2018 WI APP 36

COURT OF APPEALS OF WISCONSIN
PUBLISHED OPINION

Case No.: 2016AP1954-CR

Complete Title of Case:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DYLAN D. RADDER,

DEFENDANT-APPELLANT.

Opinion Filed: May 16, 2018
Submitted on Briefs: October 25, 2017

JUDGES: Reilly, P.J., Gundrum and Hagedorn, JJ.
Concurred: Reilly, P.J.
Dissented:

Appellant ATTORNEYS: On behalf of the defendant-appellant, the cause was submitted on the briefs of *Emily Bell* and *Andrew Mishlove* of *Mishlove & Stuckert, LLC* of Glendale.

Respondent ATTORNEYS: On behalf of the plaintiff-respondent, the cause was submitted on the briefs of *Douglass K. Jones* and *David H. Perlman*, assistant attorney generals, and *Brad D. Schimel*, attorney general.

2018 WI App 36

COURT OF APPEALS
DECISION
DATED AND FILED

May 16, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2016AP1954-CR **Cir. Ct. No. 2016CT61**

STATE OF WISCONSIN **IN COURT OF APPEALS**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DYLAN D. RADDER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Calumet County: JEFFREY S. FROEHLICH, Judge. *Affirmed*.

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

¶1 HAGEDORN, J. Dylan D. Radder was arrested for operating a motor vehicle while intoxicated (OWI), and he appeals from an order denying his amended pretrial motion to suppress. The circuit court concluded that the motion was not sufficiently particular and denied the motion without a hearing. The issue

before us is whether the circuit court erred by not conducting an evidentiary hearing on the motion. Radder's chief argument is that the pretrial pleading standards established in ***State v. Velez***[1] are inapplicable, or at least significantly lower, on a motion to suppress evidence because the State bears the burden to show that warrantless searches and seizures are reasonable. We disagree. ***Velez*** sets forth the proper standards to determine whether a pretrial motion requires an evidentiary hearing, and Radder's motion fails to satisfy these standards. Accordingly, we affirm.

BACKGROUND

¶2 On May 12, 2016, Radder was pulled over by Officer Mark Meyers of the New Holstein Police Department. According to the criminal complaint, Meyers informed Radder that he stopped Radder's vehicle due to expired registration. Smelling "a strong odor of intoxicants," Meyers noticed a case of beer on the floor behind the driver's seat, and two bottles from the case appeared to be open. At some point during the stop, Meyers performed a "Department of Transportation query" and discovered that Radder had been previously arrested for OWI.

¶3 Meyers asked Radder to exit his vehicle to administer the Standardized Field Sobriety tests—the horizontal gaze nystagmus (HGN) test, the walk-and-turn test, and the one-leg-stand test. After Radder had exited the vehicle, Meyers questioned Radder about the beer. Radder responded "that he makes his own beer and that he did not consume the beer today." After observing

[1] ***State v. Velez***, 224 Wis. 2d 1, 12, 589 N.W.2d 9 (1999).

"a total of six clues" of impairment during the HGN test, Radder was asked how much he had to drink, to which he responded he "had two Jack and Coke[s] and one shot." Meyers continued with the other two field sobriety tests and observed multiple "clues" of impairment. Then Meyers asked Radder to submit to a preliminary breath test (PBT) and again asked if Radder had been drinking. Radder admitted to stopping at a friend's birthday party after work and reiterated that he had consumed two "Jack and Coke[s] and a mystery shot." The PBT result showed a 0.082% blood-alcohol concentration (BAC), above the prescribed limit of 0.08%. *See* WIS. STAT. § 340.01(46m)(a) (2015-16).[2]

¶4 Based on this information, Meyers arrested Radder for OWI. Radder's blood was drawn (within three hours) at Calumet Medical Center and showed a BAC of 0.084%, consistent with the PBT. Radder was charged with OWI and operating with a prohibited alcohol concentration.

