Appeal Nos. 04-0958-CR
04-1609-CR

Cir. Ct. Nos. 00CF000104
00CF000137

WISCONSIN COURT OF APPEALS
DISTRICT III

NO. 04-0958-CR

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

BILL PAUL MARQUARDT,

DEFENDANT-RESPONDENT.

FILED

FEB 8, 2005

Cornelia G. Clark
Clerk of Supreme Court

NO. 04-1609-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BILL P. MARQUARDT,

DEFENDANT-APPELLANT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Cane, C.J., Hoover, P.J., and Peterson, J.

We certify these appeals to the Wisconsin Supreme Court to clarify several matters relating to the good-faith exception to the exclusionary rule and the doctrine of inevitable discovery. Specifically:

(1) Does the search warrant application in this case meet the third test set out in ***United States v. Leon***, 468 U.S. 897 (1984) that it must not be so lacking in indicia of probable cause as to render the officers' belief in its existence entirely unreasonable;

(2) When considering that issue, may the court consider facts known by the officers but not included in the search warrant application;

(3) Did the investigation in these cases meet the "significant investigation" test set out in ***State v. Eason***, 2001 WI 98, ¶63, 245 Wis. 2d 206, 629 N.W.2d 62;

(4) Does the doctrine of inevitable discovery apply if the officers had additional information not included in the warrant application that could have been used to secure a valid search warrant if the initial application had been denied, and did the officers have sufficient untainted information to secure a warrant before the evidence might have been lost or destroyed;

(5) Does the doctrine of inevitable discovery apply when additional investigation would likely have resulted in a valid search warrant, but the investigation may have taken five to eight days after the initial illegal search;

(6) What assumptions can be made about the inevitability of finding evidence after substantial delay when the record shows no attempt by the defendant to hide or destroy the evidence.

BACKGROUND

The evidence in each of these cases arises out of a search of Bill Marquardt's Eau Claire County residence pursuant to a search warrant issued and executed March 15, 2000. Marquardt's mother was found dead in her Chippewa County home two days earlier. She was shot, stabbed and was left wrapped in a blanket in her garage. Officers attempting to contact Marquardt spoke with his Eau Claire County neighbor who informed the officers that the neighbor's dog had been shot on March 9 with a 9 mm. gun, the same caliber as the gun that killed Marquardt's mother. On March 23, the State Crime Laboratory

determined that the shell casings found at Marquardt's neighbor's residence matched the shell casing found in his mother's garage.

Eight days before receiving the crime lab report, police secured a search warrant for Bill Marquardt's residence. The Eau Claire County search warrant application incorporated by reference a Chippewa County application. The officers executing the warrant found animal carcasses and firearms in Marquardt's residence. An arrest warrant was issued March 15, 2000 for animal cruelty. On March 18, Marquardt returned to his residence from Florida and was arrested. At that time he was wearing shoes and carrying a folding knife with blood on them that connected him to his mother's murder.

In an earlier appeal in the Chippewa County murder case, this court concluded the application for the search warrant was not sufficient to support probable cause. We remanded the matter to the trial court to determine whether the good-faith exception to the exclusionary rule applied. Before the Chippewa County court acted on remand, however, the Eau Claire County court ruled that the good-faith exception applied in the animal abuse cases. Eau Claire defense counsel limited the issue to whether there was a "significant investigation" as required in ***Eason***. The Eau Claire County court was not asked to review the factors set out in ***Leon***.

On remand, the Chippewa County court considered the factors set out in ***Leon*** and concluded that the warrant applications were so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. *See* ***Leon***, 468 U.S. at 923. In making this decision, the court refused to consider any evidence outside the warrant application based on ***United States v. Koerth***, 312 F.3d 862 (7th Cir. 2002), *cert. denied*, 123 S. Ct. 1947 (2003). The State

appeals the Chippewa County court's finding that the good-faith exception does not apply. Marquardt appeals the Eau Claire County court's finding that the good-faith exception applies.[1]

THE GOOD FAITH EXCEPTION

The State argues that, although the warrant applications were not sufficient to establish probable cause for a search warrant, they were sufficient to justify the officers' good faith based on the officers' objectively reasonable reliance on the warrant. *See* ***United States v. Leon***, 468 U.S. at 919. Marquardt contends the good-faith exception should not apply because ***Leon*** prohibits implementing the exception if the application is devoid of indicia of probable cause. The good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known the search was illegal despite the magistrate's authorization. ***Id.*** at 922.

The State argues that the warrant applications, read together, establish sufficient objective facts to support the officers' good faith. The applications show that the phone was busy throughout the day at the murder scene, suggesting that it was off the hook and that the perpetrator had been inside the residence. From the absence of any indication of a break-in or missing valuables, the State argues that it was likely the murderer was known by Mrs. Marquardt or had a key to the residence. The State notes that most homicides committed by use

[1] A jury found Marquardt guilty of animal abuse and weapons charges. On the State's stipulation, he was found not guilty by reason of mental disease or defect and was committed to an institution. His appeal from the commitment order (04-1609-CR) includes a challenge to the good faith ruling, an argument that trial counsel ineffectively presented that issue, and other unrelated issues.

of a gun and a knife are committed by males, and covering the body with a blanket strongly suggests that the perpetrator felt compassion or remorse, suggesting that it was not the act of a stranger. Finally, family members and police were unable to contact Bill following his mother's death despite substantial publicity about the crime. The State contends that this information constitutes more than a "bare bones" application and that officers should be allowed to rely on the magistrate's finding of probable cause based on this information and reasonable inferences. *See* ***id.*** at 926. Marquardt argues that none of this information suggests that he was the perpetrator or that evidence of the crime would be found at his residence, and the officers executing the warrant should have known that more was required.

