Appeal No. 2017AP208-CR **Cir. Ct. No. 2015CF84**

WISCONSIN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHNNY K. PINDER,

DEFENDANT-APPELLANT.

FILED

DEC 13, 2017

Diane M. Fremgen
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2015-16),[1] this appeal is certified to the Wisconsin Supreme Court for its review and determination.

ISSUE

If a search warrant issued under WIS. STAT. § 968.12 for the placement and use of a GPS tracking device on a motor vehicle is not executed within five days after the date of issuance per WIS. STAT. § 968.15(1) is the warrant void under § 968.15(2), even if the search was otherwise reasonably conducted?

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[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

BACKGROUND

In February 2015, police received reports of burglaries at several businesses in Mequon, Wisconsin. Based on commercial surveillance footage and an informant, police determined that the likely burglar was Johnny Pinder and, on February 27, obtained a warrant to install a GPS tracking device on his car. The warrant required removal of the device "as soon as practicable after the objectives of the surveillance are accomplished or not later than 60 days" after issuance.

Police first installed the device on Pinder's car ten days later on March 9, 2015. They set up a "geofence" which would notify them if the car entered Mequon. Receiving a geofence alert on March 14, police tracked Pinder's car to an office building. After the car left, police went to the building, found indications of a break-in, and ultimately learned of missing property. Surveillance footage showed that a silver vehicle had been parked outside and GPS data confirmed that this was Pinder's car.

Police stopped and searched Pinder's car, finding stolen property as well as gloves and screwdrivers. Pinder and Darnelle Polk, the driver, were arrested and Pinder was charged with burglary as a party to the crime in violation of WIS. STAT. § 943.10(1m)(a) and with possession of burglarious tools in violation of WIS. STAT. § 943.12. (Polk was also charged.)

Pinder moved to suppress the evidence seized during the search. He argued that the warrant expired after police failed to execute it within five days per WIS. STAT. § 968.15. Acknowledging that there were "difficulties" when applying the statute to this case, the circuit court denied the motion, concluding that the issue was controlled by ***State v. Sveum***, 2010 WI 92, 328 Wis. 2d 369, 787 N.W.2d 317.

The jury convicted Pinder on both charges. Pinder appeals.

DISCUSSION

Pinder's Late Execution of a Search Warrant Argument

The Fourth Amendment of the United States Constitution protects persons from "unreasonable searches and seizures and sets forth the manner in which warrants shall issue," requiring probable cause and a description of who or what is to be searched and seized. ***State v. Henderson***, 2001 WI 97, ¶17, 245 Wis. 2d 345, 629 N.W.2d 613. A warrantless search is presumptively unreasonable. ***Id.***, ¶19.

Although the forgoing constitutional considerations stand at the center of many search warrant issues, Pinder does not assert that the search was unlawful because of a Fourth Amendment violation. Instead, he limits his argument that the search was unlawful to the plain language of WIS. STAT. § 968.15, which states as follows:

> **(1)** A search warrant must be executed and returned not more than 5 days after the date of issuance.
>
> **(2)** Any search warrant not executed within the time provided in sub. (1) shall be void and shall be returned to the judge issuing it.

Because police waited ten days before installing the device on his car, Pinder contends that, under subsec. (2), the warrant was already void by that time and well before any evidence was obtained.

Prior Statutory Provisions

Before 1969, when the Wisconsin Legislature extensively revised the criminal code, WIS. STAT. ch. 963 governed search warrants. No statutory provision limited the time in which a warrant could be executed. Instead, the statutes provided an "illustrative" search warrant form, which directed the sheriff or other peace officer to conduct the search "forthwith." WIS. STAT. § 963.05 (1967). The form also stated that the officer, if any property was seized, should return the warrant and property "within 48 hours" to the issuing court. ***Id.***[2]

There was also a statutory "substantial compliance" provision. WISCONSIN STAT. § 963.08 (1967) stated that "[n]o evidence seized under a search warrant shall be suppressed because of technical irregularities not affecting the substantial rights of the accused." This provision remains in the current statutes, but was renumbered to WIS. STAT. § 968.22.

