FILED
03-19-2021
Clerk of Court
Marinette County
2019CF000049

BY THE COURT:

DATE SIGNED: March 19, 2021

Electronically signed by Judge James Morrison
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT BRANCH II MARINETTE COUNTY

STATE OF WISCONSIN
Plaintiff,
v.

RAYMAND L. VANNIEUWENHOVEN
Defendant

DECISION AND ORDER REGARDING MOTION TO SUPPRESS DNA EVIDENCE

Case No.: 19-CF-49

The Defendant seeks to exclude the DNA which he placed on an envelope when he licked and sealed that envelope and handed it to the Chief Deputy of the Oconto County Sheriff's Department. The Court rejects that argument.

The facts in this case are rather simple. The State believed that they had good reason to believe that the Defendant was the likely perpetrator of the murder of David Schuldes and Ellen Matheys. That belief arose from the fact that the perpetrator of that murder apparently left his DNA on a pair of shorts that was worn by Ms. Matheys at the time of her death. The DNA was properly collected at the time of crime in 1976 but because of the state of the art at the time that evidence did not lead to the identification of any potential suspect or suspects. Over the years, because of the substantial advancements in DNA technology, it became clear that the DNA that was recovered from her clothing could be subjected to various analysis including ancestral DNA testing and as a result of that there was a high likelihood to believe that the DNA found on Ms. Matheys clothing belonged to the Defendant, one of his brothers or one of their male

descendants. In order to determine that which of these men provided the DNA conclusively it was necessary to collect the DNA of these individuals. There were four Vannieuwenhoven brothers. One was deceased. The DNA of two of the others was collected, without their knowledge, from trash in one case and from a coffee cup used in a local restaurant in the other. It was determined that neither of those were a match for the DNA found on Ms. Matheys clothing.

In order to obtain the DNA of the Defendant, Marinette County Detective Todd Baldwin worked with his colleague, Darren Laskowski, who was the Chief Deputy of the recently elected Oconto County Sheriff Todd Skarban. Baldwin asked Laskowski to assist by going to the home of Mr. Vannieuwenhoven, explaining to him that Laskowski was there at the request of the Sheriff to conduct an informal survey and to obtain information from residents of rural Oconto County, especially more senior citizens, to better determine the law enforcement presence and needs for those individuals in remote parts of Oconto County.

This was, of course, a complete fabrication. There was no such effort. This was a ruse, an investigative technique designed to obtain from Mr. Vannieuwenhoven his DNA by asking him to complete a survey, lick an envelope and provide it to Deputy Laskowski so that it could be confidentially reviewed by the Sheriff.

Laskowski went to Mr. Vannieuwenhoven's home in the middle of the day, approached the front door, knocked on the door and the Defendant came to the door. Detective Baldwin and Chief Deputy Laskowksi recognized the importance of getting this right and Deputy Laskowski wore a recording device so that the entire event could be recorded by audio.

Laskowski came to the house in the day light, knocked on Mr. Vannieuwenhoven's front door, Mr. Vannieuwenhoven came to the door, and Laskowski engaged in a brief

conversation explaining the purpose of his visit and asked if he could come in. Mr. Vannieuwenhoven invited him in. Once inside the house it was clear that Mr. Vannieuwenhoven was watching some kind of television or had a radio on and Deputy Laskowski asked him to turn it off, which he did. This is significant to the Court indicating that Mr. Vannieuwenhoven was not under pressure and was acting voluntarily.

They then engaged in a conversation in which Mr. Vannieuwenhoven offered his opinions about the presence of squad cars (without deputies in them) parked for long periods of time at various locations, the fact that people drove too fast through town and that Mr. Vannieuwenhoven even tried to slow them down by driving well below the speed limit himself. This was not the conversation of someone under pressure in the opinion of the Court.

The Chief Deputy was not in uniform but he had clearly identified his rank and his purpose to Mr. Vannieuwenhoven at the initial discussion at the front door and he pressed Mr. Vannieuwenhoven to complete the survey, which he did, and then he asked Mr. Vannieuwenhoven to seal the envelope so that it could be delivered to the Sheriff with assurance of no one tampering with it. The Defendant voluntarily complied with all of that.

Laskowski then took the envelope, provided it to Detective Baldwin who had it processed, the DNA was properly extracted, analyzed and there was a highly relevant match to the DNA taken from Ms. Matheys clothing.

In essence, the Defendant's Complaint is that the State used deception to obtain this information and that therefore it was not voluntarily given. They go on to argue that the physical entry in to a home to conduct a search is even more strongly **presumptive** as unreasonable than a search conducted elsewhere. *Welsh v. Wisconsin,* 466 US 740 (1984). There are a host of cases that stand for the proposition that this is a rebuttable presumption.

Counsel for the Defendant is not able to articulate any action taken by Chief Deputy Laskowski that deprived Mr. Vannieuwenhoven of free will or his ability to say no at any point. The Defendant obviously did not know that Laskowski was there to harvest his DNA. This was clearly a ruse.

