COURT OF APPEALS
DECISION
DATED AND FILED

May 19, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-2593-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MCKINLEY WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: BONNIE L. GORDON, Judge. *Affirmed.*

Before Wedemeyer, Schudson and Curley, JJ.

WEDEMEYER, P.J. McKinley Williams appeals from a judgment entered after he pled no contest to carrying a concealed weapon, contrary to § 941.23, STATS. He claims that the trial court erred in denying his motion to suppress. He argues that the evidence should have been suppressed because it was discovered incident to a stop which was conducted in violation of his Fourth

Amendment rights. Because the officers acted in good faith when they conducted the search, the trial court did not err in denying Williams's motion to suppress, and we affirm.

I. BACKGROUND

On December 29, 1994, at approximately 2:30 p.m., City of Milwaukee Police Officers Paul Vierck and Steven Vento were patrolling the area of 12th and Center Streets. They observed a Cadillac whose license plate corresponded with a vehicle that had been reported stolen in an armed robbery a few days earlier. The Cadillac's license plate appeared on a "hot sheet" that the officers had updated immediately prior to their shift at 6:30 a.m. The officers observed a driver and passenger in the vehicle and considered both potential suspects in the armed robbery. The officers stopped the car. Vierck approached the driver while Vento approached the passenger. Williams was the passenger.

Vento ordered Williams to exit the vehicle and then began a pat-down search for safety reasons. Williams told Vento that he had something in his pocket. Vento discovered a semiautomatic handgun in Williams's coat pocket. Williams was charged with carrying a concealed weapon. During the subsequent investigation, the officers discovered that the Cadillac had recently been returned to its owner, who was driving the car at the time the stop was made. There is no specific evidence in the record to show exactly when the car was recovered, though the State concedes that it was recovered prior to the time the officers commenced their shift.

Williams filed a motion to suppress, claiming that the ***Terry***[1] stop was illegal because it was based on outdated and incorrect information. The trial court denied the motion, ruling that the officers acted in good faith. He then entered a no contest plea. Judgment was entered and he now appeals.

II. DISCUSSION

A motion to suppress evidence raises a constitutional question, presenting a mixed question of fact and law. To the extent the trial court's decision involved findings of evidentiary or historical facts, those findings will not be overturned unless they are clearly erroneous. ***State v. Krier***, 165 Wis.2d 673, 676, 478 N.W.2d 63, 65 (Ct. App. 1991). The application of constitutional and statutory principles to the facts found by the trial court, however, presents a matter for independent appellate review. ***Id.***

This case presents an issue of first impression: whether, when only two days have passed between the report of a stolen car and the police stopping of that car, evidence discovered incident to the investigatory stop should be suppressed where the stop was performed in good-faith reliance on a police "hot sheet" and where, between the time the police received the "hot sheet" information and the time of the stop, the information on the hot sheet had become outdated and incorrect. In addressing this issue, we apply the good faith exception to the exclusionary rule as articulated in ***United States v. Leon***, 468 U.S. 897, 922-24 (1984). Based on ***Leon***, we conclude that the police officers in the instant case acted in good-faith reliance on their hot sheet when they conducted the

[1] *See* ***Terry v. Ohio***, 392 U.S. 1 (1968).

investigatory stop. Accordingly, the evidence discovered pursuant to the stop should not be suppressed.

In ***Leon***, the United States Supreme Court created a good faith exception to the exclusionary rule. ***Id.*** The exception applies in situations where the exclusion of evidence would not promote the purpose of the exclusionary rule to deter police conduct that violates the Fourth Amendment. ***Id.*** The good faith exception to the exclusionary rule has been applied in one opinion from this court. *See* ***State v. Collins***, 122 Wis.2d 320, 325-27, 363 N.W.2d 229, 232 (Ct. App. 1984). Another court of appeals opinion, however, concluded that Wisconsin has not adopted the ***Leon*** exception. *See* ***State v. Grawien***, 123 Wis.2d 428, 432, 367 N.W.2d 816, 818 (Ct. App. 1985). ***Grawien*** declined to apply the exception, ruling that our supreme court in ***Hoyer v. State***, 180 Wis. 407, 193 N.W. 89 (1923), barred the good faith exception.

We resolve the conflict in favor of applying the ***Leon*** exception for two reasons: (1) the factual scenario presented in the instant case is more akin to ***Collins*** than to ***Grawien***; and (2) our analysis of all the pertinent law leads us to conclude that the Wisconsin Supreme Court has not rejected the ***Leon*** case.

A. ***Collins*** *Case Analysis.*

Williams asserts that the evidence should be suppressed because it was discovered incident to an illegal ***Terry*** stop. He argues that the ***Terry*** stop was illegal because the vehicle had been returned to the rightful owner, who was driving it at the time of the stop. Accordingly, Williams claims that the police officers did not have reasonable suspicion sufficient to justify a ***Terry*** stop.

