

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 2005CF000210

DARYISE EARL,

Defendant.

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DARYISE EARL'S PRETRIAL MOTIONS

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NOW COMES the above-named defendant, by his attorney, Jeffrey W. Jensen, and hereby moves the court as follows:

1. To dismiss the action for the reason that the evidence presented at the preliminary examination was insufficient to establish probable cause to believe that the defendant committed any felony in Racine County.

2. To sever the trial of Daryise Earl from the trial of Johnny Herring for the reason that Herring made inculpatory statements which are not admissible against Earl. *Bruton v. United States*, 391 U.S. 123 (1968)

Dated at Milwaukee, Wisconsin, this \_\_\_\_\_ day of \_\_\_\_\_, 2005.

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MEMORANDUM IN SUPPORT OF DARYISE EARL'S PRETRIAL MOTIONS

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**I. THE EVIDENCE PRESENTED AT THE PRELIMINARY EXAMINATION WAS INSUFFICIENT TO ESTABLISH PROBABLE CAUSE TO BELIEVE THAT EARL COMMITTED A FELONY.**

The State's case against Daryise Earl ("Earl") is entirely circumstantial. Generally, the State presented evidence at the preliminary hearing that Michael Bizzle was found shot in the head outside of his van. Bizzle died from that wound. The fingerprints of Earl were found somewhere on the van. Additionally, the codefendant, Johnny Herring, told Derek Earl (the defendant's brother) that he (Herring) shot Bizzle. Earl was present during this conversation and shook his head when he heard it. Maurice Bizzle (the victim's brother) was in jail with Earl and picked a fight with Earl. During the course of the ensuing argument Earl told Maurice that he (Earl) was going to kill him and bury him next to his brother. Police recovered CBC brand 9 mm shells from the scene of the murder and also from the scene of a "shots fired" call at Earl's home several days before the murder. Finally, police recovered a watch of Earl's home which Maurice Bizzle identified as belonging to his brother, Michael.

As will be set forth in more detail below, virtually every "circumstance" outlined above was established either wholly or in part by inadmissible hearsay. Therefore, the evidence was plainly insufficient to support the bindover.

Police Technician James Yoghourtjian testified at the preliminary examination that he compared fingerprints taken from the door frame of the van at the scene of the homicide and compared them to the exemplar prints of Daryise Earl. According the Yoghourtjian, the prints matched.

However, on cross-examination Yoghourtjian admitted that he did not recover the latent prints from the van; rather, the basis for his testimony that they were recovered from the van was based upon what some other officer told him. (Transcript p. 10). Earl then moved to strike Yoghourtjian's testimony concerning the latent prints and the court commissioner overruled the objection. (Trans. P. 11) On redirect examination the prosecutor attempted to refresh Yoghourtjian's recollection by showing him police reports. The reports did refresh the witness's recollection insofar as he then remembered that he was the one who recovered the latent prints but, still, he could not remember the location of the latent prints on the van. (Trans. P. 14)

Additionally, Earl's brother, Derek, testified at the preliminary hearing. Derek said that Johnny Herring (the codefendant) told him (Derek) that he (Herring) had shot Michael Bizzle (the victim). As the statement related to Daryise Earl, Earl objected on the grounds of hearsay and the objection was overruled. (Tran. P. 30)

Finally, Investigator Warmington testified that the 9 mm shells which were found at the scene of the Bizzle murder were of an unusual brand "CBC". Warmington then went on to point out that similar 9 mm CBC brand shells were found in the back of Earl's home when police were sent to a "shots fired" call several days before the Bizzle murder. However, cross-examination revealed that Warminington did not recover any of the casings; rather, the location where the casings were found was told to him by another officer. (Tran. P. 43). Earl again moved to strike but the motion was overruled. (Trans. P. 43)

The standards governing probable cause at a preliminary hearing. "[T]he purpose of a preliminary examination is to determine if there is probable cause to believe a felony has been committed by a defendant. Section 970.03(7) then commands the court to bind the defendant over for trial if probable cause is found to exist." *State v. Dunn*, 121 Wis. 2d 389, 394, 359 N.W. 2d 151 (1984). "A preliminary hearing as to probable cause is not a preliminary trial or a full evidentiary trial on the issue of guilt beyond a reasonable doubt." *Id.* at 396. "It is intended to be a summary proceeding to determine essential or basic facts as to probability." *Id.* at 396-97. As such:

The focus of the judge at a preliminary hearing is to ascertain whether the facts and the reasonable inferences drawn therefrom support the conclusion that the defendant probably committed a felony. . . . [A] preliminary hearing is not a proper forum to choose between conflicting facts or inferences, or to weigh the state's evidence against evidence favorable to the defendant. . . . If the hearing judge determines after hearing the evidence that a reasonable inference supports the probable cause determination, the judge should bind the defendant over for trial. Simply stated, probable cause at a preliminary hearing is satisfied when there exists a believable or plausible account of the defendant's commission of a felony.

*Id.* at 397-98.

