under § 968.27(4)(d). More telling, the State makes no effort to refute Sveum's explanation at pages 7-10

why a GPS device is not a tracking device for purposes of § 968.27(4)(d).

The State also argues at page 13 that "police did not violate WESCL because Sveum had no reasonable expectation of privacy in the whereabouts of his car on the public highways of this state."

> It is true that persons have diminished expectations of privacy in automobiles on public roads. These automobiles can be visually tracked by the police, but the police do not have the unfettered right to tamper with a vehicle by surreptitiously attaching a tracking device without either the owner's consent or without a warrant issued by a court....The right to privacy is a fundamental right in a free and civilized society. The increasing use of electronic devices is eroding personal liberty.

State v. Biddle, 2005 Del.C.P. LEXIS 49 at 4-5 (2005). The privacy arguments presented in sub. a. also apply with equal force here. Further, the State's argument does not address the fact that police also monitored the location of Sveum's vehicle in two garages - locations not open to visual surveillance - for a period of 11 days as noted in sub. a., places he had an expectation of privacy.

II. The trial court erred when it denied the motion to suppress items seized pursuant to a search warrant.

The State argues at page 16 that "the fruits of the GPS tracking device which showed that Sveum was stalking Johnson" and that on "most days the vehicle would leave the residence of 2426 Valley St." was "the most crucial evidence set forth in the affidavit" supporting the search warrant. This argument shows how woefully inadequate the affidavit was as:

> probable cause to believe that a person has committed a crime does not automatically give the police probable cause to search his house for evidence of that crime.

State v. Higginbotham, 162 Wis.2d 978, 995 (1991). And this information falls far short of the showing of specific facts necessary to establish the required nexus between each item to be seized and the place to be searched Richards v. Wisconsin, 520 U.S. 385, 390-394 (1997). Likewise, the information at page 16 showing that Sveum violated conditions of parole relates to none of the objects sought or places to be searched, so also fails to help establish probable cause.

The State also argues at page 21 that letters seized from Renee Sveum's bedroom "were not suppressible because Sveum lacked standing to challenge their seizure from his sister's bedroom." However, the State conceded standing (116:78; 24:2). Finally, standing is not based on any particular item seized; the inquiry is "whether the person...has a legitimate expectation of privacy in the invaded place." Rakas v. Illinois, 439 U.S. 128, 143 (1978).

The State does not dispute Sveum's assertion at page 18 that if this court finds the search warrant unconstitutional then he is entitled to a new trial despite a finding that the use of the GPS device was lawful. By not presenting any opposing argument, the State concedes the issue. Blank, 219 Wis. at 199. In fact, the State actually offers argument that supports Sveum's position. The State argues at page 20 that "letters seized from his sister's, Renee's, bedroom" were "the most damning items of evidence." And at page 27 that "various documents recovered by police from a folder found in Renee's bedroom" were "particularly damning," and that "documentary evidence from another part of the house directly implicat[ed] Sveum." The State also argues at page

26 that "the most damning testimony came from Sveum's sister" who "described at trial the letters Sveum sent her from prison;" testimony obtained as a direct result of the unconstitutional search. Finally, the State argues in footnote 4 at page 21 that "the search of his automobile produced all sorts of incriminating evidence as well." [4]

III. The trial court erred when it admitted evidence of the defendant's prior stalking conviction.

Sveum moved the trial court to exclude evidence of his 1996 stalking conviction by offering to stipulate to that element of the crime under § 940.32(3)(b), pursuant to State v. Alexander, 214 Wis.2d 628 (1997). The court held that the evidence was admissible to show intent, knowledge, and plan, not solely to prove that Sveum had a prior stalking conviction, as Alexander requires (A:72-73).

The State does not dispute Sveum's assertion at page 20 that the evidence was not admissible to show knowledge or plan, thus the State concedes error here. Blank, 219 Wis. at 199. Instead, the State argues at pages 22-23 that the prior conviction "is also an essential part of the 'course of conduct' that induced fear in Johnson." However, the statutory definition of "course of conduct" does not include a prior conviction. *Sec.* 940.32(1)(a). Moreover, stalking does not require proof that the "course of conduct" caused fear, only that a single act caused fear. State v. Sveum, 220 Wis.2d 396, 413-414 (Ct. App. 1998). And that act must occur during the charging time period.

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[4] The State incorrectly argues here that Sveum does not challenge the search of his vehicle, which was authorized by the same warrant (A:38).

In the same paragraph, the State offers a brief argument on intent:

> As were his similar acts leading up to the 1996 conviction, the state could reasonably argue that the course of conduct engaged in by Sveum both before and after that conviction was done "intentionally."

This argument supports Sveum's assertion at page 20 "that at best only the facts surrounding Sveum's prior conviction would tend to show intent, not the conviction itself." Therefore, because "the purpose of the evidence was solely to prove the element of" a prior stalking conviction, "its probative value was far outweighed by the danger of unfair prejudice." Alexander, 214 Wis.2d at 634. As such, "the circuit court erroneously exercised its discretion when it allowed the introduction of [the] evidence...and further submitted that element to the jury when [Sveum] fully admitted to the element." Id.

Sveum was further prejudiced due to trial counsel's failure to request a curative instruction on the prior conviction (Sveum's brief at 23). Where the prior conviction is identical to the charged crime, "the risk of unfair prejudice is particularly great." Alexander, 214 Wis.2d at 642-643; State v. Warbelton, 747 N.W.2d 717, ¶ 28-29 (Ct. App. 2008); State v. Lozada, 815 A.2d 1002, 1003-1004 (2003).