Terry and its progeny provide that a law enforcement officer may stop a person for a reasonable length of time when the officer reasonably suspects that the person has committed, is committing or is about to commit a crime. *See* ***id.***; *see also* § 968.24, STATS. This same standard applies to stops of automobiles. ***Jones v. State***, 70 Wis.2d 62, 68-69, 233 N.W.2d 441, 444-45 (1975). Officers may stop an automobile if they have an articulable and reasonable suspicion that either the vehicle or an occupant is subject to seizure for a violation of the law. ***State v. Washington***, 120 Wis.2d 654, 660, 358 N.W.2d 304, 307 (Ct. App. 1984), *aff'd,* 134 Wis.2d 108, 396 N.W.2d 156 (1986). The officers' actions are measured against an objective standard. ***State v. Guzy***, 139 Wis.2d 663, 675, 407 N.W.2d 548, 554, *cert. denied*, 484 U.S. 979 (1987). The reasonableness of an investigative stop depends on the facts and circumstances that are present at the time the stop takes place. ***Id.*** at 679, 407 N.W.2d at 555. Williams argues that the officers could not meet the ***Terry*** standard because the information they relied on to conduct the stop was incorrect.

Despite the fact that the grounds upon which the officers relied to conduct the stop turned out to be invalid, the evidence is admissible under the good faith exception to the exclusionary rule. *See* ***Collins***, 122 Wis.2d at 325-27, 363 N.W.2d at 232. Suppressing evidence in a situation where a reasonable officer would believe that a ***Terry*** stop should be conducted would not help to deter misconduct by arresting officers, because there is no misconduct to deter. *See* ***id.*** Here, the officers had a good faith basis to conduct the stop.

The car in which Williams was riding had been reported stolen two days prior to the stop. Although the car had been recovered before Officers

Vierck and Vinto began their shift,[2] the updated "hot sheet" information they received just prior to starting their shift at 6:30 a.m. still listed the car as stolen. Eight hours later, while on the same shift, they observed a vehicle whose license plate matched the "hot" car stolen in the armed robbery. Under these facts and circumstances, we agree that the officers acted in good faith belief that they had reasonable suspicion to stop the car. In light of the information available at the time they acted, the police were stopping a car taken in an armed robbery. The two individuals in the car were considered potential suspects. The officers were concerned that they still might be armed and dangerous. A pat-down search conducted for the officers' safety was performed, which resulted in the discovery of the concealed weapon.

It was reasonable for the officers to rely on the information available to them. This case does not present a situation where the car was stolen months or weeks earlier. The case to which Williams directs our attention, ***Carter v. State***, 305 A.2d 856 (Md. Ct. Spec. App. 1973), is distinguishable. ***Carter*** involved a situation where the officers relied on outdated records to conduct a stop on a vehicle that had been stolen and recovered three months prior to the stop. *See* ***id.*** at 858. It would be more difficult to conclude that the officers were justified in relying on their hot sheet if the car in which Williams was riding had been stolen and recovered three months prior to the stop. Records that are not updated for three months are unreliable and cannot form the basis for a good faith act. In this case, however, the car was stolen only two days prior to the stop. Under these

[2] The record is unclear whether the car was recovered by the police, by the owner, or by some other person.

circumstances, it was objectively reasonable for the officers to presume that their hot sheet, which still listed the car as stolen, was accurate.

We acknowledge that another published case from this court declined to apply the good faith exception to the exclusionary rule. *See* ***Grawien***, 123 Wis.2d at 432, 367 N.W.2d at 818. The facts in the instant case, however, are more aligned with ***Collins*** than with ***Grawien***. In ***Collins***, an officer arrested the defendant without knowing that the warrant had been previously executed. ***Collins***, 122 Wis.2d at 325-27, 363 N.W.2d at 232. In ***Grawien***, a warrant was declared invalid because it was issued by an individual without authority to do so. ***Grawien***, 123 Wis.2d at 430-31, 367 N.W.2d at 817. The instant case is different from both of these cases because it did not involve an invalid warrant. However, we believe it is more akin to ***Collins*** because, like the instant case, ***Collins*** involved police reliance on police-source information. In ***Grawien***, the police reliance was on non-police source information. Accordingly, we follow the ***Collins*** analysis and apply the good faith exception.

Collins has been precedential authority since 1984 and has not been overruled or limited. Moreover, ***Collins*** does not directly acknowledge the ***Hoyer*** case, which ***Grawien*** cites as authority for refusing to apply the good faith exception. We interpret ***Collins***'s failure to mention ***Hoyer*** as a recognition of the development of doctrines, including the good faith exception, since ***Hoyer*** was decided in 1923. This interpretation is discussed in further detail in the remainder of this opinion.

B. ***Leon*** *Case Analysis.*

We acknowledge that the Wisconsin Supreme Court has not explicitly adopted the ***Leon*** rule although it has had several opportunities to do so.

See ***State v. Higginbotham***, 162 Wis.2d 978, 988, 471 N.W.2d 24, 28-29 (1991) (declining to consider whether to adopt the "good faith" exception to the exclusionary rule in light of determination that there was probable cause for the issuance of the search warrant); ***State v. DeSmidt***, 155 Wis.2d 119, 124-25, 454 N.W.2d 780, 782 (1990); ***State v. Brady***, 130 Wis.2d 443, 453-54, 388 N.W.2d 151, 156 (1986) (concluding that ***Brady*** is not the appropriate case to decide whether to adopt a good faith exception to the exclusionary rule). We also acknowledge that this court, with the exception of the ***Collins*** case, has declined to apply the ***Leon*** good faith exception on the basis that ***Hoyer*** prevents us from doing so. *See* ***Grawien***, 123 Wis.2d at 432, 367 N.W.2d at 818. Upon a reexamination of all the pertinent law, we conclude that ***Hoyer*** does not preclude the application of the ***Leon*** exception.