¶5 Radder then moved to suppress all evidence "derived from [an] unlawful stop, detention, and arrest" and requested an evidentiary hearing. The motion specifically averred that Meyers lacked reasonable suspicion to stop Radder's vehicle in the first instance and had no authority to detain him thereafter without a warrant. Other than bare legal conclusions, the motion offered no support for these assertions. Radder further alleged that Meyers lacked probable cause to arrest him for OWI—again offering little in the way of detail or factual support. Instead, the motion generally asserted that there were insufficient indicia of impairment—whether through Radder's driving or "behavior and demeanor."

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

The motion also took aim at the administration of the field sobriety tests. The motion acknowledged that the walk-and-turn and one-leg-stand tests "may have some degree of general reliability," but averred that these tests were "improperly administered." The motion did not, however, give any details concerning how the tests were improperly administered. As to the HGN test, the motion asserted that the test is "inherently unreliable as it was improperly administered." The motion did not address the specific factual allegations of impairment detailed in the complaint or Meyers' suspicion that Radder's registration was expired.

¶6 The State argued that the motion should be denied without a hearing on the grounds that it failed to "state with particularity" the grounds for the motion as required by WIS. STAT. § 971.30(2)(c). The circuit court agreed and denied the motion, explaining that "[t]he defense has chosen to file a boiler plate motion that fails to state any factual basis for the motion or how the legal grounds apply to the case."

¶7 Radder filed a motion for reconsideration and an amended motion. The amended motion to suppress was largely identical to Radder's original motion supplemented with a few additional details. Regarding the initial stop, the motion maintained the generic assertion that Meyers had no "reasonable suspicion that [Radder] had committed any offense," now adding, "including the offense of expired registration." Regarding the OWI investigation and arrest, Radder's amended motion added that he was not accused of any moving violations and only admitted to drinking quantities of alcohol which would not cause impairment or a prohibited alcohol concentration. The amended motion reiterated the assertion

that the field sobriety tests had been administered improperly, but now added that "the HGN Test is an inherently unreliable test."[3] The circuit court again denied the motion without a hearing. Radder sought leave to appeal, which we granted.[4]

DISCUSSION

¶8 WISCONSIN STAT. § 971.30(2)(c) provides that all motions shall "[s]tate with particularity the grounds for the motion and the order or relief sought." This requirement to "[s]tate with particularity" applies to both pretrial and postconviction motions. *See* ***State v. Allen***, 2004 WI 106, ¶10, 274 Wis. 2d 568, 682 N.W.2d 433. The underlying rationale for the particularity requirement is to provide notice to both the nonmoving party and the court "of the issues being raised by the defendant in order to fully argue and consider those issues." ***State v. Caban***, 210 Wis. 2d 597, 605-06, 563 N.W.2d 501 (1997). Requiring particularity in a defendant's pretrial motion practice also conserves "scarce judicial resources by eliminating unnecessary evidentiary hearings when there may be no disputed facts requiring resolution, or when the facts would not warrant the relief sought even if proved." ***State v. Velez***, 224 Wis. 2d 1, 12, 589 N.W.2d 9 (1999). This ensures that "the evidentiary hearing will serve as more than a discovery device." ***Id.*** Thus, a defendant is not entitled to an evidentiary hearing every time he or she

[3] The motion also added language stating that "[t]he necessary conditions for administering the standardized field sobriety tests were absent in this case," the tests were "improperly scored," and the HGN test was "administered under improper conditions." However, just like the original motion, the amended motion failed to explain what "necessary conditions" were absent, how the tests were improperly scored, or how the testing conditions were "improper."

[4] The appeal was originally assigned to one judge pursuant to WIS. STAT. § 752.31(2) but was subsequently converted to a three-judge panel on our own motion. *See* WIS. STAT. RULE 809.41(3).

makes a pretrial motion. ***Id.*** "An evidentiary hearing is necessary only if the party requesting the hearing raises a significant, disputed factual issue." ***Id.*** (quoting ***United States v. Sophie***, 900 F.2d 1064, 1070 (7th Cir. 1990)).