Showing a concern with a vague or open-ended period of time by which a search warrant could be executed, the legislature enacted the current version of WIS. STAT. § 968.15, which voids a warrant not executed within five days. The Wisconsin Judicial Council explained its view of the rationale behind the new statute:

> Current law has no provision on the execution of a search warrant. It is believed that there should be some reasonable period in which a warrant should be executed and returned. Experience teaches that normally search warrants have little effect if they are not promptly served. They should

[2] In addition, "[a] search warrant may be executed at any reasonable time of the day or night, but shall be executed in the daytime if practicable. No evidence seized under a search warrant shall be suppressed because the warrant was executed in the nighttime." WIS. STAT. § 963.06 (1967). This provision was removed with the 1969 revision.

> not be held by an officer and served at his whim. Various states have adopted times different from the federal requirements in F.R.Cr.P. 41(d) which has a 10-day limitation. The Council, after consultation with law enforcement authorities, felt 5 days was a reasonable period.

Judicial Council Note, 1969, § 968.15. The legislature also added WIS. STAT. § 968.17, which requires the return of the warrant, along with a written inventory, within forty-eight hours after execution.

*The Pre-**Sveum** Cases*

Only a few published cases deal with these statutes. In ***State v. Meier***, 60 Wis. 2d 452, 210 N.W.2d 685 (1973), the court addressed the forty-eight hour return limit of WIS. STAT. § 968.17(1). Police executed a warrant on the same day it issued, but returned it five days later. The circuit court determined that, since a weekend interceded, the warrant's return complied with the forty-eight-hour return limit. Without directly deciding whether the return complied with the statute, the supreme court concluded that any noncompliance "was ministerial in nature and was not error which should affect the validity of the search." ***Meier***, 60 Wis. 2d at 459. The court noted that a prompt return, while safeguarding property rights, does not implicate privacy rights since the invasion has already occurred and, moreover, there was nothing in the record showing prejudice to the defendant's rights.[3] ***Id.***

[3] ***State v. Elam***, 68 Wis. 2d 614, 229 N.W.2d 664 (1975), dealt with subsec. (2) of WIS. STAT. § 968.17, which requires that any transcript upon which the warrant is based be filed with the court clerk within five days of execution. The transcript was filed more than ten months late. Citing ***State v. Meier***, 60 Wis. 2d 452, 210 N.W.2d 685 (1973), and WIS. STAT. § 968.22, the court concluded that the filing of the transcript was ministerial and that the defendant suffered no prejudice, as he had almost six weeks to review the transcript. ***Elam***, 68 Wis. 2d at 620.

In ***State v. Edwards***, 93 Wis. 2d 44, 286 N.W.2d 369 (Ct. App. 1979), *reversed*, 98 Wis. 2d 367, 297 N.W.2d 12 (1980), the court addressed the five-day execution limit of WIS. STAT. § 968.15(1). The police executed a warrant four days after issuance. The defendant argued that the search failed to meet the warrant's command that it be executed "forthwith." The state argued that, if a warrant is executed within the five-day statutory limit, the execution is timely per se. The court of appeals rejected the state's argument, reasoning that "the statute merely sets a maximum time period" and that the test for timeliness should be (1) whether the probable cause upon the warrant's issuance still continued at execution and (2) whether the delay was unfairly prejudicial. ***Edwards***, 93 Wis. 2d at 47, 49.