The ***Hoyer*** case, decided in 1923, stands for the proposition that when police officers violate an individual's constitutional right to be free from illegal search and seizure, any evidence discovered must be suppressed, i.e., the exclusionary rule should apply. *See* ***id.***, 180 Wis. at 416-17, 193 N.W. at 92. ***Hoyer*** also acknowledges, however, that Wisconsin has consistently followed federal law on Fourth Amendment issues because the state and federal search and seizure constitutional provisions are virtually identical. *See* ***id.***, 180 Wis. at 416, 193 N.W. at 92. In 1984, the United States Supreme Court decided ***Leon***, adopting what has been termed the good faith exception to the exclusionary rule. *See* ***id.***, 468 U.S. at 922-24.

Our review of ***Hoyer***, ***Leon***, and subsequent cases leads us to conclude that the good faith exception applies under the Wisconsin Constitution. When ***Leon*** was decided, the Supreme Court did not find it necessary to overrule its earlier Fourth Amendment decisions applying the exclusionary rule. Rather,

the exclusionary rule remains the law, but now has exceptions to the general rule, under certain facts and circumstances. Similarly, we need not reject ***Hoyer*** in order to conclude that an exception to the general rule of exclusion has been created. Under certain facts and circumstances, evidence unconstitutionally obtained should not be excluded. These facts and circumstances were described in ***Leon***, i.e., where police officers act in good-faith reliance on information to conduct an arrest (or investigatory stop), and where excluding the evidence procured would not operate to deter police conduct. *See* ***id.***, 468 U.S. at 922-24. In the instant case, the police officers acted in good faith reliance on the updated hot sheet to conduct the investigatory stop. Excluding the weapon discovered on Williams would not serve any deterrent purpose.

Although our supreme court has not formally adopted the good faith exception, it has offered some guidance on the issue, which supports our conclusion that applying the ***Leon*** exception is consistent with existing case law. In ***State v. Tompkins***, 144 Wis.2d 116, 423 N.W.2d 823 (1988) our supreme court recognized that ***Hoyer*** represents a case in which the court conformed the law relating to the state constitutional search and seizure provisions to that developed by the United States Supreme Court with respect to the Fourth Amendment:

> [A]lthough *Hoyer* was decided long before the United States Supreme Court held the provisions of the fourth amendment through the fourteenth amendment applicable to the states in *Mapp v. Ohio*, 367 U.S. 643 (1961), the Wisconsin Supreme Court accepted the United States Supreme Court's decisions and applied them to interpret Wisconsin Constitution art. I, sec. 11. In *Hoyer*, … the Wisconsin search and seizure provision was interpreted as consistent with the protections of the United States Constitution as interpreted by federal cases.

Tompkins, 144 Wis.2d at 134, 423 N.W.2d at 830-31. In conforming state search and seizure law to that developed under the federal Constitution, ***Hoyer*** was a

precursor of the approach that the Wisconsin Supreme Court has consistently followed in this area:

> Where the state and federal constitutional provisions at issue are virtually identical, this court has traditionally interpreted the state provision consistent with the protections afforded its federal counterpart. This has been particularly true with respect to the provisions at issue here. This court has held on numerous occasions that the standards and principles surrounding the fourth amendment are generally applicable to the construction of Art. I, Sec. 11.

DeSmidt, 155 Wis.2d at 130, 454 N.W.2d at 784 (citations omitted).

From this analysis, we conclude that our supreme court views ***Hoyer*** as conforming Wisconsin search and seizure law to that enunciated by the United States Supreme Court. Thus, ***Hoyer*** should not be viewed as an impediment to the adoption of the good faith exception to the exclusionary rule. It should be viewed as fully consistent with the development of the federal case law on this issue. For these reasons, we conclude that the ***Leon*** good faith exception to the exclusionary rule applies in the instant case. The evidence obtained incident to the investigatory stop should not be suppressed even though the information that formed the basis of the officers' grounds to conduct the stop had become outdated and incorrect. The officers acted in good faith reliance on the information, which provided them with reasonable suspicion to conduct the stop. Accordingly, we affirm.

By the Court.—Judgment affirmed.

Recommended for publication in the official reports.

No. 96-2593-CR(C)

CURLEY, J. *(concurring).* Although I share Judge Schudson's concerns with Judge Wedemeyer's extension of the ***Leon/Evans*** "good faith exception" to the Fourth Amendment's exclusionary rule to a non-warrant situation, I write separately to clearly express my view of this factually unusual case.

