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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
Case No. 2019AP1404-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,
v.
GEORGE STEVEN BURCH,
Defendant-Appellant.

On Notice of Appeal to Review the Judgment of Conviction entered in the Circuit Court for Brown County, the Honorable John Zakowski Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTE CITED

CASES CITED

REPLY ARGUMENT

I. THE BCSO'S SEARCH OF BURCH'S CELL PHONE EXTRACTION IN AUGUST 2016 VIOLATED THE FOURTH AMENDMENT

The State's argument can be summarized as follows: Burch consented to have his entire phone downloaded; once police possessed the download, Burch forever lost any privacy interest in the phone's contents, and police can search, share, and use this information indefinitely. *See* State's Br. at 14-25. The State's argument is based on the flawed premise that Burch's consent was unlimited. But even if this Court agrees with the State, Burch's consent did not continue indefinitely.

Take for example a house. If one consents to the search of his living room, he has arguably relinquished some privacy interest. But he has not forever surrendered this privacy interest, thereby justifying police to reenter and search his home indefinitely. And he certainly has not relinquished his privacy interests in other areas of his home–say his bedroom–not previously exposed to police eyes.

Burch recognizes that the home has historically been given heightened Fourth Amendment protections, but the United States Supreme Court holds that cell phones present the same, if not greater, privacy interests as those applicable to one's home. *Riley v. California*, 573 U.S. 373, 396-97 (2014) ("A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form–unless the phone is.")

Admittedly, there is a distinction between a house and a phone extraction in that the extraction is in police possession. But the fact that police can readily capture a wealth of information, much of which is irrelevant to their investigation and would never have been seized in a search of tangible evidence, should not eviscerate traditional Fourth Amendment principles. To be clear, Burch is not asking this Court to give additional Fourth Amendment protections to digital data, as the State suggests. State's Br. at 24. Burch is asking this Court to apply the same limits that are naturally imposed by the dimensions of physical evidence.

This Court should hold that once police isolate the evidence relevant to their investigation and within the scope of the search, the non-relevant data must be returned or destroyed. At a minimum, this Court should require a warrant prior to conducting a second search of the data.

A. Scope of Consent

As an initial matter, the State urges this Court to review this issue deferentially, relying on *Garcia*. State's Br. at 19. *Garcia*, however, involved a dispute of fact and required the court to make a credibility determination; this Court deferred to that determination. *State v. Garcia*, 195 Wis. 2d 68, 75, 535 N.W.2d 124 (Ct. App. 1995). Where, as here, there was no dispute of fact, and the court was instead tasked with applying a constitutional reasonableness standard (R. 101:6-7), this Court should review de novo. *See State v. Kolp*, 2002 WI App 17, ¶ 5, 250 Wis. 2d 296, 640 N.W.2d 551; Opening Br. at 14-15. In any event, the court's analysis is incorrect under either standard.

The focus of the State's argument on this point is that Burch consented to a download of his entire phone and he did not specifically limit that consent. State's Br. at 15-16, 19-21. However, this position fails to account for the circuit court's finding that the scope of consent was initially limited to only text messages. R. 101:5. Burch agrees. Bourdelais made clear that his request of Burch was limited to "hey, do you mind if we take a look at those text messages. . . ." R. 234:11. Where the court erred is in concluding that the scope was broadened when Bourdelais used the blanket term "information" R. 101:5. As previously developed, the court omitted a critical word from its analysis, "the," meaning Burch consented to a download of the specific information they had discussed: the text messages. Opening Br. at 15. The State does not refute this argument.

The State's remaining arguments are based on the premise that Burch's consent was unlimited. If the Court agrees that consent was limited to text messages, then the inquiry ends.

B. The GBPD Unlawfully Retained Burch's Entire Phone Extraction

Burch did not forfeit this argument. *See* State's Br. at 21. Before the circuit court, Burch moved to suppress on grounds that the police violated his Fourth Amendment rights (R. 68:2), and he maintains those same grounds here. Opening Br. at 10-23. Thus, unlike in *Nelis*, Burch does not ground his claim on a different statute than that raised before the trial court; "the specific grounds for inadmissibility" is, and has always been, the Fourth Amendment. *See State v. Nelis*, 2007 WI 58, ¶ 31, 300 Wis. 2d 415, 733 N.W.2d 619.