In reversing the court of appeals and rejecting its test for timeliness, the supreme court considered compliance with WIS. STAT. § 968.15 to be the "threshold" inquiry. ***Edwards***, 98 Wis. 2d at 371. Statutory compliance is required. ***Id.*** at 375-76. It is not, however, necessarily sufficient. ***Id.*** at 372, 375-76. Even if the execution is timely under the statute, a delay could result in a loss of probable cause, rendering the search constitutionally impermissible.[4] ***Id.*** at 372. The court therefore held that the execution of a search warrant is timely when (1) the warrant's execution complies with § 968.15 and (2) if such

[4] Although primarily concerned with a warrant's execution, ***Edwards*** also briefly dealt with a return issue. "The defendant impliedly argues that, since the return of the warrant was filed several hours after the five-day anniversary of the date and hour of issue, the warrant had expired." ***State v. Edwards***, 98 Wis. 2d 367, 371, 297 N.W.2d 12 (1980). Rejecting this contention, the court held that the five-day period begins to run on the day after the warrant is issued. ***Id.***

compliance is found, the probable cause upon issuance still exists at execution.[5] ***Edwards***, 98 Wis. 2d at 375-76. The court concluded that the search complied with § 968.15, that the defendant did not show that probable cause had dissipated before execution, and that the evidence, therefore, should not be suppressed.[6] ***Edwards***, 98 Wis. 2d at 378.

*The **Sveum** Decision*

This brings us to ***Sveum***, upon which the circuit court based its decision. In ***Sveum***, the defendant's former girlfriend believed that he was stalking her. Police obtained a warrant to install a GPS device on his vehicle. The warrant required removal of the device as soon as the objectives of the surveillance were accomplished, but not to exceed sixty days. The next day, police installed the device and, because of the limited battery life, had to replace it twice. Thirty-five days after the first installation, police removed the device for the final time but failed to return the warrant within the statutory time limits. Based in part on the GPS data, the defendant was eventually arrested and charged with aggravated stalking. He moved to suppress the evidence on multiple grounds.

[5] Consistent with this test is the proposition that, even when the execution of a search warrant passes muster under the Fourth Amendment, it does not necessarily mean that the search is valid. Constitutional provisions serve as the "floor" with regard to the protection of rights, whereas the Wisconsin Legislature may choose to enact statutes that afford greater protection. ***State v. Koopmans***, 202 Wis. 2d 385, 399-400, 550 N.W.2d 715 (Ct. App. 1996), *aff'd*, 210 Wis. 2d 670, 563 N.W.2d 528 (1997) (statutes "may accord greater protections than the minimums" that are set by the constitution).

[6] The court rejected the argument that the search was not conducted "forthwith." ***Edwards***, 98 Wis. 2d at 374. After noting that the "forthwith" language was illustrative, not mandatory, the court reasoned that the five-day execution limit of the statute satisfied the "forthwith" language in any event. ***Id.***

Upholding the circuit court's denial of the motion, the supreme court rejected Sveum's argument that the failure to comply with the statutory return and inventory procedures justified suppression of the evidence. ***Sveum***, 328 Wis. 2d 369, ¶¶68-72. The court pointed out that a prompt return of the warrant and inventory "safeguards the property rights of individuals" by providing the property owner with timely access and control of the seized property. ***Id.***, ¶¶68-69 (citation omitted). A failure, however, to return the warrant "within the confines of [WIS. STAT.] §§ 968.15 and 968.17 do[es] not render the execution of the [warrant] unreasonable. The timely return of a warrant is 'a ministerial duty which [does] not affect the validity of the search absent prejudice to the defendant.'" ***Sveum***, 328 Wis. 2d 369, ¶69 (citation omitted).

The court held that the defendant failed to show that his substantial rights were prejudiced "by law enforcement's failure to comply with the procedural return statutes." ***Id.***, ¶70. Because police only obtained electronic data, and did not seize any tangible property, safeguarding the property prior to its return was not an issue. ***Id.*** Further, the defendant had access to and control of his vehicle at all times. ***Id.***

After concluding that the violation of the return limit was not prejudicial, the court went on to explain why there was also no prejudice from any violation of the execution limit. ***Id.***, ¶71. The court stated:

> Similarly, we are not persuaded that Sveum's substantial rights were violated by the officers' failure to execute and return the warrant within 5 days after the date of issuance. *See* Wis. Stat. § 968.15.

