State of Wisconsin
Court of Appeals
District 1
Appeal No. 2016AP001564 - CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Jeremy Ezekiel Hollis,

Defendant-Appellant.

On appeal from a judgment of the Milwaukee County Circuit Court, The Honorable Claire L. Fiorenza, and the Hon. Stephanie Rothstein, presiding

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Defendant-Appellant's Brief and Appendix

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Statement on Oral Argument and Publication

The issues presented by this appeal are controlled by well-settled law. Therefore, the appellant does not recommend either oral argument or publication.

Statement of the Issues

Whether the circuit court erred in denying Hollis' pretrial motion to suppress all evidence seized by the police as a result of the warrantless forced entry into his home, which was purportedly done to assist Hollis' probation agent in conducting a probation search of the home.

Answered by the circuit court: No. The circuit judge concluded that this was a reasonable probation search, not a police search. The police officers did not use the probation agent as a "stalking horse."

Summary of the Argument

A warrantless entry into a home by police officers is *per se* unreasonable, subject to certain narrowly drawn exceptions. One such exception is a reasonable search conducted by a probation agent. Nevertheless, the police may not use a probation agent as a "stalking horse" to conduct a police search

that would otherwise be prohibited. Whether a search was a police search or a probation search is a matter of constitutional fact that the appellate court reviews *de novo*.

Here, the evidence presented at the motion hearing demonstrates that the police officers plainly used Hollis' probation agent as a stalking horse. This was a warrantless police search of a home, not a probation search. This is true for the following reasons:

- Prior to contacting Hollis' agent, the police attempted to enter Hollis' home, and Hollis demanded that the police "get a warrant." Instead of getting a warrant, the officers contacted Hollis' probation agent.
- Not only did the impetus for the entry into the home begin with the police officers, the agent testified at the motion hearing that it was his belief that the reason for the forced entry into the home was because the police knew Hollis was there, and they wanted to arrest him. According to the agent, the search of the home by him was an afterthought.
- According to Department of Corrections rules, probation agents are not even permitted to conduct forced entries into homes to conduct a probation search.

For these reasons, the circuit court's order denying Hollis' motion to suppress must be reversed.

Statement of the Case[1]

The defendant-appellant, Jeremy Ezekiel Hollis (hereinafter "Hollis") was charged with possession of MDMA ("Ecstasy") with intent to deliver, possession of marijuana with intent to deliver, disorderly conduct, possession of cocaine with intent to deliver, possession of a firearm by a felon, and keeping a drug house. (R:1) Essentially, the complaint alleged that on April 3, 2013, Milwaukee Police were dispatched to a residence upon a complaint of a man armed with a pistol. *Id.* When the police arrived, a neighbor told police that Hollis had threatened to shoot anyone who came into his (Hollis') residence. At that point, Hollis was on his porch yelling profanities at the neighbor for calling the police. When the police made a move to talk to Hollis, he went into the house and refused to come out.

During the investigation, the police learned that Hollis was on probation, so they contacted his agent. The agent came to the scene, according to the criminal complaint, and entered Hollis' home. The agent then searched the residence and found various illegal drugs.

Hollis waived his preliminary hearing, and he was bound

[1] Hollis resolved this case with a guilty plea, and he does not challenge the entry of his guilty plea nor the sentence imposed. The sole issue on appeal is whether the circuit court erred in denying his motion to suppress. Therefore, for the sake of clarity and efficiency, this brief will not set forth a separate section for the factual history and the procedural history. The facts, as necessary for an understanding of the issue, will be set forth as needed.

over for trial. He initially entered not guilty pleas to all counts. (R:42-4)

Hollis filed a pretrial motion seeking suppression of all evidence seized by police during the warrantless search of his apartment on April 3, 2013. (R:16) The court held an evidentiary hearing on the motion.