In addition, Burch did not take a contrary position below in arguing that the BCSO should have obtained a warrant. *See* State's Brief at 21. Burch never conceded that the extraction was lawfully retained; he simply argued that a warrant would have cured the constitutional problem. R. 234:9. This argument is consistent with *United States v. Ganias II*, 824 F.3d 199, 220-21, 225-26 (2d. Cir. 2016).

The State distinguishes *Ganias* and *People v. Thompson*, 28 N.Y.S.3d 237 (2016) on the basis that those cases involved warrants, which limited the evidence the government was allowed to seize. State's Br. at 22. According to the State, because Burch consented to the download of all his phone's data, police could use all this information at their leisure. *Id.*

Again, a reasonable person in Burch's position would not think that he was consenting to the seizure of all his phone's data. Burch agreed that Bourdelais could look at his text messages between he and Schuyler and allowed Bourdelais to download those, as opposed to the cumbersome process of taking individual screen shots. R. 234:10-11. But Burch's focus on this point is on what police can do with non-relevant evidence once the search is complete and the relevant evidence has been identified and isolated.

Physical evidence imposes natural limits on what police take and retain. Say police want to determine whether someone had contact with a certain individual, and that person consents to police searching the caller identification log in his home. In conducting this search, police are not also going to take the person's bank records, diaries, home videos, prescription information, etc.; these

items are totally irrelevant to their investigation. And even if they did, general principles would require the return of these items if they contained no evidentiary value. *See United States v. Tamura*, 64 F.2d 591, 596-97 (9th Cir. 1982). Similarly, police here identified and isolated the relevant information by generating a report of the specific information Bourdelais wanted to review. R 234:42-43. At that point, all of the other information downloaded from Burch's phone became irrelevant. Under traditional principles, irrelevant information would need to be returned. *See Tamura*, 694 F.2d at 596-97.

The fact that police overseize electronic data as an administrative convenience should not eviscerate these principles and should not serve to create an investigative playground for the government to enjoy in perpetuity.

C. The BCSO's August 2016 Review of Burch's Phone Extraction Constituted a Search

The State argues that the BCSO's examination of the extraction was not a search because Burch did not have an expectation of privacy. State's Br. at 22-23. According to the State, *Stout* and *Randall* stand for the proposition that consent permanently terminates one's expectation of privacy. *Id.* at 16, 18. Neither of these cases so hold.

In *Randall*, the court made clear that Randall's reduced expectation of privacy in the alcohol content of her blood flowed from her arrest for drunk driving, not her consent. *State v. Randall*, 2019 WI 80, ¶¶ 21, 36, 387 Wis. 2d 744, 930 N.W.2d 223 (lead opinion)(noting that arrestees have a reduced expectation of privacy in the instrumentalities of their crime and "Upon her arrest, Ms. Randall's reduced expectation of privacy meant that she

could not keep the presence and concentration of alcohol in her blood secret from the police."); ¶¶ 42, 76 (Roggensack, C.J., concurring)("a defendant who has been arrested for driving while under the influence of alcohol has no reasonable expectation of privacy in the alcohol concentration of the blood . . . .") Randall's consent was relevant only to the "method" by which police obtained the evidence. *Id.*, ¶ 36.

Stout made a passing reference to a person giving up his or her right to privacy by consent, but that relinquishment was temporary. *See State v. Stout*, 2002 WI App 41, ¶ 17 n. 5, 250 Wis. 2d 768, 641 N.W.2d 474. Certainly, *Stout* would not tolerate police reentering one's home or automobile in perpetuity because at one point the owner gave consent. The State points to no authority holding that consent to search forever terminates one's expectation of privacy.

D. The BCSO Lacked Lawful Authority to Search in August 2016

The State grounds its authority to search on its possession of the extraction, relying on *Petrone*, *Reidel*, and *VanLaarhoven*. State's Br. at 19. In those cases, the court concluded that the examination of evidence cannot be parsed from the seizure of that evidence; the examination of evidence is essential to the seizure and constitutes a single constitutional event. *See State v. VanLaarhoven*, 2001 WI App 275, ¶ 16, 248 Wis. 2d 881, 637 N.W.2d 441; *State v. Petrone*, 161 Wis. 2d 530, 545, 468 N.W.2d 676 (1991); *State v. Riedel*, 2003 WI App 18, ¶¶ 13, 16, 259 Wis. 2d 921, 656 N.W.2d 789.