Sveum, 328 Wis. 2d 369, ¶71. In support of its conclusion that the thirty-five-day-long search was only a technical violation and did not cause prejudice to Sveum's

rights, the court pointed out that the Federal Rules of Criminal Procedure expressly permit warrants for tracking devices to be used for up to forty-five days. ***Sveum***, 328 Wis. 2d 369, ¶71; *see* FED. R. CRIM. P. 41(e)(2)(C).

The ***Sveum*** court summarized its conclusions:

> [B]ecause we conclude that the failure to comply with the requirements of Wis. Stat. §§ 968.15 and 968.17 did not prejudice [defendant's] substantial rights, the effect of the error is cabined by Wis. Stat. § 968.22. Section 968.22 provides that unless an error in the warrant affects a substantial right of the defendant, the error does not permit the suppression of evidence.

Sveum, 328 Wis. 2d 369, ¶72.

Notably, the court did not discuss the provision in WIS. STAT. § 968.15(2) voiding a warrant not executed within five days of issuance, nor did it address the two-part test for the timeliness of a warrant's execution set forth in ***Edwards***. ***Sveum***, 328 Wis. 2d 369, ¶71.

The Conflict between WIS. STAT. § 968.15 and ***Sveum***

This appeal turns on the interpretation of WIS. STAT. § 968.15. The primary source of statutory interpretation is the language of the statute itself. ***Grace Episcopal Church v. City of Madison***, 129 Wis. 2d 331, 336, 385 N.W.2d 200 (Ct. App. 1986). Courts use the common, ordinary, and accepted meaning of statutory language, except for words or phrases that are specially defined or technical. ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110.

Neither party argues that WIS. STAT. § 968.15 is ambiguous. Its terms are specific and compulsory. Subsection (1) states that the warrant "must be

executed and returned not more than 5 days" after issuance. The term "must" is mandatory. *See* ***Pries v. McMillion***, 2010 WI 63, ¶29, 326 Wis. 2d 37, 784 N.W.2d 648 ("must" and "shall" are mandatory terms). Here, police waited ten days before installing the device and then removed it four days later. Whether the date of execution is considered to be when the device was installed or removed, it was a violation of § 968.15(1).

Subsection (2) of WIS. STAT. § 968.15 states that, if five days pass without execution, the warrant "shall" be void, and it "shall" be returned to the judge. The term "shall" is mandatory. *See* ***Pries***, 326 Wis. 2d 37, ¶29. By voiding the warrant, the legislature has specified a penalty for noncompliance. The existence of such a penalty favors a mandatory interpretation. *See* ***Village of Elm Grove v. Brefka***, 2013 WI 54, ¶26, 348 Wis. 2d 282, 832 N.W.2d 121 (a penalty on a failure to meet statutory time limit indicates that the limit is mandatory).

It is noteworthy that, through the penalty, WIS. STAT. § 968.15 distinguishes executions from returns. Subsection (1) applies the five-day limit to both executions and returns. The voiding consequence of subsec. (2), however, only applies to executions. The distinction suggests that promptness carries greater importance for a warrant's execution than its return. This makes sense. As ***Meier***, 60 Wis. 2d at 459, explained, the return of a warrant is merely ministerial to safeguard property rights. By the time the return limit is relevant, the invasion of privacy is done.

The timeliness of executing a warrant, however, implicates other protected rights. A core requirement of a search warrant is probable cause, which is inconstant and can be fleeting. ***State v. Ehnert***, 160 Wis. 2d 464, 469, 466

N.W.2d 237 (Ct. App. 1991) ("[p]robable cause is a fluid concept"). The ***Edwards*** court noted the importance of a timely execution:

> The element of time can admittedly affect the validity of a search warrant. Since it is upon allegation of presently existing facts that a warrant is issued, it is essential that it be executed promptly, "in order to lessen the possibility that the facts upon which probable cause was initially based do not become dissipated." If the police were allowed to execute the warrant at leisure, the safeguard of judicial control over the search which the fourth amendment is intended to accomplish would be eviscerated. Thus, a search pursuant to a "stale" warrant is invalid.