¶9 Radder argues that his amended motion was sufficiently particular to require an evidentiary hearing. Although he concedes that WIS. STAT. § 971.30(2)(c) requires his motion to "[s]tate with particularity the grounds for the motion and the order or relief sought," he maintains that the pleading standard is different for motions bringing Fourth Amendment challenges because the State bears the burden to show that a warrantless search or seizure was reasonable. He claims that the pleading standards set forth in ***Velez*** are inapplicable because "the particularity required of defendants where the state has the burden is lower" than that outlined in ***Velez***, a case where the defendant had the burden of proof. Instead, in Fourth Amendment cases where the State bears the burden of proof at a suppression hearing, he claims that "the motion need only allege that the stop, detention, and arrest were without a warrant, and without reasonable suspicion for the initial stop or probable cause that the defendant had committed any offense." We disagree. Radder must satisfy the same pleading standard applicable in all pretrial motions, and merely alleging that he was stopped and arrested without a warrant does not cut it.

A. Pleading Standards for Pretrial Motion to Suppress

¶10 In ***Velez***, our supreme court clarified that the legal standards governing postconviction motions are largely applicable to pretrial motions as well. *See* ***Velez***, 224 Wis. 2d at 13; *see also* ***Allen***, 274 Wis. 2d 568, ¶11. The analysis for postconviction motions proceeds in two parts. Under these standards—notably defined in ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629

(1972), and ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996)—if a defendant's motion "alleges facts which, if true, would entitle the defendant to relief, the trial court must hold an evidentiary hearing." ***Velez***, 224 Wis. 2d at 11 (citation omitted). This means alleging the "who, what, where, when, why, and how" to enable "reviewing courts to meaningfully assess a defendant's claim." ***Allen***, 274 Wis. 2d 568, ¶23. Whether a motion alleges sufficient, nonconclusory facts to require an evidentiary hearing is a question of law we review de novo. ***Velez***, 224 Wis. 2d at 18.

¶11 Second, if the "defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief," then the circuit court has discretion to deny the motion without a hearing.[5] ***Bentley***, 201 Wis. 2d at 309-10 (citation omitted); *see also* ***State v. Sulla***, 2016 WI 46, ¶23, 369 Wis. 2d 225, 880 N.W.2d 659. We review discretionary decisions under the deferential erroneous exercise of discretion standard. ***Sulla***, 369 Wis. 2d 225, ¶23. A circuit court properly exercises its discretion if it examines the relevant facts, applies the proper legal standards, and engages in a rational decision-making process. ***Bentley***, 201 Wis. 2d at 318.

¶12 In the context of pretrial motions, however, the ***Velez*** court recognized that "the ***Nelson*** standards are not, by themselves, sufficient to protect a defendant's due process rights when he is bringing a motion prior to trial."

[5] Like the question of whether a motion states sufficient facts, whether the record conclusively demonstrates that the defendant is not entitled to relief is a question of law we review de novo. ***State v. Sulla***, 2016 WI 46, ¶23, 369 Wis. 2d 225, 880 N.W.2d 659.

Velez, 224 Wis. 2d at 13. The court noted the "inherent difficulties a defendant may have in developing the facts necessary to support a pretrial motion" in contrast to "the plentiful record often available to a defendant making a postconviction motion." ***Id.*** Accordingly, when assessing whether a hearing is required for a pretrial motion, the court adopted the safeguard we established in ***State v. Garner***:

> [A]lthough a defendant may be unable to allege sufficient specific facts to warrant relief, a trial court must provide the defendant the opportunity to develop the factual record where the motion, alleged facts, inferences fairly drawn from the alleged facts, offers of proof, and defense counsel's legal theory satisfy the court of a reasonable possibility that an evidentiary hearing will establish the factual basis on which the defendant's motion may prevail.