Like Judge Schudson, I am concerned by Judge Wedemeyer's application of the ***Leon/Evans*** "good faith exception" to the facts of this case for a number of reasons. Extension of the "good faith exception" to the facts of a non-warrant case which may implicate the record-keeping procedures of the police is a very large step for this court to take, and, as Judge Schudson suggests, is properly a task for the supreme court. *See* ***Cook v. Cook***, 208 Wis.2d 166, 188-89, 560 N.W.2d 246, 255-56 (1997) (supreme court's primary function is law defining and law development, while court of appeals primary function is error correcting). Therefore, although I take a somewhat different approach than Judge Schudson, I, too, choose not to apply the ***Leon/Evans*** "good faith exception" to the facts of this case.

I am concerned by the lack of factual findings in this case, and specifically, by the lack of a finding by the trial court concerning whether the police were ever actually notified of the car's recovery prior to Officers Vierck and Vento's stop of Williams's vehicle, and, if so, when. The record fails to reveal, and the trial court did not make a finding, of the details of whether, when, and how the police were notified of the car's recovery. If the police department had not been notified of the car's recovery, there clearly would have been no Fourth Amendment violation. Without the possibility that the police department

had been informed of the car's recovery prior to the stop of Williams's vehicle, and the imputation of that information to Officers Vierck and Vento through the "collective knowledge" doctrine, no danger of a Fourth Amendment violation is created. *See* ***State v. Middleton***, 135 Wis.2d 297, 312 n.7, 399 N.W.2d 917, 924 n.7 (Ct. App. 1986) (through the "collective knowledge" doctrine, one officer's knowledge of a fact is generally imputed to the entire police force, and in some instances, this benefits the suspect). In this case, the police department's knowledge that the car was no longer stolen, if imputed to Officers Vierck and Vento, might arguably destroy the reasonableness of their stop of Williams's vehicle. Therefore, I would have preferred to remand the case to the trial court for a finding of fact concerning if and when the police department was notified of the car's recovery.

Nevertheless, given the very narrow facts of this case, I would affirm for slightly different reasons than those given by Judge Schudson and Judge Wedemeyer. In cases addressing a possible Fourth Amendment violation involving a failure of the police department to update its records, other jurisdictions have required the State to show that the delay in updating the records was reasonable. *See* ***State v. Mance***, 918 P.2d 527, 544 (Wash. Ct. App. 1996). In the instant case, although the trial court failed to make a factual finding as to if, and when, the police department learned of the car's recovery, the police department could not have learned of the car's recovery more than approximately 48 hours before the stop of the vehicle, since it had only been reported as stolen approximately 48 hours earlier. Based on these unique facts, I would conclude as a matter of law that any delay in updating the police department's records was reasonable. Therefore, I would find that there was no Fourth Amendment violation and I would affirm the trial court.

SCHUDSON, J. *(concurring).* With inadequate attention to the record, cursory attention to a few Wisconsin cases, and no attention to ***Arizona v. Evans***, 514 U.S. 1 (1995), and its progeny (the critical cases on which this appeal may hinge), Judge Wedemeyer's opinion takes four extraordinary steps.

First, Judge Wedemeyer's opinion invokes the ***Leon*** good faith exception to the exclusionary rule despite this court's acknowledgment of the supreme court's apparent reluctance to do so, *see* ***State v. Grawien***, 123 Wis.2d 428, 432, 367 N.W.2d 816, 818 (Ct. App. 1985), and despite the fact that many states have rejected the ***Leon*** exception, *see* Leigh A. Morrissey, *State Courts Reject* ***Leon*** *on State Constitutional Grounds: A Defense of Reactive Rulings*, 47 VAND. L. REV. 917, 922-23 (1994).

Second, with no analysis, Judge Wedemeyer's opinion grafts the ***Leon*** good faith exception, developed in the context of a case involving a warrant, to the instant case in which no warrant was involved. It does so in an attempt to resolve a conflict between ***Grawien*** and ***State v. Collins***, 122 Wis.2d 320, 363 N.W.2d 229 (Ct. App. 1984), despite the fact that *both* ***Grawien*** and ***Collins*** were *warrant* cases. It does so without any acknowledgment that many courts—including those that *do* apply the ***Leon*** good faith exception in warrant cases—refuse to extend the exception to non-warrant cases. *See* 1 Wayne R. LaFave, SEARCH AND SEIZURE, § 1.3(g), at 92-96 (3d ed. 1996).[3]

[3] The difference between warrant and non-warrant cases may be crucial. After all, "reliance on a magistrate who determines the existence of probable cause [for issuance of a warrant] after careful consideration, cannot be compared to blind reliance on a [computer] device, the potential for error of which is known to everyone who has ever used one." Alitia F.

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Third, in the process of ignoring the distinction between warrant and non-warrant cases, Judge Wedemeyer's opinion neglects to identify whether Williams had the burden to demonstrate the impropriety of the police conduct (as ordinarily would be so in a challenge in a warrant case, *see* ***State v. Edwards***, 98 Wis.2d 367, 376-77, 297 N.W.2d 12, 16-17 (1980)), or the State had the burden to demonstrate the propriety of the police conduct (as ordinarily would be so in a non-warrant case, *see* ***State v. Milashoski***, 159 Wis.2d 99, 110, 464 N.W.2d 21, 25-26 (Ct. App. 1990), *aff'd*, 163 Wis.2d 72, 471 N.W.2d 42 (1991)).[4]

Stockwell, ***Arizona v. Evans****: Isaac Evans and the Supreme Court Get Caught Driving the Wrong Way*, 26 SW. U. L. REV. 1183, 1208 (1997).