Edwards, 98 Wis. 2d at 372 (quoting ***United States v. Bedford***, 519 F.2d 650, 655 (3d Cir.) (1975)).[7] Making a warrant self-voiding after five days recognizes, and helps to protect against, the ever-changing and time-sensitive nature of probable cause.[8]

In this case, the execution/return distinction is the crux of Pinder's argument and serves as his basis for distinguishing ***Sveum***. Pinder points out that,

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[7] Other courts have concluded that the execution of a warrant within the statutory time period "may not be excused as a mere ministerial or clerical aspect" of search warrant procedure. *See* ***California v. Clayton***, 22 Cal. Rptr. 2d 371, 375 (Cal. Ct. App. 1993).

[8] Further pointing up the importance of timeliness in executing a search warrant is a distinction between arrest and search warrants:

> [I]t is useful to recall that probable cause to search is of a somewhat different character than probable cause to arrest. The latter is concerned only with the probability that a particular person has committed an offense (a past fact), while the former is concerned with the probability that particular items are *now* to be found in a particular place. Unique to the search warrant area, therefore, is the so-called "stale" probable cause problem, which bears directly upon the issue [of a delayed execution].

2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 4.7(a) (5th ed. 2017) (footnote omitted).

in ***Sveum***, the device was installed on the day after the warrant issued, plainly within the five-day limit. ***Sveum*** did not, however, hold or even imply that the execution of the warrant occurs on the first day of a multiday search. Although ***Sveum*** did not expressly address whether the execution occurs on the initiation or completion of a search, the court discussed execution only in terms of the thirty-five-day search. *See* ***Sveum***, 328 Wis. 2d 369, ¶¶66-72.

The only point made by the State with regard to WIS. STAT. § 968.15 is that, contrary to Pinder's position, ***Sveum*** addressed not just returns under WIS. STAT. § 968.17, but also executions under § 968.15. The State argues that ***Sveum*** in fact held "that a violation of either statute did not entitle Sveum to suppression" of the seized evidence. Apparently because it believes that ***Sveum*** indisputably controls the late execution issue, the State does not refer to the voiding provision of subsec. (2). The State spends most of its brief explaining why the search here was conducted reasonably under the reasonableness analysis of ***Sveum***.

As to Pinder's primary argument, although ***Sveum*** did not explicitly address whether the initiation of the search or its completion, when a multiday search is involved, constitutes the execution, the language and logic of the search warrant statutes at least imply that "execution" means the completion, not just the beginning, of the search.[9] WISCONSIN STAT. § 968.17(1) requires the return of the warrant "within 48 hours after execution." If "execution" meant just the initiation

[9] Depending on the statutory language, some courts have concluded that the determination of when a search warrant was executed is the time at which the search began, not when it ended. *See* ***Yanez-Marquez v. Lynch***, 789 F.3d 434, 466 n.19 (4th Cir. 2015); ***State v. Callaghan***, 576 P.2d 14, 18 (Ore. Ct. App. 1978); ***State v. Kern***, 914 P.2d 114, 116 (Wash. Ct. App. 1996) (a search is timely "so long as the search begins before the warrant expires and so long as probable cause continues through completion of the search").

of the search, no search that lasted more than two days could comply with the forty-eight hour provision. Similarly, no search that was initiated within five days, but lasted for more than five days, could comply with WIS. STAT. § 968.15(1), which requires return within that time. Moreover, interpreting "execution" to mean completion of the search would better support the purpose of the limit, i.e., ensuring that probable cause existed throughout the performance of the search.

