COURT OF APPEALS
DECISION
DATED AND FILED

September 15, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1519-CR **Cir. Ct. No. 2007CF492**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSHUA J. OSBORNE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Marathon County: DOROTHY L. BAIN, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 HOOVER, P.J. Joshua Osborne appeals a nonfinal order denying his motion to suppress evidence obtained during the execution of an allegedly defective search warrant.[1] Osborne argues the warrant does not satisfy the

[1] The petition for leave to appeal was granted on July 17, 2008.

definition of a search warrant set forth in WIS. STAT. § 968.12(1).[2] Specifically, he contends the issuing judge's failure to include language directing the officer to conduct the search violates the statute. We conclude this omission is merely a technical irregularity under WIS. STAT. § 968.22 that does not affect Osborne's substantial rights. We therefore affirm the order denying Osborne's suppression motion.

BACKGROUND

¶2 The relevant facts are not in dispute. On July 3, 2007, officer Shawn Fritsch prepared a document titled "Complaint for Search Warrant" (the complaint), requesting a warrant to search Osborne's residence. The affidavit supporting the warrant request stated Kent Lorenzen had reported several items missing from his garage, including two fishing poles and several packages of venison. Fritsch, who knew of complaints against the residents of a neighboring house, approached the house and observed in plain view items matching the description of those missing from Lorenzen's garage.

¶3 A search warrant was issued on the same day. In substance, it is an exact copy of the complaint. However, the issuing judge modified the title of the complaint to read "Search Warrant" and substituted his signature for that of Fritsch. But instead of directing the officers to search the premises, the document concludes by requesting that the judge issue a search warrant. Fritsch executed the warrant and seized the evidence.

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶4 Osborne was charged with burglary, bail jumping, and theft. He moved to suppress the evidence, contending the search was unconstitutional because the warrant was defective. The circuit court denied the motion, applying the good-faith exception to the exclusionary rule. Osborne appeals the court's nonfinal order.

DISCUSSION

¶5 Osborne contends the warrant issued for the search of his residence did not comply with WIS. STAT. § 968.12(1). He argues the search was therefore executed without a valid warrant and in violation of his constitutional rights. Statutory interpretation presents a question of law that we decide independently of the circuit court. ***Rechsteiner v. Hazelden***, 2008 WI 97, ¶26, 313 Wis. 2d 542, 753 N.W.2d 496. Similarly, whether a search and seizure is constitutional is a question of law that we review without deference to the circuit court, but benefitting from its analysis. ***State v. LaCount***, 2008 WI 59, ¶34, 310 Wis. 2d 85, 750 N.W.2d 780.

¶6 WISCONSIN STAT. § 968.12(1) provides a one-sentence description of a search warrant: "A search warrant is an order signed by a judge directing a law enforcement officer to conduct a search of a designated person ... object or ... place for the purpose of seizing designated property or kinds of property." Osborne emphasizes that the document authorizing the search does not fit the statutory description because it does not specifically direct a law enforcement officer to conduct a search.

¶7 The statute, however, does not require that the direction to law enforcement officers be spelled out explicitly in every warrant. Although the search warrant form provided by WIS. STAT. § 968.23 includes such explicit

direction, that statute also states the forms "are illustrative and not mandatory[.]"[3] Osborne cites no legal authority holding that every search warrant must contain specific language directing a law enforcement officer to execute it in order to be valid. The State argues, and we agree, that the failure to include explicit directory language in a search warrant constitutes a technical irregularity under WIS. STAT. § 968.22. That statute provides that "[n]o evidence seized under a search warrant shall be suppressed because of technical irregularities not affecting the substantial rights of the defendant." ***Id.***

¶8 No substantial right is implicated by the failure of the issuing judge to include language directing law enforcement to execute the warrant in this case. Osborne argues the issuing judge's omission demonstrates a "wholesale failure in the constitutionally required process of obtaining a search warrant" similar to that in ***State v. Tye***, 2001 WI 124, ¶23, 248 Wis. 2d 530, 636 N.W.2d 473. In ***Tye***, the Wisconsin Supreme Court considered the constitutionality of a search where the authorizing warrant was not supported by an oath or affirmation. The court concluded the oath requirement was a "matter of substance, not form, and ... is an essential component of the Fourth Amendment and legal proceedings." ***Id.***, ¶19. The court explained that the oath or affirmation requirement "protects the target of the search from impermissible state action by creating liability for perjury or false swearing for those who abuse the warrant process by giving false or fraudulent information." ***Id.*** (footnotes omitted). Thus, the oath requirement "preserves the