Velez, 224 Wis. 2d at 13 (quoting ***State v. Garner***, 207 Wis. 2d 520, 533, 558 N.W.2d 916 (Ct. App. 1996)).

¶13 Thus, "[w]here there is a reasonable possibility that the defendant will establish the factual basis at an evidentiary hearing, the circuit court must 'provide the defendant the opportunity to develop the factual record.'" ***Velez***, 224 Wis. 2d at 18 (quoting ***Garner***, 207 Wis. 2d at 533). Although this additional safeguard may "generally" allow for a hearing in order to "develop the factual record," *see* ***Allen***, 274 Wis. 2d 568, ¶11, "a defendant is not entitled to an evidentiary hearing simply to search for *something* based on *nothing* but hope or pure speculation." ***Garner***, 207 Wis. 2d at 533-34. There must be a "reasonable possibility that the defendant will establish" the necessary factual basis. ***Velez***, 224 Wis. 2d at 18. Though couched partially in constitutional due process language, the ***Velez*** court explained that these protections in the pretrial context are added on to the second prong of the analysis as part of the circuit court's discretionary decision to deny a hearing. ***Id.*** at 17-18.

¶14 To bring this all together, our review of the failure to grant a hearing on a pretrial motion is as follows. First, we review de novo "[w]hether a defendant alleged facts sufficient to require an evidentiary hearing." ***Id.*** at 18. Second, where the motion does not allege sufficient facts, the circuit court—in its exercise of discretion—"must take into consideration the record, motion, counsel's arguments and offers of proof, and the law" to determine if "the record establishes no factual scenario or legal theory on which the defendant may prevail, and/or where the defendant holds only hope but articulates no factually-based good faith belief" that an evidentiary hearing will yield a sufficient factual basis for the motion. ***Id.*** (citation omitted).

¶15 With the reasoning of ***Velez*** in view, Radder's assertion that a different burden applies to his Fourth Amendment claim is incorrect. As an initial matter, he confuses the State's burden during a suppression hearing with his obligation to state the grounds for his motion with particularity. He is surely correct that the State bears the burden at a suppression hearing to prove that a warrantless seizure is constitutionally reasonable. *See* ***State v. Taylor***, 60 Wis. 2d 506, 519, 210 N.W.2d 873 (1973). But a movant still bears the burden of demonstrating a need for an evidentiary hearing in the first place. An evidentiary hearing exists to expose and settle factual disputes, and such a hearing is only warranted when a movant can, at the very least, show a reasonable possibility that a hearing is needed to allow the defendant to establish the necessary factual basis to succeed on the motion.

¶16 The real heart of Radder's argument is that simply by raising the burden-of-proof-shifting claim that a warrantless search has taken place, he in fact has stated enough to satisfy WIS. STAT. § 971.30. He is wrong. Our supreme court has explained,

> The rationale underlying [WIS. STAT.] § 971.30's particularity requirement is notice—notice to the nonmoving party and to the court of the specific issues being challenged by the movant. Both the opposing party and the circuit court must have notice of the issues being raised by the defendant in order to fully argue and consider those issues. Neither the principle of notice, nor WIS. STAT. § 971.30 makes an exception for motions raising Fourth Amendment challenges.