LaFave concludes that "[t]he reasoning which was critical to the decisions in [***United States v. Leon***, 468 U.S. 897 (1984), and ***Massachusetts v. Sheppard***, 468 U.S. 981 (1984)] – especially that in with-warrant cases there is no need to deter the magistrate and usually no need to discourage the executing officer from relying upon the magistrate's judgment and actions – does not carry over to the without warrant situation." 1 Wayne R. LaFave, SEARCH AND SEIZURE, § 1.3(g), at 94 (3d ed. 1996). Similarly, many courts and other commentators also have concluded, as James P. Fleissner, a former prosecutor, has written, "***Leon*** assumed the existence of a warrant; it was, and remains, wholly inapplicable to warrantless searches and seizures." James P. Fleissner, *Glide Path to an "Inclusionary Rule": How Expansion of the Good Faith Exception Threatens to Fundamentally Change the Exclusionary Rule*, 48 MERCER L. REV. 1023, 1040 (1997).

The federal circuits are split, with most concluding that the ***Leon*** exception applies only in warrant cases. *See* ***United States v. Scales***, 903 F.2d 765 (10th Cir. 1990) (***Leon*** not applicable where police were not acting in reliance on a search warrant); ***United States v. Curzi***, 867 F.2d 36 (1st Cir. 1989) (good faith exception not available in case involving warrantless search); ***United States v. Winsor***, 846 F.2d 1569 (9th Cir. 1988) (***Leon***'s good faith exception does not extend to searches not conducted in reliance on a warrant); *see also* ***United States v. Morales***, 913 F. Supp. 132 (D.R.I. 1996); *but see* ***United States v. De Leon-Reyna***, 930 F.2d 396 (5th Cir. 1991) (good faith exception applies in cases not involving warrants).

[4] *See also* ***Commonwealth v. Hecox***, 619 N.E.2d 339, 343 (Mass. App. Ct. 1993) (holding that "where there is stale information or outmoded records that are demonstrably incorrect, the government has the burden of showing that it is not at fault in failing to update its records or to provide correct information"); ***Ott v. State***, 600 A.2d 111 (Md. 1992), declaring:

> The question whether a lapse of time was sufficiently short so that reliance by the police may properly be considered reasonable and in good faith may be a mixed question of law and fact. Moreover, the burden to establish the facts underlying that

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Fourth, without any analysis or acknowledgment of the substantial case law evolving from ***Leon/Evans*** principles, Judge Wedemeyer's opinion not only extends the good faith exception to a non-warrant case, but also to a situation involving the "collective knowledge" of police.[5] It does so based on a record that does not detail *why* the police did not have accurate information, and despite Chief Justice Rehnquist's plurality opinion in ***Evans*** clarifying that, in this regard, the ***Evans*** holding is limited. Chief Justice Rehnquist explained:

> The Solicitor General, as *amicus curiae,* argues that an analysis similar to that we apply here to court personnel also would apply in order to determine whether the evidence should

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> determination rests with the State. And the good faith exception does not serve to excuse the State of that burden. Since the State failed to meet its burden of going forward with evidence as to the amount of time reasonably required to clear the computer of outdated information, not to mention the burden of persuasion on the issue, the trial court properly suppressed the evidence ….

Ott, 600 A.2d at 119 (citations omitted); ***State v. Moore***, 614 A.2d 1360, 1364 (N.J. Super. Ct. App. Div. 1992) (although "some delay in updating information is inherent and must be countenanced," even in a case involving a warrant, "where those records are demonstrably incorrect …, the State must carry the burden to establish justification for any administrative delay in their update"); ***State v. Mance***, 918 P.2d 527 (Wash. Ct. App. 1996):

> *The State had the burden of proving that the two-day delay between the attempted cancellation of the stolen vehicle report and Mance's arrest was reasonable.…* LaFave notes that most jurisdictions have adopted the following dichotomy: where the issue is the validity of a search or seizure conducted pursuant to a warrant, the burden of proof is on the defendant; but where a warrantless search or seizure is challenged, the prosecution bears the burden of proof.

Mance, 918 P.2d at 530 (emphasis added) (citation omitted).

[5] *See, e.g.,* ***State v. White***, 660 So.2d 664 (Fla. 1995), in which the Florida Supreme Court held that the "collective knowledge" rule holds police officers responsible for computer errors if the computer system is under police control but does not apply if the computer information was compiled by non-law enforcement agencies; ***State v. Mayorga***, 938 S.W.2d 81 (Tx. App. 1996), in which the Texas Court of Appeals reiterated that the ***Evans*** exception does not "extend … to errors committed by police personnel." ***Id.*** at 83-85; *see also* Alana Northrop, et al., *Police Use of Computers*, 23 J. CRIM. JUST. 259, 264 (1995) ("[P]olice officers report 'difficulty in getting incorrect computer-based information changed or corrected.'").