At the motion hearing, officer Elizabeth Hallman of the Milwaukee Police Department testified that on April 2, 2013, at about 3:45 p.m., she was dispatched to 2476 N. 15th Street in Milwaukee, based on a subject with a gun complaint. (R:57-8) When Hallman arrived at the scene she was met by a neighbor, S.J., who told Hallman that the man in the upper apartment next door had pulled out a firearm. (R:57-10) S.J. identified the man with the gun as Hollis. *Id.* Hallman also spoke to G.J., who lived in the lower unit of the duplex in which Hollis lived. (R:57-11) According to G.J., Hollis has told his wife that he was going to shoot anyone who came into the residence. (R:57-11)

As part of her investigation, Hallman ran a check on Hollis, and learned that he was on probation, and also that he is a convicted felon. (R:57-12)

At about this point, Hollis came out onto the porch of the upper unit of the duplex, and he began yelling at G.J. and the police. (R:57-13) Police asked Hollis to come down and speak to them about the situation. (R:57-16) Hollis declined, and he told the police to go get a warrant. *Id.*

The police then contacted Hollis' probation officer, told him what had occurred, and so the agent issued a probation warrant. (R:57-16; R:57-43) The probation agent, Daniel Isaacson, went to the scene, but he initially remained back by the squad cars. (R:57-46) The police forced entry into Hollis' home, but Isaacson was not part of the entry team. (R:57-47, 48) Once the residence was cleared and Hollis was arrested, Isaacson entered the home. *Id.* Inside the residence, Isaacson searched for a firearm. (R:57-51) According to Isaacson, he made it clear to the officers that they were there only to protect him (Isaacson). (R:57-51) While searching the home, Isaacson found two firearms and a plastic container with suspected marijuana, cocaine, and ecstasy pills. (R:57-52)

Agent Isaacson explained that the Department of Corrections is not allowed to force entry into a home based upon a probation/parole warrant. (R:57-57) According to Isaacson, "[The] Milwaukee Police Department made the decision to force entry based on the fact that Mr. Hollis was in the residence, and they wanted to take him into custody. The forced entry, to my knowledge, was not to go in there and do a home search. The home search was determined after the fact." (R:57-57)

The court made findings of fact that essentially mirrored the testimony set forth above, except that the judge failed to account for Agent Isaacson's testimony that the police forced

entry because they wanted to arrest Hollis, and that the home search was done as an afterthought. Then the judge concluded, "And I do find that the search was, in fact, a probation search done at the request of Supervisor Isaacson, not at the request of the Department, and that Supervisor Isaacson made it clear to the officers that they were solely there for purposes of security when he entered into this residence where the defendant was, hand been seen yelling . . . .the agent was not a mere stalking horse, and it was a valid probation search." (R:58-18)

Thereafter, Hollis reached a plea agreement with the State. Under the agreement, Hollis entered guilty pleas to counts 1, 3, 4, and 5 in the amended information[2] (R:22). The State moved to dismiss and read-in counts 2 and 6. Later, the judge sentenced Hollis to a total of thirteen years and nine months of initial confinement, and thirteen years of extended supervision. (R:32, 33)

Hollis timely filed a notice of intent to pursue postconviction relief. He then filed a notice of appeal. There were no postconviction motions.

[2] Count one of the amended information alleges possession with intent to deliver MDMA; count three alleges disorderly conduct with a dangerous weapon; count four alleges possession with intent to deliver cocaine; and count five alleges felon in possession of a firearm.

Argument

I The warrantless entry into Hollis' home was unreasonable because the police used the probation agent as a stalking horse to circumvent Hollis' demand that the police "get a warrant."

A Standard of Appellate Review

"[T]he determination of whether a search is a police or probation search is a question of constitutional fact reviewed according to a two-step process. First, we review the circuit court's findings of historical fact under the clearly erroneous standard. Second, we review the circuit court's determination of constitutional fact *de novo.*" *State v. Hajicek,* 2001 WI 3, ¶ 2, 240 Wis. 2d 349, 352–53, 620 N.W.2d 781, 782–83

In this appeal, Hollis does not challenge the circuit judge's findings of historical fact; rather, Hollis contends that, under those historical facts, this was a police search, not a probation search.