Caban, 210 Wis. 2d at 605-06 (citations omitted). The fact that the State would bear the burden of proof at a hearing does not mean Radder simply gets to raise questions and put the State to its proof. Circuit courts do not need to hold evidentiary hearings on demand, even for Fourth Amendment claims. While it is true that neither ***Garner*** nor ***Velez*** specifically addressed pretrial Fourth Amendment claims, the rationale applies just the same. The court must guard its use of scarce judicial resources, and the State is entitled to notice of the factual disputes supporting a purported constitutional violation.[6] The court is under no obligation to hold an evidentiary hearing if a defendant's motion presents nothing more than conclusory allegations and fails to show that there are any factual disputes that require a hearing. This is both practical and, in our view, the best reading of the applicable law set forth in ***Garner*** and ***Velez***.[7]

[6] The concurrence disagrees "that the guarding of 'scarce judicial resources' is a justifiable reason for denying an evidentiary hearing." Concurrence, ¶32. This value is not one of our own invention, however. It comes straight from ***Velez***, verbatim. Moreover, nothing in our opinion should be taken as an invitation for judges to skimp on a hearing when the requisite pleading standard has been met. The guarding of scarce judicial resources only applies as a value when a party does not hold up his or her end of the bargain by providing the court and opposing party notice of what they actually wish to challenge. Seen in this light, this is nothing more than common sense and no threat to defendants wishing to exercise their constitutional rights.

[7] Radder cites to cases from other jurisdictions to bolster his claim that defendants should be able to proceed to a hearing merely by alleging that a warrantless search or seizure has occurred. To the extent these authorities support his argument, we are nevertheless bound by ***Velez***, which in our view, clearly applies to his motion. ***Velez***, 224 Wis. 2d at 12.

B. Application

¶17 Our de novo review confirms that Radder has not pled his motion with sufficient particularity, and we affirm the circuit court's discretionary decision to deny the motion without a hearing.

1. Radder's Motion Was Not Sufficiently Particular Under WIS. STAT. § 971.30

¶18 Radder focuses much of his argument on the lack of a warrant authorizing the search and seizure of his person and vehicle. He argues such searches and seizures are unreasonable per se, and thus, he is entitled to put the state to its proof at a hearing. Warrantless traffic stops, however, are constitutionally permissible so long as the officer had reasonable suspicion. *See* ***State v. Begicevic***, 2004 WI App 57, ¶¶3, 5, 270 Wis. 2d 675, 678 N.W.2d 293. Likewise, if police have probable cause to make an arrest, they generally do not need a warrant. ***State v. Ferguson***, 2009 WI 50, ¶17, 317 Wis. 2d 586, 767 N.W.2d 187. Fourth Amendment reasonableness, in this context, is established by reasonable suspicion and probable cause, respectively—not the presence or absence of a warrant. Radder is not entitled to a hearing merely by the conclusory statement that reasonable suspicion and probable cause are lacking. He must plead specific facts showing that a hearing is necessary to resolve a factual dispute. If Radder's position were accepted, every OWI defendant could needlessly slow circuit court dockets with fact-devoid conclusory motions alleging a warrantless stop and arrest. Neither WIS. STAT. § 971.30 nor constitutional due process guarantees require such a waste of judicial resources. Merely alleging the absence of a warrant is not sufficiently particular to entitle Radder to an evidentiary hearing.

¶19 As to reasonable suspicion to stop the vehicle and detain him, Radder's original motion stated nothing more than a legal conclusion ("there was no reasonable suspicion that the defendant had committed any offense"). His amended motion, while adding a reference to the offense he was stopped for, is still nothing more than a legal conclusion. We are left to guess exactly why Radder thought that the officer lacked reasonable suspicion that his registration was expired. Was his registration still valid? Did Meyers mistakenly think his registration was expired? Or is Radder claiming something more nefarious, like Meyers fabricating the grounds for the stop? This court and any court reviewing such a motion must, on the one hand, recognize that a pretrial movant is generally allowed to develop the factual record at a hearing, but on the other hand, need not grant a hearing as a discovery device. *See* ***Velez***, 224 Wis. 2d at 12-13. Again, at the very least there must be a "reasonable possibility that the defendant will establish" the necessary factual basis; conclusory assertions will not suffice. ***Id.*** at 18. A statement that reasonable suspicion to stop the vehicle for any offense was lacking, including the one alleged in the complaint, does not tell the court or the State what is being challenged or what a factual hearing might show. It is, as the circuit court recognized, a boilerplate allegation with a fill-in-the-blank violation, and nothing more. We agree with the circuit court that this was not enough.