These facts raise several important constitutional questions.

The Fourth Amendment protects persons from unreasonable searches and seizures but also permits law enforcement to obtain a warrant to conduct searches and seizures upon probable cause. From an analysis stand point the first thing to consider is whether Detective Baldwin and Chief Deputy Laskowski were required to obtain a warrant before engaging in the exercise before this Court. Clearly, if they had a properly issued warrant this would not be an issue because a warrant issued upon probable cause would make the search permissible under the Fourth Amendment. The question arises whether the failure to obtain a warrant when one could have been obtained renders a permissible search impermissible simply because the State had not obtained a warrant.

The United States Supreme Court has answered that question numerous times, most pointedly in *Kentucky v. King,* 131 S. Ct. 1849 (2011). As the Court pointed out in *King*, warrantless searches are allowed when the circumstances make it reasonable within the meaning of the Fourth Amendment to dispense with the warrant requirement. Warrantless searches in the presence of **exigent circumstances** are a type of such reasonable searches. Additionally, officers may seize evidence in **plain view** if they have not violated the Fourth Amendment in arriving at the point from which the observation of the evidence was made. Critical to this case, officers may also seek **consent to search** if they were lawfully present in the place where the consensual encounter occurs. While *King* cited its decision in *Brigham v. City of Stuart*, to the effect that "searches and seizures inside of a home without a warrant are presumptively unreasonable, but it also

recognized that that presumption "may be overcome in some circumstances because the ultimate touch stone of the Fourth Amendment is reasonableness." The Court discussed officers seeking consent based searches if they are lawfully present where the consensual encounter occurs, as for example, on the front porch of someone's home. The Court held that "if consent is freely given it makes no difference that an officer may have approached the person with the hope or expectation of obtaining consent." Key to this case:

> "While most citizens will respond to a police request the fact that people do so, and do so without being told they are free to refuse, hardly eliminates the consensual nature of the response."

King makes clears that there are many entirely proper reasons why police may not want to seek a warrant even when they think they might be able to do so. One of those reasons might be to speak to persons where they think a short and simple conversation may obviate the need to apply for and execute a warrant, or, police may ask an occupant for consent to search because it is simpler, faster and less burdensome than applying for a warrant and a consensual search under those circumstances may result in considerably less inconvenience and embarrassment to the occupants and as the Court points out in *King*:

> "Law enforcement may not want to execute a search that will disclose the existence of an investigation because doing so may interfere with the acquisition of additional evidence against those already under suspicion or evidence about additional but as yet unknown participants in a criminal scheme.
>
> 'We have said that law enforcement officers are under no constitutional duty to call a halt to criminal investigation the moment that they have minimum evidence to establish probable cause, citing *Hoffa v. United States*, 385 U.S. 293 (1966)."

Precisely parallel to our case in *King* the Court held:

> "When law enforcement officers are not armed with

> a warrant knock on a door they do no more than any private citizen might do. Whether the person who knocks on the door and requests the opportunity to speak as a police officer or a private citizen the occupant is under no obligation to open the door or to speak.

These holdings are, of course, consistent with *Schneckloth v. Bustamonte*, 93 S. Ct. 2041 (1973), where Justice Stewart delivered the opinion of the Court in a case involving an automobile search in which the Court held consent was surely given. In that case, the driver was asked if he could search the car and his response was "sure, go ahead", very similar to permitting the deputy in to the house. In that case, the Court specifically rejected the notion that voluntariness requires that the party searched needs to be told that he can refuse permission or withdraw permission and in that case the Court recognized and acknowledged the "need" for police questioning as a tool for effective enforcement of criminal laws and most importantly as applicable to our case:

> "The significant fact about all of these decisions (the many decisions cited by the Court in that opinion) is that none of them turned on the presence or absence of a single controlling criteria; each reflected a careful scrutiny of all surrounding circumstances citing, among others, *Miranda v. Arizona*, 384 U.S. 436."

Among other things, the Court recognized that a warrantless search conducted pursuant to consent could actually benefit significantly the target of the search:

> "If the search is conducted and proves fruitless, that in itself may convince the police that an arrest with its possible stigma and embarrassment is unnecessary."

Quoting Justice Traynor of the California Supreme Court Justice Stewart stated:

> "It is not unreasonable for officers to seek interviews with suspects or witnesses or call upon them at their homes for such purposes" and;
>
> "Neither this Court's prior cases, nor the traditional definition of 'voluntariness' requires proof of knowledge of the right to refuse as the Sine Qua Non of an effective consent to search."

Justice Prosser writing for the Wisconsin Supreme Court in *State v. Artic*, 327 Wis.2d 392 (2010), was faced with a case instructive to us. In *Artic*, the police sought information with respect to the activities of Robert Lee Artic, Jr. when they in fact found evidence implicating his father, Robert Lee Artic, Sr. which supported convictions for maintaining a drug trafficking place and possession with intent to deliver cocaine as a party to a crime. Sr. appealed.