Unlike in those cases, the BCSO's search of the extraction was not essential to the GBPD's seizure of the same. The BCSO's search can be parsed from the GBPD's seizure, as it was conducted by a different agency, in an unrelated investigation, months later. R. 78; R. 101:12; R. 234:4; R. 251:35, 66. In *Petrone*, could the police later share the film canister with another agency for fingerprint examination in an unrelated homicide investigation? Could police subsequently test the blood samples obtained in *VanLaarhoven* or *Reidel* for DNA connecting the defendants to a robbery? The logic–that the examination is essential to the seizure of evidence–collapses when applied to the above hypotheticals. Sure, the examination of evidence is an essential part of the seizure but none of these cases hold that police can do so in perpetuity for reasons entirely unrelated to the seizure.

Also, *Riley* and *Randall* teach us that lawful possession does not equate to an unfettered right to search. Police may lawfully *seize* an individual's cell phone incident to arrest, to ensure it cannot be used as a weapon and to prevent the destruction of evidence, but police must obtain a warrant to *search* the phone. *Riley v. California*, 573 U.S. 373, 387-88, 401 (2014). Similarly, in *Randall*, the State was limited to testing for only the alcohol content of the defendant's blood. 387 Wis. 2d 744, ¶ 35. Even though the State possessed the blood sample, a "generalized rummaging" of information beyond the alcohol content was not permissible. *Id.*

Further, the State wrongly reads *Betterley* in arguing that defendants have a diminished expectation of privacy in items that police have "unobjectionable *access* to." State's Br. at 18 (emphasis added). Instead, *Betterley* held that a defendant's reduced expectation of privacy flows from "prior unobjectionable *exposure* of the item to police."

State v. Betterley, 191 Wis. 2d 406, 418, 529 N.W.2d 216 (emphasis added). As developed, even if Burch had a reduced expectation of privacy in the text messages previously exposed to police, this exposure did nothing to diminish his expectation of privacy in the areas of his phone never exposed to police eyes. Opening Br. at 21-23.

E. This Court Should Not Remand to Address the Independent-Source Doctrine

Under the independent-source doctrine, the State must show that it obtained the evidence by "independent and lawful means[.]" *State v. Quigley*, 2016 WI App 53, ¶ 51, 370 Wis. 2d 702, 883 N.W.2d 139. Apart from having forfeited the issue by not raising it below (*State v. Van Camp*, 213 Wis. 2d 131, ¶ 25-26, 569 N.W.2d 577 (1997)), the State cannot meet either prong.

Starting with the latter, the State asserts–without record support–that it lawfully searched Burch's phone with a warrant following his arrest. State's Br. at 28. This assertion is contrary to the circuit court's finding that the phone was searched "incident to arrest . . . ." R. 101:14. This finding was supported by Loppnow's testimony that Burch's phone was searched incident to his arrest; Loppnow made no mention of a warrant. R. 234:58.

Also, the State cannot show that any subsequent search was independent of the initial illegality. The State points to evidence found after Burch's arrest (State's Br. at 28), but probable cause to arrest relied heavily on the Google data placing Burch at the critical crime locations, which police obtained only after the illegal search of his phone. R. 6:5-6.

F. The Good Faith Exception does not Apply

The State points to the consent form as providing a good faith basis for the BCSO to believe it could search Burch's phone download. State's Br. at 26-27. As to the scope of consent, a general consent form is of little help in determining scope and can be overridden by more explicit statements. *United States v. Lemmons*, 282 F.3d 920, 924 (7th Cir. 2002). As discussed, Burch's consent was limited.

In any event, police possession of the extraction did not grant authority to conduct a second search. Opening Br. at 19-23; *supra* part I(D). For the good faith exception to apply, police must have relied on settled precedent; the exception does not apply when the court has not spoken on the issue. *State v. Dearborn*, 2010 WI 84, ¶ 46, 327 Wis. 2d 252, 786 N.W.2d 97. As developed, the line of cases cited by the State (State's Br. 28) did not authorize this search. *Supra* part I(D).