¶20 Whether Radder's amended motion was sufficiently particular with regard to challenging the probable cause for his arrest is a somewhat closer question. Radder's amended motion repeatedly invokes the mantra that there was "insufficient indicia of impairment to give rise to an inference that there was probable cause to arrest the defendant for an alcohol-related driving offense." Radder's motion also generally asserts that his "behavior and demeanor" did not

indicate that he was impaired. But these as well are generic and conclusory legal assertions.

¶21 Beyond these perfunctory legal conclusions, the amended motion offers only the following specific allegations. First, the amended motion added the statement that Radder "was not accused of any moving violations." But the fact Radder was not accused of a moving violation has no bearing on whether there was reasonable suspicion to conduct the traffic stop (expired registration is clearly enough under the law) or whether probable cause existed to arrest him. According to the complaint, Meyers arrested Radder based on his observations after the stop, not a moving violation. Thus, we discern no relevance to this factual averment.

¶22 The amended motion also took issue with the administration of the field sobriety tests. Radder's motion conceded that the walk-and-turn and one-leg-stand tests may "assist the officer's subjective determination of impairment" and "have some degree of general reliability," but claimed that the tests were improperly administered in this case. However, the motion does not explain how Meyers improperly administered the tests or why the other indicia of impairment (including a PBT showing a BAC above the legal limit, which the motion does not

challenge) were insufficient to establish probable cause.[8] These statements express a conclusion, nothing more. While significant leeway to develop the record is merited in the pretrial context, Radder is not entitled to use an evidentiary hearing as a discovery device in the hopes that an in-court examination of Meyers will reveal that the tests were improperly administered. *See* ***Velez***, 224 Wis. 2d at 12.[9]

¶23 Finally, Radder's amended motion claims that the HGN test is "inherently unreliable." Though we have approved of decisions admitting testimony regarding the HGN test before, *see, e.g.*, ***State v. Zivcic***, 229 Wis. 2d 119, 128, 598 N.W.2d 565 (Ct. App. 1999), Radder is certainly entitled to make this argument. However, Radder's amended motion brought up this argument in a single, conclusory statement citing to an article without explanation. More than a bare conclusion is required to demonstrate the necessity for a hearing. This would seem especially apt where a defendant seeks to challenge a test that has been and regularly is admitted in Wisconsin courts. It requires more than a one-sentence

[8] Radder's amended motion additionally asserted that even though he was "accused of smelling of intoxicants," there simply cannot be probable cause because he only admitted to drinking alcohol in "quantities which would not cause impairment or a prohibited alcohol concentration." The motion did not specify what quantity Radder admitted to drinking, but we presume it is the two "Jack and Coke[s] and one shot" reflected in the complaint. But this raises no dispute about the amount of alcohol Radder *admitted* to drinking, and hence fails to raise a factual dispute that would require a hearing to resolve. It is in the nature of an argument, and not a particularly persuasive one at that. Radder's admission to only moderate drinking—a contention nowhere contested by the State—does not raise a relevant factual dispute that a hearing would help resolve.

[9] In his supplemental reply brief to this court, Radder offers a more specific argument that the field sobriety tests were improperly administered based on the factual allegations in the complaint. However, he did not include such details in his motion or amended motion, nor did he make these arguments before the circuit court. So we need not consider whether these new allegations are sufficiently particular to require an evidentiary hearing.

argument. Again, the basic principle is notice. Does Radder intend to have a battle of the experts, to challenge the underlying science, or some other challenge? The motion does not say. For these reasons, we conclude that Radder's motion failed to state sufficient facts to require an evidentiary hearing.