> Allowing the evidence concerning [Sveum's] prior record is troubling enough, but allowing the evidence without any cautionary instruction renders the evidence fatally prejudicial and denied [Sveum] a fair trial.

Dunnigan v. Keane, 972 F.Supp. 709, 714 (W.D.N.Y. 1997). Due to space limitations, Sveum cannot address the State's other meritless Sixth Amendment arguments.

IV. The trial court erred when it denied the defendant's erroneous jury instruction claim.

To convict Sveum of stalking, the State first had to show that he "intentionally engage[d] in a course of conduct directed at" Jamie Johnson. *Sec.* 940.32(2)(a). Section 940.32(1)(a) defines "course of conduct," and lists 10 specific acts that the definition encompasses. In 2004, the legislature expanded this definition to include, among other things, causing a person to maintain a visual or physical proximity to the victim and causing a person to contact the victim by telephone. *Compare* § 940.32(1)(a)10 (2001-2002) *with* § 940.32(1)(a)10 (2003-2004). This amendment to sub. (1)(a)10 by 2003 Wisconsin Act 222 did not become effective until April 27, 2004, eleven months after Sveum was arrested and charged in this case. The jury instruction given, however, permitted the jurors to convict Sveum if the evidence showed that he caused a person to maintain a visual or physical proximity to Johnson or that he caused a person to contact her by telephone (A:127).

The trial court acknowledged that the instruction was erroneous, but concluded that the error was harmless because it is clear beyond a reasonable doubt that the jury would have found Sveum guilty absent the error since the jurors were also instructed that they could find him guilty as a party to the crime (A:22). The State argues at page 35 that the court's conclusion is correct. The State is wrong.

As its title indicates, the party to a crime statute is only applicable to crimes. "A crime is conduct which is prohibited by state law." *Sec.* 939.12. Thus, the State must first establish that state law prohibits the conduct alleged before a person may be charged as a party to a crime based on that conduct.

Since the applicable stalking statute did not prohibit causing a person to maintain a visual or physical proximity to the victim or causing a person to contact the victim by telephone, the party to a crime statute is not applicable to such conduct. Section 940.32 (1)(a)10 (2001-2002) is a specific statute creating a specific crime and defining those acts which are criminal within its contemplation and is not controlled by the general party to a crime statute. Where a specific statute conflicts with a general statute, the specific statute prevails. State v. Smith, 106 Wis.2d 151, 159 (Ct. App. 1982).

Moreover, the 2004 amendment to § 940.32(1)(a)10 that expanded the acts which are criminal from those in subds. 7 to 9 to those in subds. 1 to 9 would have been unnecessary if the legislature intended for the acts in subds. 1 to 6 to be criminalized by charging a person as a party to a crime. Further, applying the party to a crime statute renders § 940.32(1)(a)10 superfluous, producing an absurd and unreasonable result. "A statute should be construed so that no word or clause shall be rendered surplusage and every word if possible should be given effect." Donaldson v. State, 93 Wis.2d 306, 315 (1980).

Since the application of the general party to a crime statute to the specific stalking statute is contrary to legislative intent, Sveum has been convicted of a crime not known to law. "[O] nly a legislature can denounce crimes....Nowhere in this country can any man be condemned for a nonexistent crime." Adams v. Murphy, 653 F.2d 224, 225 (5th Cir. 1981). A court does not have subject matter jurisdiction over a nonexistent offense. State v. Christensen, 110 Wis.2d 538, 542 (1983). Subject matter jurisdiction cannot be conferred upon the court by consent. Kelley v. State, 54 Wis.2d 475, 479 (1972). Nor can it be waived. Id. And "the waiver doctrine does not permit conviction for a nonexistent crime"

even when a defendant has specifically requested that the jury be instructed on the non-offense. State v. Cvorovic, 158 Wis.2d 630, 631 (1990).

The jury was instructed that it could convict Sveum if the evidence showed that he: (1) maintained a visual or physical proximity to Johnson; (2) contacted her by telephone; or (3) caused a person to engage in either of these acts (A:127); the latter which was not criminalized by the legislature until eleven months after his arrest. "[W]hen a case is submitted to the jury on alternative theories, the unconstitutionality of any of the theories requires that the conviction be set aside." Boyde v. California, 494 U.S. 370, 379-380 (1990). Under these circumstances, the trial court's mistake cannot be dismissed as harmless error. Bachellar v. Maryland, 397 U.S. 564, 570-571 (1970).

Even assuming that a harmless-error analysis is proper, the conviction must still be set aside.

> The burden of proving no prejudice is on the beneficiary of the error, here the state. The state's burden, then, is to establish that there is no reasonable possibility that the error contributed to the conviction.

State v. Dyess, 124 Wis.2d 525, 547 (1985). The State makes no attempt to satisfy this burden. Nor could it. Because jury deliberations are secret and not transcribed, it is impossible to know whether any or all of the jurors found that Sveum engaged in a "course of conduct" directed at Johnson *only* by causing Renee Sveum to either maintain a visual or physical proximity to Johnson or contact her by telephone. Predictably, the State does not argue that there is no possible way that this could have happened. And if it did, then the State did not prove every element of stalking beyond a reasonable doubt by a unanimous jury verdict, in violation of Sveum's constitutional rights.

> The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense.

Carella v. California, 491 U.S. 263, 265 (1989).

CONCLUSION

For the reasons stated herein, Sveum requests the following relief:

1. vacation of the conviction and sentence with a remand to the circuit court for a new trial.

Dated this 20th day of August 2008.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in secs. 809.19(8)(b) and (c), Stats., for a brief using a proportional serif font. The length of this brief is 2997 words.

Michael A. Sveum

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