Thus, the court must "bind a defendant over for trial when there exists a set of facts that

supports a reasonable inference that the defendant probably committed a felony. . . ." Id. at 398. "All that is needed is a believable or plausible account of the defendant's commission of a felony." *State v. Cotton*, 266 Wis. 2d 308, 668 N.W.2d 346 (2003 ).

*A. The location of the fingerprints on the van*

The State presented evidence that Earl's fingerprints were located somewhere on the van. Officer Yoghourjian at first testified that there were located on the door frame but later admitted that he did not know where the prints were located on the van. Thus, no inference can be drawn from this evidence other than that at some point Earl touched Bizzle's van somewhere.

*B. Johnny Herring's statements to Derek Earl*

A hearsay statement is, "[a] statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

Plainly, what Johnny Herring said to Derek Earl at some time prior to the preliminary hearing is hearsay. It was made out-of-court, not under oath, and the state offered the statements for the truth of the matter asserted. The only remaining question is whether any subsection of the hearsay statute creates an exception or defines the statement out of the hearsay rule.

One possibility is Sec. 908.01(4)(b)5 which defines out of the hearsay rule, "A statement by a coconspirator of a party during the course and in furtherance of the conspiracy." This subsection does not save the day for the State, though, because there was no foundation that the conversation Johnny Herring had with Derek Earl was during the course of the conspiracy much less was it in furtherance of it. Therefore, at least as to Daryise Earl, the court commissioner abused her discretion in admitting the testimony of Derek Earl on this point.

Therefore, no inference may be drawn from the evidence because it was not properly admissible in the first place.

*C. Daryise Earl's statement to Maurice Bizzle in jail*

As mentioned above, the court is not to make credibility determinations during the course of a preliminary examination. Thus, even though Maurice Bizzle at first testified that Earl threatened to kill him (Maurice) and bury him next to Maurice's brother (Michael) and only later changed the testimony to include the phrase "I am going to kill you *like I killed your brother*", the court may accept the testimony.

*D. The 9 mm shells*

The 9 mm shells, of course, are of extremely limited probative value. There was no testimony from a firearms and toolmarks expert linking the bullet which killed Bizzle to any gun linked to Earl. Rather, the testimony was to the effect that CBC is an unusual brand and CBC shells were found at the scene of Bizzle's murder as well as in the yard of Earl.

The testimony concerning the locations where these shells were found was entirely hearsay, though. Again, the court commissioner erred in admitting this testimony.

Therefore, the properly *admissible* testimony concerning the shells is limited to the fact that CBC is an unusual brand of ammunition. This, of course, permits no inference that Daryise Earl was involved in the shooting of Michael Bizzle.

#### *F. The admissible evidence fails to create probable cause*

The sum, then, the properly admissible evidence is that Daryise Earl's fingerprints were located somewhere on Michael Bizzle's van. That Earl told Maurice Bizzle during the course of a heated argument that he (Earl) would kill Maurice just like he (Earl) killed Michael. Finally, a watch which was similar to one worn by Michael Bizzle was found in Daryise Earl's bedroom.

Even giving the State the benefit of all reasonable inferences this is totally insufficient to establish probable cause to believe the Earl was a party to the crime of shooting Michael Bizzle in the head. It is fundamental that the State cannot obtain a conviction based solely on the accused's confession. See *State v. Verhasselt*, 83 Wis.2d 647, 661, 266 N.W.2d 342 (1978). There must be evidence corroborating at least one significant fact. *Schultz v. State*, 82 Wis.2d 737, 752, 264 N.W.2d 245 (1978).

Here, there is no evidence in the record as to how Earl was supposedly involved in the killing of Bizzle. Rather, the evidence was to the effect that Earl was *not* the one who shot Bizzle (i.e. Herring said he was the one who shot Bizzle; however, for reasons stated above, this evidence is not admissible). The fact that Earl may have touched Bizzle's van at some unknown time at some unknown location on the van hardly corroborates Earl's supposed statement to Maurice Bizzle that he was the one who killed Michael Bizzle.

For these reasons the evidence presented at the preliminary examination was insufficient to bind Earl over to trial.

## II. THE COURT MUST ORDER SEVERANCE OF DEFENDANTS BECAUSE HERRING MADE AN INCULPATORY STATEMENT AGAINST EARL.

The State presented evidence at the preliminary hearing that Johnny Herring told Derek Earl that he (Herring) shot and killed Bizzle. Because the state intends to use the evidence the court must order severance.

If the district attorney intends to use the statement of a codefendant that implicates another defendant in the crime charged, the judge shall grant a severance as to any such defendant. 971.12(3), STATS The purpose of § 971.12(3) is to provide a mechanism to ensure compliance with *Bruton v. United States*, 391 U.S. 123 (1968), which prevents the use of a codefendant's statement inculcating another defendant at a joint trial based on the codefendant's Sixth Amendment right to confront witnesses. *Pohl v. State*, 96 Wis.2d 290, 301, 291 N.W.2d 554, 559 (1980).

Because it appears that the State intends to use Herring's statement against Earl the court is required to grant severance.

Dated at Milwaukee, Wisconsin, this \_\_\_\_\_ day of \_\_\_\_\_, 2005.

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