The facts in the case show just how far the police can go and nevertheless not violate the concept of consent found based upon a totality of the circumstances.

In that case, the police initially obtained access to the house by approaching the house with their weapons drawn, kicking in the door and entering. They then encountered Sr. and they told him, untruthfully that his son had just been arrested holding a large amount of cocaine. They asked Artic, Sr. whether he believed his son would have left any cocaine in the house, specifically the upstairs portion that Jr. occupied. Sr. told the police that he did not think that was likely and he granted permission for the police to search upstairs because he said he thought he had nothing to hide.

Artic, Sr. did not challenge the voluntariness of his consent to the entry and subsequent search upstairs where a substantial quantity of cocaine was found which supported the conviction for Sr.

This is a particularly instructive case to us because here the Court found that the initial entry into the house was completely unconstitutional but even in the face of that, the voluntary consent to go upstairs and to search upstairs was given voluntarily and was therefore not constitutionally defective. Justice Prosser made clear that it was necessary to consider all of the factors, the totality of the circumstances, in deciding whether the entry and the search upstairs was voluntary and the Court concluded, ultimately, that based upon totality of the circumstances the search was voluntary. Most importantly, for

our purposes, the deception of Artic, Sr. did not defeat the consent and ultimately caused the exclusion of the evidence.

Similarly in *State v. Triggs*, 264 Wis.2d. 861 (Court of Appeals 2003). The Court specifically dealt with the question of misrepresentations made during an examination and found that police misrepresentation is not so inherently coercive that it renders an inculpatory statement inadmissible. In that case, the misrepresentation was that there was the existence of more than one witness implicating the Defendant and describing both her and her victim and her automobile even though none of that evidence existed. The Court of Appeals discussed all the various kinds of trickery/deception that police may use, some of which renders statements involuntary some of which do not. It made clear that the analysis is a case by case analysis.

The parties have cited numerous other cases but the basic principle is that police do not need a warrant to seek consent, that evidence which police obtain from a consented, non warrant, search of a home or of a person in a home is subject to a totality of the circumstances analysis for the question of voluntariness.

Applying those principles to this case it is clear to the Court that the Defendant gave consent to talk to the police, knew the person he was speaking to was a police officer, agreed to the police officers request that he come in to the house, freely provided information to the police officer about policing and other issues, voluntarily completed the survey, placed his DNA on the envelope when he sealed it and gave that envelope to the police officer. There is nothing to indicate that these actions on the part of Mr. Vannieuwenhoven were not in every respect voluntary.

The Defendant cites the *Blackmon* case for the proposition that law enforcement cannot use deceit in obtaining consent but that case arose in the context of obtaining a blood sample from a victim of a serious automobile accident where the victim was in the

hospital being treated and where the officer misrepresented the ramifications of the refusal to provide the blood sample. Under a totality of circumstances analysis the Court there had no difficulty finding that under those circumstances consent was not voluntarily given. That is not this case.

The Defendant also asked the Court to consider *Stevens* where a private garbage hauler was enlisted to support law enforcement by collecting garbage left at the curb and then delivering it to law enforcement for subsequent analysis. There the Defendant did not "cooperate" by leaving his garbage at the curb as usual, but left his garbage in the garage. The garbage hauler went into the garage of this man's home to retrieve the garbage. The homeowner did not consent to permit the garbage hauler or police to come into his garage to pick up his garbage. It was not "garbage" until it was placed on the curb to be picked up. Control was not relinquished, and expectation of privacy was not surrendered when that garbage was retained in the Defendant's garage, clearly within the curtilage of the house.

In *Arizona v. Fulminate*, 499 US 279 (1991), law enforcement obtained information from a prisoner in custody who was offered protection from fellow inmates if he provided information with respect to the murder of yet another fellow inmate. Under those circumstances where the life of the Defendant was in fact in jeopardy, the Court found that that consent was coercive. Hardly the circumstances here. This was a conversation that occurred around the Defendant's kitchen table.

In summary, the Defendant did not need to answer his door as Justice Stewart made clear. He did not need to engage in conversation on his front porch, he did not need to agree to have the deputy into his home. He did not have to answer the questions. He did not need to complete the survey and lick the envelope. While he was not told that there is no obligation to answer the questions, he didn't ask if he had an obligation to

answer the questions. He chose, as Justice Stewart pointed out, to cooperate with law enforcement as most citizens do.

The purpose of the Fourth Amendment is to prevent strong arm techniques such as existed in the colonies before the revolution where the King's law enforcement and soldiers came in to peoples homes, tore them apart in the middle of the night, seized property and persons in utter disregard of their rights. That is not what happened here. This evidence is not going to be suppressed.