[3] Our supreme court confirmed the illustrative nature of the search warrant form in ***State v. Edwards***, 98 Wis. 2d 367, 374, 297 N.W.2d 12 (1980), where the defendant argued the warrant form's inclusion of the word "forthwith" created "some standard of timeliness independent of the continued existence of probable cause." The court responded that "the form shown in that section cannot be taken as an expression of substantive legal elements of a valid search warrant." ***Id.***

integrity of the search warrant process and ... protects the constitutionally guaranteed fundamental right of people to be secure ... against unreasonable searches and seizures" in a way that requiring an explicit directive to law enforcement would not. ***Id.***

¶9 Although Osborne does not contend the warrant was unsupported by probable cause, he does argue the warrant is constitutionally defective under ***Groh v. Ramirez***, 540 U.S. 551 (2004). The warrant in ***Groh*** was defective because it did not contain any description of the thing to be seized. ***Id.*** at 587. Here, the document authorizing the search described with specificity the location to be searched, as well as the evidence sought: a "[b]lack leather jacket," "[t]wo St. Croix fishing poles and reels-6 foot 6 inches in length with cork handles," a "Plano tackle box with approximately $1,000 in lures," a "[b]ottle of home made wine," and "[s]everal packages of venison hamburger, steaks and sticks." Thus, there is no concern that the officers would have searched the wrong location or improperly seized any property beyond the scope of the warrant. In short, the omission of an explicit directive to the officers affected neither Osborne's right to be free from unreasonable searches and seizures nor his right to have warrants issued "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

¶10 We therefore conclude the omission of explicit language directing law enforcement officers to execute the warrant was a mere technical irregularity. The warrant provided sufficient detail and guidance such that, in light of the modification to the document's title and the presence of a judge's signature, the only reasonable inference is that the document directed police to execute the requested search. While we do not endorse the practice of issuing search warrants

that are near-verbatim copies of the warrant application, we conclude Osborne's substantial rights were not affected by the omission of a specific directive to execute the warrant.

¶11 Given the fluid nature of probable cause—evidence of a crime is often easily concealed, destroyed, or transported—search warrants are often times hurriedly sought at odd hours. It is not unreasonable that documents that must be quickly prepared, presented, and executed might not be in perfect form. We therefore neither anticipate nor require perfection in their drafting. Indeed, WIS. STAT. § 968.22 specifically recognizes both the likelihood of drafting errors and their inconsequence. Instead, it is the process and the substance of the information conveyed that are important:

> Our law strongly favors searches conducted pursuant to a warrant. ***State v. Kerr***, 181 Wis. 2d 372, 379, 511 N.W.2d 586 (1994). The warrant process not only places a neutral and detached magistrate between government intrusion and the people but also obligates government officials to demonstrate to that magistrate a substantial basis for their proposed intrusive conduct.

State v. Ward, 2000 WI 3, 231 Wis. 2d 723, ¶98, 604 N.W.2d 517 (Prosser, J., dissenting). In ***Kerr***, the court noted that the orderly procedure of applying for a warrant presented an opportunity to prevent unjustified intrusions by law enforcement officers. ***Kerr***, 181 Wis. 2d at 379 n.2 (citing 1 LAFAVE, SEARCH AND SEIZURE 549 (1987)). "Warrants are also preferred because a 'warrant assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.'" ***Id.*** (quoting ***United States v. Chadwick***, 433 U.S. 1, 9 (1977), *abrogated on other grounds*, ***California v. Acevedo***, 500 U.S. 565 (1991)).

¶12 Because we conclude that the evidence obtained from the search is admissible under WIS. STAT. § 968.22, we need not consider the applicability of the good-faith exception to the exclusionary rule under ***United States v. Leon***, 468 U.S. 897 (1984), and ***State v. Eason***, 2001 WI 98, 245 Wis. 2d 206, 629 N.W.2d 625.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

¶13 BRUNNER, J. (*dissenting*). I respectfully dissent. "A fundamental safeguard against unnecessary invasions into private homes is the Fourth Amendment's warrant requirement, imposed on all government agents who seek to enter the home for purposes of search or arrest." ***State v. Larson***, 2003 WI App 150, ¶8, 266 Wis. 2d 236, 668 N.W.2d 338. A constitutionally valid warrant is based upon probable cause, supported by an oath or affirmation, and describes with particularity the place to be searched and the person or things to be seized. U.S. CONST. amend. IV; *see also* ***State v. Henderson***, 2001 WI 97, ¶19, 245 Wis. 2d 345, 629 N.W.2d 613. While it is apparent that these constitutional requirements have been satisfied in this case, "[i]n order for a warrant to be valid, it must [also] meet the requirements specified in … applicable state rules for the issuance of warrants." 1 WILLIAM E. RINGEL, SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS, § 5:1 (2nd ed. 2009).