2. The Circuit Court Appropriately Exercised Its Discretion In Denying Radder's Motion Without a Hearing

¶24 Because Radder's amended motion failed to state sufficient facts, we review the circuit court's decision to deny Radder's motion without a hearing for an erroneous exercise of discretion. ***Velez***, 224 Wis. 2d at 18. Although the circuit court simply wrote "[d]enied" on the facsimile cover sheet for Radder's amended motion, it had already explained its reasons for denying Radder's substantially similar initial motion—the motion was "boiler plate" and "fail[ed] to state any factual basis for the motion or how the legal grounds cited apply to the case." These observations apply to the amended motion as well. At any rate, even if the circuit court fails to state its reasons for a discretionary decision on the record, "we are permitted to search the record for reasons to sustain" the decision. *See* ***Sulla***, 369 Wis. 2d 225, ¶23. And we conclude that the circuit court appropriately exercised its discretion.

¶25 As we noted above, Radder's claim that the stop and detention were not supported by a warrant or reasonable suspicion was nothing more than a bare conclusion, and the circuit court reasonably denied a hearing on that issue. The claim that Radder was arrested without probable cause articulated in the amended motion offered a bit more detail, but without alleging any factual dispute a hearing would resolve. As the circuit court seemingly recognized, the motion rested on what the ***Garner*** court called mere "hope or pure speculation" that grounds for

suppression would be discovered. ***Garner***, 207 Wis. 2d at 533-34. Thus, the court reasonably determined that Radder had failed to demonstrate "a reasonable possibility that an evidentiary hearing" would "establish the factual basis" for his claim that he was arrested without probable cause. *See* ***Velez***, 224 Wis. 2d at 13 (quoting ***Garner***, 207 Wis. 2d at 533). Given the perfunctory and conclusory nature of Radder's motion, the circuit court appropriately exercised its discretion to deny a hearing.

CONCLUSION

¶26 When defendants file a pretrial motion to suppress, the clear weight of our law suggests that an evidentiary hearing should ordinarily be held. The circuit court could have done so in this case. However, this was, as the circuit court recognized, a boilerplate motion full of legal conclusions that told neither the State nor the court what Radder intended to challenge and why. While significant leeway in the pretrial context should be afforded, it is not, and need not be, limitless. We conclude that the circuit court's line drawing here was not in error and affirm.

By the Court.—Order affirmed.

¶27 REILLY, P.J. (*concurring*). The majority holds that a defendant who has filed a pretrial suppression motion "bears the burden of demonstrating a need for an evidentiary hearing in the first place" and that the defendant must show a "reasonable possibility that a hearing is needed to … establish the necessary factual basis to succeed on the motion." Majority, ¶15. I concur as given the reasoning in ***State v. Zamzow***, 2017 WI 29, ¶31, 374 Wis. 2d 220, 892 N.W.2d 637, I see no alternative; however, I caution that the Constitution is a restriction rather than a tool of the government, and the State should have the burden to show that a warrantless seizure and arrest was reasonable under the Fourth Amendment and should have the burden to show that an evidentiary hearing is *not* needed. ***Zamzow*** fundamentally changed constitutional law in Wisconsin by holding that hearsay evidence satisfies the Due Process Clause at a pretrial hearing and a defendant has no Sixth Amendment right to confront his accusers at a pretrial hearing. ***Zamzow***, 374 Wis. 2d 220, ¶31. Therefore, I must concur that the State's burden is satisfied simply through a legally sufficient criminal complaint.

¶28 ***Zamzow*** teaches us that where a criminal complaint is legally sufficient to establish reasonable suspicion or probable cause, the State has met its burden of production and persuasion. As Radder had no pretrial right to confront the officer(s) who stopped and arrested him and the court had the authority to consider solely hearsay evidence (criminal complaint), *see* ***id.***, ¶¶24, 30-31, I agree that Radder's boilerplate motion presented a purely legal question and the circuit court did not err.