> be suppressed if police personnel were responsible for the error. As the State has not made any such argument here, we agree that "[t]he record in this case … does not adequately present that issue for the Court's consideration." Brief for United States as *Amicus Curiae* 13. Accordingly, we decline to address that question.

See ***Evans***, 514 U.S. at 15 n.5.[6]

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[6] Notably, however, numerous courts have concluded that the ***Leon*** exception is inapplicable in such circumstances. *See, e.g.,* ***Hecox***, 619 N.E.2d at 342-43 ("Most courts that have considered the question have held that ***Leon*** does not apply where an arrest is based on erroneous information supplied by the law enforcement authorities themselves," and does not apply where the information consists of "uncorrected, outdated police data."). Indeed this is so even in cases involving warrants. *See* ***State v. Greene***, 783 P.2d 829 (Ariz. Ct. App. 1989).

Further, in both warrant and non-warrant cases, and particularly in cases involving computerized data, the distinction between police and nonpolice can present additional, complicated issues. LaFave contends:

> One consequence of the ***Evans*** majority's narrow focus is that the Court has drawn a rather bold line between police and nonpolice actors in the system, when in real life no such line exists. As a general matter, it is fair to say that our processes of criminal justice are best understood if viewed as they actually are: as a system of interlocking stages and agencies, rather than as discrete bits and pieces. This is particularly true as to the matters here under consideration, as Justice Ginsburg's dissent in ***Evans*** so aptly illustrates:
>
> > In this electronic age, particularly with respect to record keeping, court personnel and police officers are not neatly compartmentalized actors. Instead, they serve together to carry out the State's information-gathering objectives. Whether particular records are maintained by the police or the courts should not be dispositive where a single computer database can answer all calls. Not only is it artificial to distinguish between court clerk and police clerk slips; in practice, it may be difficult to pinpoint whether one official, e.g., a court employee, or another, e.g., a police officer, caused the error to exist or persist.

1 LaFave, *supra*, § 1.8(e), at 267-68 (footnote omitted) (quoting ***Evans***, 514 U.S. at 29 (Ginsburg, J., dissenting)).

Although Justice Ginsburg expressed these views in her dissenting opinion in ***Evans***, her position appears to command a majority of the Supreme Court. As LaFave explains:

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"[T]he police may not rely upon incorrect or incomplete information when they are at fault in permitting the records to remain uncorrected or at fault in not informing themselves." ***Commonwealth v. Hecox***, 619 N.E.2d 339, 343 (Mass. App. Ct. 1993) (internal quotation marks and quoted source omitted). Thus, in cases involving the "collective knowledge" of police, it may be essential to determine the details of how a police department gains and maintains the information leading to stops, searches and seizures, and arrests. What was the source of the data? Who entered it? Who accessed the information and prepared it for patrol officers? How often was the information updated? Was the information usually accurate? And, in a case like this one: had the police experienced problems (chronic or otherwise) leading to stops of suspected stolen

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> Indeed, it may be said that a majority of the Court has made it rather clear that in an ***Evans***-type case exclusion is called for if the defendant makes an additional showing that the police (meaning the police agency, not the arresting officer) are at fault. This majority is made up of the two ***Evans*** dissenters plus the three-Justice group represented by the O'Connor concurrence, where this important limitation on ***Evans*** is put forward:
>
> > [T]he Court does not hold that the court employee's mistake in this case was necessarily the only error that may have occurred and to which the exclusionary rule might apply. While the police were innocent of the court employee's mistake, they may or may not have acted reasonably in their reliance on the record keeping system itself. Surely it would not be reasonable for the police to rely, say, on a record keeping system, their own or some other agency's, that has no mechanism to ensure its accuracy over time and that routinely leads to false arrests, even years after the probable cause for any such arrest has ceased to exist (if it ever existed).

1 LaFave, *supra*, § 1.8(e), at 269-70 (quoting ***Evans***, 514 U.S. at 16-17 (O'Connor, J., concurring)).

vehicles that proved not to be stolen, or failures to stop unsuspected vehicles that proved to be stolen?

Without the answers to questions such as these, no court can adequately address what have come to be considered the three issues under the ***Leon/Evans*** test: (1) "whether the purpose of the exclusionary rule will be served by suppressing the evidence;" (2) "whether the individuals who were responsible for the inaccurate record keeping are inclined to ignore or subvert the Fourth Amendment, such that the sanction of exclusion is required to control this behavior;" and (3) "whether the exclusion of the evidence would have a significant deterrent effect on the individuals responsible for the faulty record keeping." ***Bunse v. State***, 661 So.2d 389, 392 (Fla. Dist. Ct. App. 1995). Not surprisingly, therefore, "the decisions facing courts applying the good faith exception to warrantless searches and seizures often will require an involved, time-consuming inquiry. Determining good faith in cases not involving a warrant will be much more involved than cases in which there is a warrant, like ***Leon***." James P. Fleissner, *Glide Path to an "Inclusionary Rule": How Expansion of the Good Faith Exception Threatens to Fundamentally Change the Exclusionary Rule*, 48 MERCER L. REV. 1023, 1045 (1997).