¶14 Osborne argues that one such state rule is WIS. STAT. § 968.12(1), which defines a search warrant: "A search warrant is an order signed by a judge directing a law enforcement officer to conduct a search of a designated person, a designated object or a designated place for the purpose of seizing designated property or kinds of property." Osborne argues that the document authorizing the

search does not meet this definition and therefore the evidence seized during the search of his residence should have been suppressed.[1]

¶15 The circuit court concluded that the good-faith exception to the exclusionary rule applied and did not consider whether the document was a warrant within the meaning of WIS. STAT. § 968.12(1). Courts should generally resolve the substantive constitutional or statutory issue before analyzing the applicability of the good-faith exception. ***State v. Eason***, 2001 WI 98, ¶2, 245 Wis. 2d 206, 629 N.W.2d 625. If none of the defendant's rights have been violated, there is no need to devote judicial resources to analyzing good faith; additionally, this ordered analysis ensures that the focus of the magistrate will remain on determining whether the constitutional and statutory requirements for a valid warrant have been satisfied. ***Id.***, ¶55 n.22. For those reasons, and because the court does not reach the good faith issue, I will address the substantive issue Osborne raises even though the circuit court did not do so.

¶16 Osborne argues that the error committed by the issuing judge flows from the statutory enactment describing a search warrant. "The interpretation and application of statutes are questions of law that we review de novo." ***Christensen v. Sullivan***, 2009 WI 87, ¶42, __ Wis. 2d __, 768 N.W.2d 798. Statutory interpretation begins with the language of the statute. ***State ex rel. Kalal v. Circuit***

[1] There appears to be some confusion surrounding the propriety of applying the suppression remedy for statutory violations. Osborne argues that the remedy is authorized by ***State v. Popenhagen***, 2008 WI 55, 309 Wis. 2d 601, 749 N.W.2d 611, in which the supreme court used principles of statutory construction to conclude that suppression was an appropriate remedy for violations of WIS. STAT. § 968.135 governing the issuance of subpoenas. That statute did not expressly authorize suppression, even though the court had previously held that "[s]uppression is only required when evidence has been obtained in violation of a defendant's constitutional rights, or if a state statute *specifically provides* for the suppression remedy." ***State v. Raflik***, 2001 WI 129, ¶15, 248 Wis. 2d 593, 636 N.W.2d 690 (emphasis added).

Ct., 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. "[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." ***Id.***, ¶46.

¶17 WISCONSIN STAT. § 968.12(1) unambiguously describes a valid search warrant as "an order signed by a judge directing a law enforcement officer to conduct a search …." The plain language of the statute indicates that a document not containing directory language addressed to a member of law enforcement is not a search warrant. When the meaning of a statute is plain, we ordinarily stop the inquiry. ***Kalal***, 271 Wis. 2d 633, ¶45.

¶18 The "search warrant" in this case neither ordered nor directed law enforcement to do anything. The circuit court found that the warrant was nothing more than a carbon copy of the warrant application with a substituted title and signature block:

> The warrant in this case, though entitled "Search Warrant" and bearing the signature of a judge, is otherwise indistinguishable from the complaint for search warrant that preceded it; the text of the complaint for search warrant is repeated verbatim in the body of the warrant. Consequently, the warrant lacks an explicit order directing a law enforcement officer to execute it – which is one of the defining features of a search warrant.

This deficiency is evident even in the warrant's conclusion, which prays that the search be authorized rather than authorizing a search. WISCONSIN STAT. § 968.12(1) plainly defines a search warrant, and we must give that language its common, ordinary and accepted meaning. ***Kalal***, 271 Wis. 2d 633, ¶45. The document issued in this case does not meet that definition, and thus was not a search warrant.