¶29 The majority adheres to the rule set forth in ***State v. Velez***, 224 Wis. 2d 1, 18, 589 N.W.2d 9 (1999) (citation omitted), that "[w]here there is a reasonable possibility that the defendant will establish the factual basis at an evidentiary hearing, the circuit court must 'provide the defendant the opportunity to develop the factual record.'" Majority, ¶13. I caution that this rule is meaningless given ***Zamzow***, which eliminates the right to an evidentiary hearing on a motion to suppress.[1] Under the reasoning in ***Zamzow***, for example, an arresting officer who made an arrest and who wrote a report explaining the circumstances of the arrest may not be constitutionally compelled to swear under oath to the truth of the statements in his police report utilized to prepare the criminal complaint prior to trial. Counsel is no longer able to explore with the officer(s) the circumstances and nuances that are invariably and often times inadvertently left out of any narrative report. The childhood game of "telephone" is a rich example as to what happens when one person whispers something to the next and the next and the next—what was originally whispered by the original declarant is often much different when recorded by the last person—all without any nefarious intent.

[1] "Reasonable possibility" has not been defined in the context of the standard to establish a factual basis for an evidentiary hearing on a motion to suppress. It sounds a lot like "probable" to me. Our case law has defined the phrase in the context of a claim of ineffective assistance of counsel. Reasonable possibility of a different outcome means "one that raises a reasonable doubt about guilt, a 'probability sufficient to undermine confidence in the outcome' of the proceeding." ***State v. Dyess***, 124 Wis. 2d 525, 544-45, 370 N.W.2d 222 (1985) (citation omitted) (explaining that the "reasonable probability" standard from ***Strickland v. Washington***, 466 U.S. 668 (1984), is "substantively the same" as our "reasonable possibility" standard). Where the facts of a case have been developed through a trial and the parties are at the postconviction phase of the criminal proceeding, this standard has teeth and is an arguably workable gauge. Where no facts have been developed or investigated at the pretrial stage, however, the reasonable possibility standard is, in my opinion, unworkable for a defendant, especially where no right to an evidentiary hearing or confrontation exists.

¶30 I also disagree with the notion that discovery at the pretrial stage is bad for the justice system. If our aim is to do justice by punishing the guilty and promptly setting the innocent free, then there is no error in allowing for sworn examination to ferret out ambiguities, clarifications, and amplifications of the facts that were set down on paper and averred to be the "truth." Obtaining the true facts early in the criminal proceedings from the witness(es) with firsthand knowledge is never an evil. Truth, whichever side it falls upon, is better than a game of surprise and intrigue at trial.

¶31 We should also err on the side of safeguarding the constitutional rights of those whose liberty is threatened by allowing the accused to confront the State's suppression witnesses as to factual allegations set forth in the complaint or other hearsay evidence offered as there is no greater engine for exposing truth than the ability to cross-examine one's accuser. The "wasting of judicial resources" is, in my opinion, never grounds for the denial of an evidentiary hearing in which witnesses are sworn to tell the truth under the pain of perjury. Constitutional safeguards are for the citizens and are not rights given to make the government's job easier. As I warned in my dissent in ***State v. Zamzow***, 2016 WI App 7, ¶22, 366 Wis. 2d 562, 874 N.W.2d 328 (Reilly, P.J., dissenting), now "evidentiary hearings are no longer necessary to the determination of whether a warrantless search and/or seizure was constitutional. Suppression hearings [have now been] reduced to a paper review in which trial courts read police reports and review evidence … to determine whether a warrantless search or seizure was nevertheless lawful."

¶32 I concur with the majority that we must be careful and cognizant of the "inherent difficulties a defendant may have in developing the facts necessary to support a pretrial motion," ***Velez***, 224 Wis. 2d at 13, but I disagree with the

majority that the guarding of "scarce judicial resources" is a justifiable reason for denying an evidentiary hearing. Majority, ¶¶12, 16, 18. I concur but only for the reason that the State has met their burden of proof in light of ***Zamzow***.