Even in a case that involved a *one-day delay in the updating of a "hot sheet"* of recently reported stolen vehicles (resulting in the mistaken belief that the car in which the defendant was stopped was stolen), "whether the police are at fault in failing to correct their records is [first] a question of fact …." *See* ***State v. Mance***, 918 P.2d 527, 544 (Wash. Ct. App. 1996). Therefore, if Wisconsin were to embrace the ***Leon*** good faith exception to the exclusionary rule, then, consistent with ***Leon*** and ***Evans***, proper resolution of a challenge such as the one in the instant case would require a full factual record detailing: (1) the

circumstances surrounding the method, timing, and substance of data entry; (2) the specification of who — police personnel, court officials, or someone else — was responsible for the error; and (3) the overall reliability of the system. Alitia F. Stockwell, ***Arizona v. Evans****: Isaac Evans and the Supreme Court Get Caught Driving the Wrong Way*, 26 SW. U. L. REV. 1183, 1202-07 (1997). Without that factual record, it would be difficult, if not impossible, to properly consider the cautions explicitly and implicitly voiced by the plurality, concurring, and dissenting opinions in ***Evans***: that in a society in which police increasingly rely on and benefit from computerized information systems for effective crime-fighting, police must also accept corresponding constitutional responsibility for the accuracy of the information.[7] *See* Anderson M. Renick, *Orwellian Mischief – Extending the Good Faith Exception to the Exclusionary Rule:* ***Arizona v. Evans***, 25 CAP. U. L. REV. 705, 714-25 (1996).

"Misinformation which exists in police computer records not only places thousands of individuals at risk of constitutional rights violations, but also disserves law enforcement's interest in an accurate tool to carry out its duties." Renick, *supra*, at 726. Moreover, those who might quickly categorize decisions in cases like these as "pro" or "anti" police are missing an important point. Indeed,

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[7] *See*, *e.g.*, Justice O'Connor's concurring opinion in ***Evans***:

> In recent years, we have witnessed the advent of powerful, computer-based recordkeeping systems that facilitate arrests in ways that have never before been possible. The police, of course, are entitled to enjoy the substantial advantages this technology confers. They may not, however, rely on it blindly. With the benefits of more efficient law enforcement mechanisms comes the burden of corresponding constitutional responsibilities.

Id. at 17-18 (O'Connor, J., concurring).

while one commentator may be correct in pointing out that "data errors have proliferated as computerization has spread," Stockwell, *supra*, at 1185, her analysis is simplistic when it then states that because of the Supreme Court's decision in ***Evans***, "computer errors now will inure to the benefit of the police. Law enforcement agencies have no incentive to keep their records up to date because careless recording provides them more authority to conduct searches." ***Id.***

Wrong. Accuracy promotes effective law enforcement. After all, we may safely assume that the computer data-base documenting the *theft* of cars is the same computer data base documenting the *recovery* of stolen cars. Thus, a failure to maintain accurate and updated records would result in improper and time-wasting stops of recovered cars, *and* in failures to stop stolen cars because the computer does not list them as stolen. Every *good* law enforcement agency has substantial fiscal and crime-fighting incentives to use accurate and updated data.

Thus, if the Wisconsin Supreme Court were to embrace the ***Leon*** good faith exception, and if the Wisconsin Supreme Court were to extend the good faith exception to non-warrant cases, and assuming that a "collective knowledge" analysis would be essential to the determination of good faith, and assuming that the State would bear the burden of proving the propriety of police action in this non-warrant case, I then would affirm. Although the evidentiary record is silent on some of the potential questions I have posed, and although that silence makes this case a relatively close call, the undisputed testimony of the two police officers, together with the reasonable inferences about the "collective knowledge" of the department logically drawn from their testimony, satisfies the State’s burden.

Officer Paul Vierck testified that the information about the Cadillac originated not from a computerized print-out, but rather, from "the summary of the vehicles taken in major crimes" that is teletyped to "each district, each shift." Officer Vierck explained that his partner, Officer Steven Vento, would then enter that information by hand on the computerized "hot sheet" list of stolen vehicles, which they took with them on patrol. Officer Vierck acknowledged that "[o]ccasionally a vehicle that's been recovered just isn't removed from … the hot-car sheet or the summary" as a result, "more than likely," of "a clerical situation."

Officer Vento confirmed Officer Vierck's account. He explained that he "checked the daily summary every day at work [sent by fax machine from the downtown district] from shortly after [he] report[ed] in to work," and that he transcribed the information from the daily summary to the hot-car list. Significantly, under cross-examination, Officer Vento further testified:

> Q And do you recall whether or not you gained the information pertaining to this particular vehicle on the day that you came in on your shift, or could it have been on a prior day?
>
> A *Had it been on a prior day, I would have seen a cancellation and would have not entered it* onto it, [the] copy of the hot-car sheet. So it probably would have continued on the summary.
>
> Q Is it your testimony that it that you put it on the sheet because you had seen it in a summary?
>
> A I'm sure that I had seen it prior to that day on the summary, and it would have continued with each summary that comes out until that date.
>
> Q Okay. So is it possible that you put it on your - - your sheet, your hot-car sheet, prior to December 29th?
>
> A Oh, yes.
>
> Q And then you would have potentially just continued it on that sheet?
>
> A No.