II. THE CIRCUIT COURT ERRONEOUSLY ADMITTED THE FITBIT EVIDENCE WITHOUT AN EXPERT WITNESS TO ESTABLISH THE RELIABILITY OF THE SCIENCE UNDERLYING THE FITBIT TECHNOLOGY AND WITHOUT A WITNESS FROM FITBIT TO AUTHENTICATE THE EVIDENCE. IN ADDITION, THE COURT'S ERROR IS ONE OF A CONSTITUTIONAL MAGNITUDE.

A. Expert Testimony was Required to Establish the Reliability of the Science Underlying the Fitbit Technology

The State approaches the Fitbit issue with an oversimplified view. Like the circuit court (R. 70:8-9), it likens the Fitbit technology to a pedometer, watch or speedometer. State's Br. at 31. The Internet of Things

aspect of a Fitbit distinguishes it from these devices. *See* R. 63:2. The concern in this case is not simply with the device itself, a three-axis accelerometer sensor that generates data representing the user's movements. *Id.* at 1. The greater concern is with how the device processes that data into a meaningful output, how that output is exchanged with a phone or computer, and how that evidence ultimately ended up in Fitbit's business records. Behling could not answer any of these questions. *See* R. 251:98-100.

The State's claim that jurors need only be generally familiar with technology and need not understand the underlying science is simply wrong. State's Br. at 31. In *Kandutsch*, the case the State likens most to this case, the court did not conclude that jurors need not understand the underlying science. The court explained that *because* jurors understand the underlying technology, expert testimony is not required. *State v. Kandutsch*, 2011 WI 78, ¶ 37, 336 Wis. 2d 478, 799 N.W.2d 865.

Also contrary to the State's argument, whether the underlying science is accepted *is* critical to a determination of whether an expert is required. *See* State's Br. at 31. Sure, the ultimate question in *Hanson* was whether the court could take judicial notice of the accuracy and reliability of the science at issue. *State v. Hanson*, 85 Wis. 2d 233, 244, 270 N.W.2d 212 (1978). However, the alternative to the court taking judicial notice was requiring expert testimony. *See id.* at 244-45; *see also Kandutsch*, 336 Wis. 2d 478, ¶ 43 ("The *Hanson* court concluded that judicial notice could properly be taken of the reliability of the underlying scientific principles of speed radar detection without expert testimony.") Because the scientific principles at issue there had been widely accepted and considered unassailable by courts, expert testimony was

not necessary. *Hanson*, 85 Wis. 2d at 237-39, 244-45; *Kandutsch*, 336 Wis. 2d 478, ¶ 44.

The Fitbit evidence, involving the "Internet of Things," is unlike any other previously addressed in Wisconsin courts. *See* R. 63:2. The State offers no authority that Fitbit evidence, or evidence from technology even remotely similar, has been accepted without expert testimony. This case will set the benchmark for the admissibility of such evidence in the years to come.

B. The State Failed to Properly Authenticate the Fitbit Evidence

Contrary to the State's argument (State's Br. at 32), reliability is critical to authentication. The *Kandutsch* decision was replete with reference to reliability and accuracy as pertinent to its authentication analysis. 336 Wis. 2d 478, ¶¶ 45-46, 48, 64. The State is correct that Wis. Stat. § 909.015 is not mandatory. State's Br. at 33. However, the State does not explain how it otherwise authenticated this data. Indeed, the State does not defend the trial court's self-authenticating conclusion (R. 70:17), which, as discussed, failed to account for the information contained within those records. Opening Br. at 36.

The State takes a two-dimensional view when it frames the authentication issue as "whether Detrie's Fitbit was accurately tracking the steps he took." State's Br. at 34. The State wholly ignores the three-dimensional aspect, the Internet of Things aspect, and whether the data from the device itself arrived at Fitbit's business records in an authentic, reliable, and accurate manner.

Kandutsch teaches us that even when expert testimony is not required, testimony by one familiar with the technology is required to establish that the process "produces an accurate result." 336 Wis. 2d 478, ¶ 46. The *Kandutsch* jury heard extensive testimony about how the technology works, how the information is transmitted, and why the jury could trust that it was accurate. *Id.*, ¶¶ 13-16, 19. Unlike in *Kandutsch*, the witness used to introduce the underlying data, Behling, knew nothing about how the Fitbit data is stored and transmitted, and he could not give the jury any assurance that the data was not manipulated or edited. R. 251:98-100; Opening Br. at 32-34.