B The exception to the warrant requirement for probation searches

The entry into Hollis' home was without a warrant, and, therefore, it was *per se* unreasonable, subject to certain exceptions. *See, e.g., Katz v. United States,* 389 U.S. 347, 357,

88 S.Ct. 507, 19 L.Ed.2d 576 (1967) Among other exceptions, "There is an exception to the warrant requirement for probation searches. *Griffin v. Wisconsin,* 483 U.S. 868, 875-76, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987)." *Hajicek*, 2001 WI 3, ¶ 36, 240 Wis. 2d 349, 368, 620 N.W.2d 781, 789.

Nevertheless, the police may not use a probation agent as a stalking horse to conduct a search that would otherwise not be permitted. "A 'stalking horse' is '[s]omething used to cover up one's true purpose; a decoy." *Id.* at ¶ 22 (citation omitted). In determining whether a search is a police or probation search, a 'stalking horse' is a probation officer who uses his or her authority to help the police evade the warrant requirements of the Fourth Amendment." *State v. Wheat*, 2002 WI App 153, ¶ 20, 256 Wis. 2d 270, 281, 647 N.W.2d 441, 446

In determining whether a probation agent is being used as a stalking horse, one important factor is who instigated the search, the police or the agent. "[A] probation officer cannot be a "stalking horse" of law enforcement if the probation officer instigated the search." *Wheat*, 2002 WI App 153, ¶ 21, 256 Wis. 2d 270, 281, 647 N.W.2d 441, 446

The mere presence of police officers, though, does not necessarily mean that the probation agent is being used as a stalking horse. The agent may have police officers be present for protection. *Id.* So long as a parole agent is not acting as a mere tool or device of the police, it is perfectly proper for him to

cooperate and assist law enforcement. *United States v. Hallman*, 365 F.2d 289, 292 (3d Cir.1966).

C As a matter of constitutional fact, this was a police search; the officers used the probation agent as a stalking horse.

There are several compelling reasons that, even under the circuit court's findings of historical fact, this was plainly a police search, not a probation search.

Firstly, the entry into the home was instigated by the police. The testimony at the motion hearing established that Officer Hallman attempted to speak to Hollis, but, when she did, Hollis went into his home after telling the officer to get a warrant.

Rather than trying to get a warrant, though, the officer instead called Hollis' probation agent. The inference demanded by this fact is so compelling that it is practically unnecessary to consider any further evidence. The officer was told that she could not come into the home without a warrant. Instead of trying to get a warrant, though, the officer took the shortcut of contacting Hollis' probation agent. What explanation can there be for this conduct *other than the officer intended to use the probation agent to get into Hollis' home*?

For his part, the probation agent testified at the motion hearing that it was his understanding that the reason the police

forced entry into the home was *because they knew Hollis was in there, and they wanted to take him into custody*. The agent could have come to this understanding only by observing the police conduct, or by what the police told him. The police officers led the agent, himself, to believe he was acting as a stalking horse.

Finally, the *coup de grâce* is that the police *forced entry into Hollis' home.* Under DOC rules, agents are not permitted to make a forced entry into a home to conduct a probation search. How, then, could this possibly be a probation search? Again, the persuasive force of this fact, standing alone, is probably enough to demand the conclusion that this was a police search, not a probation search. But when it is considered along with the other facts presented at the hearing, it makes it difficult to understand how one could reach any other conclusion.

For all of these reasons, the court of appeals should find-- based on a *de novo* review of the historical facts-- that this was plainly a police search. Because it involved a warrantless entry into a private home in the absence of any exception to the warrant requirement, the entry and search was unreasonable.

Conclusion

It is respectfully requested that the court of appeals reverse the circuit court's order denying Hollis' motion to suppress, and to order that the motion be granted. Hollis should be permitted to withdraw his guilty pleas, and the matter should be remanded to the circuit court for further proceedings consistent with these orders.

Dated at Milwaukee, Wisconsin, this _____ day of November, 2016.

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Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2761 words.

This brief was prepared using *Google Docs* word processing software.The length of the brief was obtained by use of the Word Count function of the software

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Dated this _____ day of November, 2016

_____

Jeffrey W. Jensen

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Defendant-Appellant's Appendix

A. Record on Appeal
B. Excerpt of circuit court's bench decision (R:58)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this ____ day of November, 2016.

_____

Jeffrey W. Jensen