> Q I'm sorry. This is what I'm not understanding.
>
> A *I checked for cancellations. When a vehicle is recovered, there should be a cancellation on the summary indicating that the vehicle was recovered or the suspects arrested. I looked for that.* I didn't find it, so I continued on or continued with that vehicle on my hot-car sheet.
>
> Q Okay. Do you - - *Do you write down the cars on the major crimes on your summary sheet every day when you take shift?*
>
> A *Yes, I do.*
>
> Q *And do you rely on a new list then every day as you take shift?*
>
> A *Sometimes I'll update the list during the day, but every day I do - - I do update my hot-car sheet.*
>
> Q Okay. Now, did you ever use do you ever use the same list that you have written out by hand twice?
>
> A No.
>
> Q So when you're done with shift one day, do you keep that list that you make?
>
> A I will keep it for the next day, and I will check that list against the current summary or the major-crime list along with the hot-car sheet that comes out as well.
>
> Q Okay. I think I've got it now. When you make out that list for the second day, *if a car comes through on a cancellation, you simply [do] not write it down - -*
>
> A *Correct.*
>
> Q - - on that day's sheet?
>
> A Correct.

(Emphasis added.)

Officer Vento's account was never impeached or even challenged. It indicates that, on at least a daily basis, he utilized a process that enabled him to check for updated information on vehicles taken in major crimes, accounting for both their loss and recovery. His testimony indicates that he relied on that information regularly and knew that it did include regularly updated cancellation information. Although the testimony does not absolutely establish that the process was perfect or that the data were always accurate, it does lead to the inference that

Officer Vento—based on extensive personal experience—had found the information to be accurate and, therefore, his testimony does establish that his reliance on the information was reasonable.[8]

Therefore, I conclude: (1) whether Wisconsin embraces the ***Leon*** good faith exception *at all* is for our supreme court to decide; (2) if Wisconsin embraces the ***Leon*** exception, the issue of whether it extends to non-warrant cases also is for our supreme court to decide; (3) if Wisconsin embraces the ***Leon*** exception, and if the exception extends to non-warrant cases, then, based on settled Wisconsin authorities, the State bears the burden of proving the propriety of police conduct in cases involving warrantless stops, searches and seizures, and arrests; and (4) even when the delay in updating information is as short as one day, the propriety of police action is first a question of fact (i.e., without knowing the circumstances leading to the gathering and/or dissemination of inaccurate information, a court cannot know whether a "one-day" delay was the only day, or merely the first day of many because, even with the passage of time, the mechanisms to produce accuracy were not in place), often involving "collective knowledge" analysis.

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[8] *See* 2 Wayne R. LaFave, SEARCH AND SEIZURE, § 3.5(d), at 274 (3d ed. 1996) ("Courts are understandably not inclined to infer police misconduct when the records lack currency by just a few days."). *But see* ***Evans***, 514 U.S. at 17 (O'Connor, J., concurring), in which Justice O'Connor advises that the exclusionary rule might apply where:

> [P]olice … may not have acted reasonably in their reliance *on the recordkeeping system itself*. Surely it would *not* be reasonable for the police to rely, say, on a recordkeeping system, their own or some other agency's, that has no mechanism to ensure its accuracy over time and that routinely leads to false arrests, ….

Evans, 514 U.S. at 17 (O'Connor, J. concurring).

Moreover, even if the Wisconsin Supreme Court were not to embrace the good faith exception or extend it to non-warrant cases, I conclude, consistent with the overwhelming case law from other jurisdictions as well as Wisconsin, *see, e.g.,* ***State v. Willie***, 185 Wis.2d 673, 683, 518 N.W.2d 325, 329 (Ct. App. 1994), that "collective knowledge" analysis is appropriate in determining whether, under ***Terry v. Ohio***, 392 U.S. 1 (1968), police had reasonable suspicion justifying a stop. *See also* § 968.24, STATS. Here, Officers Vierck and Vento reasonably relied on the information on the summary and, therefore, reasonably suspected that Williams and the driver of the Cadillac had committed armed robbery and/or were operating a vehicle without the owner's consent. Accordingly, even without the good faith exception, the police conduct was proper and, therefore, I would affirm.[9]

[9] I must confess that when I first reviewed the briefs in this case, I considered Williams's claim to be preposterous. After all, lawful ***Terry*** stops frequently are based on police suspicions that, while reasonable, prove to be incorrect. Thus, I thought, what could be more reasonable than police reliance on "hot sheet" information obtained at the beginning of a shift on the very day of the stop?

I, however, had not considered the many highly consequential possibilities that now exist by virtue of police reliance on computerized information. I had not considered the very substantial case law questioning the propriety of police conduct under circumstances similar to those of the instant case. With the added benefit of several very helpful discussions with Judge Patricia S. Curley, I have attempted to better understand these subjects.

Unfortunately, Judge Wedemeyer declined to participate in those discussions. In his apparent eagerness to adopt ***Leon***, Judge Wedemeyer has failed to appreciate that the conduct of police, the accuracy and efficacy of police data collection systems, and the liberties of all citizens are best measured by those who welcome the thoughtful guidance of judges, near and far, who have struggled with these very difficult and extremely important issues.