Along these lines, as to chain of custody, the State attempts to shift the burden to Burch to show that the data could have been manipulated. State's Br. at 34. The State, as the proponent, bears the burden to show that it is improbable that the evidence was contaminated or tampered with. *State v. McCoy*, 2007 WI App 15, ¶¶ 9, 10, 298 Wis. 2d 523, 728 N.W.2d 54; Opening Br. at 34. The State makes no argument as to how it did so below.

C. The Admission of the Fitbit Evidence without an Expert and without a Witness from Fitbit Implicated Burch's Right to Confrontation

Burch recognizes that his Confrontation claim does not neatly fit within the test set forth in *Crawford v. Washington*, 541 U.S. 36 (2004). However, as noted in his opening brief, it is time for the Confrontation Clause to evolve, and he raises this issue to preserve for review before higher courts. Opening Br. at 37-39.

III. THE ERROR WAS NOT HARMLESS

The State faces a high burden in establishing harmless error; indeed, it must show *beyond a reasonable doubt* that the error *did not contribute* to the verdict. *State v. Harris*, 2008 WI 15, ¶ 42, 307 Wis. 2d 555, 745 N.W.2d 397. The State cannot make that showing.

With respect to the Google Dashboard evidence, the State argues that it was duplicative to the DNA evidence, placing Burch outside VanderHeyden's house and at the field. State's Br. at 36. The discovery of the DNA evidence, however, was the byproduct of the evidence derived from the illegal search of the cell phone. At the time of the illegal search, all police had was an "investigative lead" of the database hit linking Burch to the sock. R. 246:194. The DNA link connecting Burch to the cord and the victim's body was not developed until September 12 (R. 152), after his September 7 arrest (R. 246:98), the probable cause for which was primarily grounded on the Google Dashboard evidence. R. 6:5-6. The DNA evidence referenced by the State was thus derived from the illegal search, and must also be suppressed under the fruit of the poisonous tree doctrine. *See State v. Knapp*, 2005 WI 127, ¶ 24, 285 Wis. 2d 86, 700 N.W.2d 899. The suppression of this evidence would have resulted in a much different defense strategy.

As to Detrie, it was police who blamed Detrie for Vanderheyden's death. R. 240:283-84. Detrie's lack of injuries and conduct do not establish his innocence. First, Detrie was not entirely cooperative with police, refusing to provide a DNA sample. R. 242:196. Second, Burch never claimed that "Detrie beat him up" (State's Br. at 37). Burch's testimony was that he woke up on the ground to Detrie pointing a firearm at him. R. 252:133, 137, 150.

At closing argument, Burch pointed to a myriad of facts evidencing Detrie's guilt. R. 255:105. Among the most notable, was the fact that Detrie did not report Vanderheyden missing until after her body was found. *Id.* at 108. Next, there was Detrie's confession to Dallas Kennedy when pressed about what happened: "I don't know. She hit her head . . . ." *Id.* at 115. There was also the strong odor of cleaning agents discovered in Detrie's home, which was inconsistent with the home's disheveled state. *Id.* at 118-19. Further, the defense pointed to the boxes of cables found in Detrie's garage, the same type of cable used to strangle Vanderheyden. *Id.* at 120. Also, there was DNA consistent with Detrie's on Vanderheyden's underwear, tank top, bra, and under her left fingernail. *Id.* at 124-25. All of this evidence paled in comparison to Detrie's supposed cooperation and lack of injuries relied upon by the State. State's Br. at 37.

Indeed, the jury took particular note of all the evidence Burch challenges, requesting to see the graphs of the Fitbit steps (exhibits 165-66) and the GPS coordinates with time stamps. R. 255:147-49. The State cannot show beyond a reasonable doubt that this evidence did not contribute to the verdict.

CONCLUSION

Burch requests that this Court reverse the decisions of the circuit court and remand for a new trial.

Dated this 10th day of June, 2020

Signed:

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I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3,771 words.

Dated this 10th day of June, 2020

Signed:

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This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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Dated this 10th day of June, 2020

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