Furthermore, we agree with the State and the circuit court that ***Sveum***'s language is broad enough to encompass executions in addition to returns. Indeed, a significant portion of the court's analysis centers on a warrant's execution and its reasonableness. ***Sveum***, 328 Wis. 2d 369, ¶¶53-55, 58, 68-72. The court generally stated that the violations at issue were of "the Wisconsin statutes governing search warrants" and specifically stated that Sveum's rights were not violated by the failure to "execute and return" the warrant within five days. ***Id.***, ¶¶58, 71. ***Sveum*** approved of a search period that significantly exceeded five days, expressly concluding that the thirty-five-day length of the search was reasonable and that the technical failures to comply with WIS. STAT. §§ 968.15 and 968.17 did not permit the suppression of the evidence per WIS. STAT. § 968.22. ***Sveum***, 328 Wis. 2d 369, ¶¶58, 67, 72. We are bound by all statements of the supreme court. ***Zarder v. Humana Ins. Co.***, 2010 WI 35, ¶58, 324 Wis. 2d 325, 782 N.W.2d 682.

That said, as noted above, the ***Sveum*** court did not address the voiding provision of WIS. STAT. § 968.15(2), which is no small matter. In addition, the ***Sveum*** court did not address the interplay with WIS. STAT. § 968.22, and specifically, how a time limit on the execution of a warrant, which depends on

probable cause for its validity and is presumably a critical requirement of a search warrant, fits into the category of a "technical irregularity."[10]

Some courts have concluded that, by enacting a statutory time limit, the legislature has answered the dissipation-of-probable-cause question, i.e., it is presumed that probable cause dissipates after the specified period of time. *See, e.g.*, ***State v. Miguel***, 101 P.3d 214, 216 (Ariz. Ct. App. 2004); ***Spera v. State***, 467 So. 2d 329, 331 (Fla. Dist. App. 1985) ("If the police were allowed to execute the warrant at leisure, the safeguard of judicial control over the search which the fourth amendment is intended to accomplish would be eviscerated." (citation omitted)).

When there is a voiding provision, courts strictly enforce the time limit on executions. In ***State v. Evans***, 815 S.W.2d 503 (Tenn. 1991), the Tennessee Supreme Court interpreted a statutory five-day-execution limit similar to Wisconsin's (including a voiding provision). It held that, if the warrant was executed within five days, there is a rebuttable presumption that the warrant retained the probable cause attributed to it upon issue, but that the "[e]xecution of a warrant beyond the outer limits fixed by the statute renders the warrant impermissibly void." ***Id.*** at 505-06. This analysis appears to be consistent with that set forth by the Wisconsin Supreme Court in ***Edwards***. *See also* ***Sgro v.***

[10] Technical irregularities often involve clerical and typographical matters. *See, e.g.*, ***State v. Rogers***, 2008 WI App 176, ¶17, 315 Wis. 2d 60, 762 N.W.2d 795 (warrant incorrectly identified the car; nowhere was the correct car identified; court holds that the "mistakes on the face of the warrant" were technical irregularities under WIS. STAT. § 968.22); ***State v. Nicholson***, 174 Wis. 2d 542, 548-49, 497 N.W.2d 791 (Ct. App. 1993) (warrant incorrectly identified the residence; court held it to be a technical irregularity that did not affect the defendant's rights). They do not encompass more significant defects. *See, e.g.*, ***State v. Tye***, 2001 WI 124, ¶19, 248 Wis. 2d 530, 636 N.W.2d 473 (warrant lacked the oath or affirmation, which is a critical requirement of any search warrant; court held it not to be a technical irregularity).

United States, 287 U.S. 206, 210-11 (1932) (per statute, warrant was void because it was not executed within ten days); ***People v. Brocard***, 216 Cal. Rptr. 31, 33 (Cal. Ct. App. 1985) (after ten-day statutory time limit was exceeded and warrant was void, the magistrate must make a finding that probable cause still exists in order to reissue the warrant or issue a new warrant). The parties cite no cases, and we find none, upholding the validity of a warrant when it is executed past the statutory time limit and the statute expressly voids an unexecuted warrant.