¶19 The State argues that we should uphold the warrant despite the absence of explicit directory language. First, the State believes that the title of the document – "Search Warrant" – is sufficiently directory to preclude a claim "that the warrant neglected to inform the officer that a search should be conducted." The State misconstrues Osborne's argument. While a reasonable officer's reading of the warrant is relevant to an analysis of whether evidence is admissible under the good-faith exception, it is not relevant to an analysis of whether the document meets the statutory definition of a "search warrant." Saying that the reasonable officer's interpretation has such relevance would be like rewriting the defining statute to read something like "an order signed by a judge that a reasonable officer would view as directing him or her to conduct a search." We do not rewrite statutes. ***Harris v. Kelley***, 70 Wis. 2d 242, 250, 234 N.W.2d 628 (1975). The warrant was not addressed to an officer and is therefore insufficient.

¶20 Furthermore, the title of a document does not necessarily establish that document's content. For example, "when a court analyzes a complaint to determine whether it states a particular claim for relief, the label given the claim in the complaint is not dispositive." ***Burbank Grease Serv. v. Sokolowski***, 2006 WI 103, ¶45, 294 Wis. 2d 274, 717 N.W.2d 781. Courts will go so far as to relabel a pro se prisoner's pleading if the title of the pleading is insufficient but the facts alleged, if proven, would entitle the prisoner to relief. ***Amek Bin-Rilla v. Israel***, 113 Wis. 2d 514, 521, 335 N.W.2d 384 (1983). In the statutory context, "reliance on the [statutory] title is not persuasive." ***Noffke ex rel. Swenson v. Bakke***, 2009 WI 10, ¶25, 315 Wis. 2d 350, 760 N.W.2d 156. In sum, "courts give effect to the substance of a document and not to its caption." ***Gleash v. Yuswak***, 308 F.3d 758, 761 (7th Cir. 2002). Simply naming a document a search warrant does not make it one.

¶21 The State's second argument, accepted by the court, is that the judge's omission of directory language is a "technical irregularity" under WIS. STAT. § 968.22. I am not persuaded. Generally, § 968.22 is invoked in situations in which there is a minor error in the description of the property to be searched. Thus, in ***State v. Nicholson***, 174 Wis. 2d 542, 544-45, 497 N.W.2d 791 (Ct. App. 1993), we held that exclusion was not an appropriate remedy where a confidential informant showed an officer the location of a drug apartment but where the officer incorrectly described the apartment as "2512 State Street" instead of "2510 State Street." We similarly applied § 968.22 in ***State v. Rogers***, 2008 WI App 176, ¶1, 315 Wis. 2d 60, 762 N.W.2d 795, "where the affidavit supporting the search warrant was correct, but the warrant itself identified the wrong vehicle as the subject of the search because the officer used a prior, unrelated search warrant" as a drafting template. Unlike ***Rogers*** or ***Nicholson***, this case does not involve a minor error in the description of the property to be searched; it involves the absence of a valid warrant's required language.

¶22 The facts of this case strike closer to those of ***State v. Tye***, 2001 WI 124, 248 Wis. 2d 530, 636 N.W.2d 473. In ***Tye***, the defendant argued that the absence of a sworn affidavit supporting a search warrant was more than a "technical irregularity." The supreme court held that "[a]n oath is a matter of substance, not form, and it is an essential component of the Fourth Amendment and legal proceedings." ***Id.***, ¶19. As in ***Tye***, Osborne's substantive rights are affected by the issuing judge's omission.

¶23 Although no court has held that the directory language required by WIS. STAT. § 968.12(1) flows from the Constitution, the requirement does serve important constitutional interests. Clear and unambiguous directory language "assures the individual whose property is searched or seized of the lawful

authority of the executing officer [and] his need to search." ***United States v. Chadwick***, 433 U.S. 1, 9 (1977), *abrogated on other grounds*, ***California v. Acevedo***, 500 U.S. 565 (1991). Along with the judge's signature, it also assures the individual that the warrant has received "the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime.'" ***Chadwick***, 433 U.S. at 9 (quoting ***Johnson v. United States***, 333 U.S. 10, 14 (1948)). Here this interest is enhanced because the search "warrant" was virtually indistinguishable from the complaint.

¶24 In sum, I conclude that WIS. STAT. § 968.12 plainly requires a warrant to be directed to a law enforcement officer, and that the absence of this language is not merely a "technical irregularity." *See* WIS. STAT. § 968.22. The requirement, though not itself constitutional, serves constitutional interests that neither we, nor the issuing judge, nor the attorney or investigator seeking the warrant should lightly disregard.