The police were aware of additional information that they provided to the district attorney that was not included in the warrant applications.[2] The officers learned from Marquardt's father that a phone message for Bill had been placed on the refrigerator in his parents' home the day before the murder and it was missing after the murder. That message was found several days later under a jewelry box in the parents' bedroom. Marquardt's brother and sister told officers they could think of no non-relative with a motive to harm their mother and no other family member was a suspect. Police were also aware of the break-in and shooting of Marquardt's neighbor's dog and the fact that 9 mm. casings were found at the scene. Police were aware that Marquardt had a history of drug dealing and that he had been discovered digging up $12,000 cash from his parents'

[2] Counsel in the Chippewa County murder case objects to considering any information gathered in the Eau Claire County good-faith hearing. He argues that Eau Claire counsel provided ineffective representation by not addressing the ***Leon*** factors and that several of the additional facts excluded from the warrant application were misrepresented by the State, taken out of context or not known by the officers at the time they executed the warrant.

premises approximately one month before the murder. The State argues that this additional information known to the officers but excluded from the warrant application should be considered when determining whether they acted in good faith.

In ***Koerth,*** 312 F.3d 862, the Seventh Circuit ruled that information known to the officers but not included in the warrant application cannot be considered when determining good faith. The State argues that ***Koerth*** should not be applied for several reasons. First, other federal appeals courts have reached the opposite conclusion. *See e.g.*, ***United States v. Martin***, 297 F.3d, 1308, 1318-20 (11th Cir. 2002). Second, the Seventh Circuit itself has taken an inconsistent position. *See* ***United States v. Dickerson***, 975 F.2d 1245, 1250 (7th Cir. 1992) *cert. denied*, 507 U.S. 932 (1993). Third, the language in ***Koerth*** suggests that information known by the officers but omitted from the warrant application is synonymous with the officers' "subjective beliefs." While that may be true in some circumstances, it is possible to have objective, verifiable information excluded from a warrant application. Fourth, confining the inquiry to information contained in the warrant application does not promote the goals of the exclusionary rule. Penalizing the officer for mistakes made by others does not contribute to the deterrence of Fourth Amendment violations that the exclusionary rule seeks to address. *See* ***Leon***, 468 U.S. at 921. We submit that it is appropriate for the Wisconsin Supreme Court to determine whether the information excluded from the warrant applications can be considered and whether the warrant applications and the officers' additional information constitute sufficient indicia of probable cause as to render the officers' beliefs in its existence entirely unreasonable.

THE SIGNIFICANT INVESTIGATION FACTOR

In ***Eason***, 245 Wis. 2d 206, ¶63, the court added two factors to the test set out in ***Leon***: that the process used in obtaining the warrant included a "significant investigation," and review by either a police officer trained and knowledgeable in the requirements of probable cause or a knowledgeable government attorney. Here, police conducted a substantial investigation regarding Marquardt's mother's murder but found little evidence directly connecting Marquardt to the crime. Marquardt argues that significant investigation requires results that point to the particular person or place to be searched rather than a general investigation into a crime.

Eason offered no guidance on the meaning of "significant investigation." The court adopted the significant investigation factor from a law journal article. *See* Donald Dripps, *Living With Leon*, 95 YALE L.J. 906, 932 (1986). That article focused on what it termed the "ugliest risk" that ***Leon*** encourages, the police-manufactured anonymous tip, and suggested that well-trained officers would not seek a warrant without significant independent investigation and internal screening. Because anonymous tips are not involved in Marquardt's case, we question how to apply the significant investigation test and seek guidance on its meaning.

DOCTRINE OF INEVITABLE DISCOVERY

The State argues that it would have inevitably discovered the items seized from Marquardt's residence and found on his person at the time of his arrest because the officers could have and would have obtained a valid search warrant if the initial application had been denied. The State argues that information known to the officers at the time they applied for the warrant would have established

sufficient grounds for obtaining a warrant before Marquardt returned to his residence on March 18. If that information was insufficient to establish probable cause, additional information independent of the unlawful search would have been discovered and would have inevitably led to valid search and arrest warrants.

By March 23, eight days after the initial search and five days after Marquardt's arrest, the State Crime Laboratory determined that the shell casing recovered from the murder scene matched the shell casings from the shooting of Marquardt's neighbor's dog. The State contends the crime lab's analysis may have been accelerated if the initial search had not taken place and if a suspect had not yet been arrested. Marquardt questions whether the bullets and shell casings from the two crime scenes would have been compared but for the initial illegal search. He also questions whether the incriminatory knife and shoes he possessed at the time of his arrest would have been found if the arrest warrant for animal cruelty had not been obtained after the illegal search. He argues an arrest warrant after completion of the shell casing analysis would not have been timely to insure that the knife and shoes would have "inevitably" been discovered upon his arrest.

We submit that it is appropriate for the Wisconsin Supreme Court to determine whether there is a time component to the doctrine of inevitable discovery, what assumptions should be made about the continued existence or ability to find evidence when there is no indication that the defendant was attempting to remove or destroy it, and whether the court can assume that the knife and shoes would have still been in Marquardt's possession if he had been arrested weeks or months later on a valid warrant issued after the crime lab analysis. If the doctrine of inevitable discovery cannot be extended to that degree, were the facts known by the police before the unlawful search sufficient to satisfy the requirement that the government was "actively pursuing some alternate line of

investigation." *See* ***State v. Schwegler***, 170 Wis. 2d 487, 501, 190 N.W.2d 292 (Ct. App. 1992). Should reviewing courts assume that the police investigation would have followed the same course with the same timing if the illegal search had not occurred and Marquardt had not been arrested. We submit that it is appropriate for the Wisconsin Supreme Court to offer guidance on these matters of first impression.