When there is no voiding provision, some courts are disinclined to strictly enforce the time limit, provided that probable cause has not gone stale. In South Dakota, there was a ten-day limit to execute a warrant, but no voiding provision. ***State v. Miller***, 429 N.W.2d 26 (S.D. 1988). The South Dakota Supreme Court upheld a search that was conducted past ten days, provided that probable cause still existed at execution. ***Id.*** at 34-35. The court reasoned that the ten days in which an officer "shall" conduct the search was not "a matter of constitutional dimensions" and that its purpose was to guard against stale probable cause. ***Id.*** "The ten-day rule was broken, but the legislative intent behind the rule was not infringed. The letter, not the spirit, of the law was violated." ***Id.*** at 35.

Here, given the voiding provision, it appears that under the Wisconsin statute, the letter of the law was violated. *See* ***Wood v. City of Madison***, 2003 WI 24, ¶38, 260 Wis. 2d 71, 659 N.W.2d 31 ("[C]ourts should not rewrite the clear language of the statute" and any change in the statutory language

"lies with the legislature.").[11] In that case, does Wisconsin require reissuance with a new probable cause determination? Or, is the mandatory and voiding language merely the legislature's attempt to ensure that probable cause exists, which can be overlooked if in fact probable cause does exist through execution of the search? For these reasons, we certify this question for the supreme court to determine whether the statutory provision rendering the warrant void if not executed within five days is in conflict with the supreme court's decision in ***Sveum***.

Pinder's Jury Instruction Argument

After sentencing, Pinder moved for postconviction relief, arguing that trial counsel was ineffective by not objecting to erroneous jury instructions on burglary. After holding a ***Machner***[12] hearing, the circuit court denied the motion, essentially concluding that any error was "harmless" because there was "overwhelming" evidence of Pinder's guilt and the jury would have convicted him even if the instructions were error-free. Whether it is necessary to decide this issue may depend on the resolution of the search warrant issue. If it must be decided, it appears that well-established jury instruction law will resolve it and that the issue, by itself, would not be worthy of certification. Therefore, we do not address it further here. Of course, if the supreme court were to accept the

[11] Recognizing that technological advancements may require additions or modifications to the statutes governing searches by electronic or other means, the ***Sveum*** court called upon the legislature to weigh in on these issues and enact legislation, referring again to the Federal Rules that expressly authorize warrants for extended searches using tracking technology. ***State v. Sveum***, 2010 WI 92, ¶¶77, 79, 328 Wis. 2d 369, 787 N.W.2d 317 (Crooks, J., and Ziegler, J., concurring respectively).

[12] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

certification, it acquires jurisdiction of the entire appeal, including all issues raised before us. ***State v. Denk***, 2008 WI 130, ¶29, 315 Wis. 2d 5, 758 N.W.2d 775.

CONCLUSION

We are faced with at least two paths: (1) WIS. STAT. § 968.15 establishes both a bright-line procedural mandate (a warrant *must be executed* within five days) and an equally clear consequence for noncompliance (a warrant not so executed *shall be void*), leading to the conclusion that the warrant was void before the device was installed or (2) under ***Sveum***, provided that the search is conducted reasonably per the factors discussed, violations of the statutory five-day execute and return limitations are "technical irregularities" that will not require suppression of the evidence as long as the delayed execution did not affect the substantial rights of the defendant.

We believe the supreme court should accept certification of this appeal. A decision from the supreme court will help "develop, clarify [and] harmonize the law" on the validity of search warrants that are executed in an untimely manner. WIS. STAT. RULE 809.62(1r)(c). Given the constitutional and public policy considerations involved, the supreme court is the appropriate body to guide the courts and counsel of Wisconsin in the application of the search warrant statutes and related case law, including ***Sveum***.