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October 22, 2018

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You are hereby notified that the Court has entered the following order:

2017AP895-CR State of Wisconsin v. Ronald J. Wendling (L.C. #2015CF177)

Before Sherman, Blanchard and Fitzpatrick, JJ.

Appointed counsel for Ronald Wendling filed a no-merit report under WIS. STAT. RULE 809.32 (2015-16); *see also* ***Anders v. California***, 386 U.S. 738, 744 (1967).[1] After our independent review of the record, we conclude that there is a nonfrivolous issue that must be pursued. We reject the no-merit report and order briefing to proceed under the regular rules.

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

Wendling was convicted of one felony count of operating with a restricted controlled substance, one felony count of possession of THC, and one misdemeanor count of possession of paraphernalia. All of these charges arose from a traffic stop. Wendling moved to suppress evidence obtained from the stop. After an evidentiary hearing, the circuit court denied the motion. The issue we address now is whether it would be frivolous to argue on appeal that the officer's stop of Wendling's vehicle was unlawful. We conclude that it is not frivolous.

The vehicle stop was made by an officer who testified that she was randomly checking on passing license plates. She entered Wendling's Illinois plate number into the patrol car computer and testified that she received back a response to the effect of "unable to process." She then radioed for dispatch to run the same check, and dispatch was also unable to obtain information. The officer then decided to make the stop solely on that basis.

We separately address a factual issue and a legal issue.

I. FACTUAL ISSUE

The phrase "unable to process" is arguably susceptible to different interpretations. That response might be understood as telling the user that there has been some kind of system failure that prevented the underlying license plate database from being accessed. Or, it could potentially be understood as indicating some kind of problem with the vehicle registration itself. The factual issue we focus on here is whether the State proved that the officer understood this response as meaning that there was an increased chance of a problem with the registration. We conclude that it is not frivolous to argue that the State failed to prove this.

The following exchange occurred on direct examination of the officer:

> Q: And unable to process, have you seen that before?
>
> A: Yes, sir.
>
> Q: What does that mean to you given the fact that you've worked with that system before?
>
> A: To me it means either I ran the plate wrong or there wasn't enough information regarding the plate that was on the vehicle to get back, or there could be a number of things. But those are the most two [sic] common issues that I have when I get that answer, or response back.
>
> Q: That you ran it wrong or what's the other one?
>
> A: That there wasn't enough given information for the plate for that vehicle. Such as the VIN number, registered owner, the make, the color, so on.

It appears that this is the only testimony during which the officer discussed the possible meaning of the response she received from the computer. In argument after the testimony, the State summarized the officer's testimony as meaning that "for all intents and purposes, the information that the officer has is that that vehicle is not properly registered." In response, counsel for Wendling asserted: "And I don't think she gave testimony that therefore I conclude that this plate's no good."

After argument, the circuit court noted the ambiguity of the computer response, in that the response did not say that the registration was either lawful or unlawful. It also noted that the fact that this was an out-of-state plate "adds another degree of ambiguity and unreliability." The court gave the parties an opportunity for further briefing on applicable case law.

After that briefing, the circuit court denied Wendling's motion to suppress. The court held that reasonable suspicion was present because "the officer is not required to rule out innocent explanations." The court asserted that there may have been innocent explanations here,

> [b]ut among the problematic explanations are that, you know, this is a plate that somebody just randomly threw on a vehicle after they found it at the junkyard. That the plate doesn't match the vehicle; that the plate has long since expired and therefore there is no computer record. There are reasons for a law enforcement officer under those circumstances to check out what's going on with this vehicle, what's going on with this plate, what's going on with the registration.

It is not frivolous to argue that in the course of this analysis the court made a factual finding about the meaning of the "unable to process" response that the officer received from the computer. By saying that the license plate could have been a found or expired one, the court may have, in practical effect, been finding as a fact that "unable to process" sometimes means that the vehicle is not properly registered.

We further conclude that it is not frivolous to argue that any such finding was clearly erroneous because there was no evidence to support it. As we described above, the officer was asked twice what she understood that response from the computer to mean. One possibility she clearly explained was that she entered the incorrect number. Beyond that, it is not frivolous to argue that the officer's testimony failed to give a clear answer, and did not provide any basis to infer that a problem with the vehicle registration itself was something that she understood this computer response as potentially indicating. If the officer believed that this computer response sometimes means that the plate is invalid, these appear to have been questions that would lead her to say as much. However, she did not.

It is not frivolous to argue that, rather than making a finding about what the *officer* believed this computer response to mean, the court may instead have relied on its *own* view of what that phrase could mean. However, the court's view may have been based only on

speculation, because there may be no evidence in the record to show the meaning of the computer's use of that phrase, other than the officer's testimony.

We address the potential significance of this finding in the next section.

II. LEGAL ISSUE

If the State proved that invalidity of the vehicle registration was one of the meanings that the officer understood from the computer response, then the no-merit report may be correct that it would be frivolous to argue that reasonable suspicion was not present. In other words, if invalid registration was one of several possible interpretations the officer held, that may be enough to create reasonable suspicion.

However, if the circuit court erred in finding that "unable to process" sometimes indicates an invalid registration, we conclude that it is not frivolous to argue that reasonable suspicion was not present. We do so for several reasons.

First, although the no-merit report contains a lengthy discussion of this issue, and discusses two out-of-state cases and one Wisconsin Supreme Court case, it is not clear that counsel has concluded that this issue is frivolous. The report's discussion of this issue concludes: "[T]here are arguments which favor reasonable suspicion and no reasonable suspicion, but overall the scale tips in favor of reasonable suspicion …."

It appears from this language that counsel was attempting to decide which argument is most likely to prevail. However, that is not the applicable test. In reviewing the no-merit report, the question is whether the potential arguments would be "wholly frivolous." This standard means that the issue is so lacking a basis in fact or law that it would be unethical for counsel to

make the argument. *See* ***McCoy v. Court of Appeals of Wisc***, 486 U.S. 429, 436-38 (1988). The test is not whether the attorney expects the argument to prevail. *See* comment to SCR 20:3.1 (action is not frivolous even though lawyer believes client's position ultimately will not prevail).

In addition, regardless of counsel's conclusion, we are not persuaded at this point that the case law discussed in the report makes further pursuit of this issue frivolous. That case law does not appear to be closely on point. Nothing in the report's discussion of those cases establishes that it would be frivolous to pursue this issue.

And, in the absence of dispositive case law, we conclude that the issue is not frivolous. If the officer did not infer from the computer's response that there was an increased probability of a problem with the vehicle registration, then it is not frivolous to argue that reasonable suspicion was not present. Without an inference of increased probability, the computer's response may not have provided a basis for the officer to be more suspicious of this vehicle than of the other vehicles that passed her that day. It is not frivolous to argue that the simple unavailability of an information source does not create reasonable suspicion.

In summary, we conclude that it is not frivolous to argue that the circuit court erred in denying Wendling's suppression motion. Because this issue appears to have been preserved in the record, it does not appear necessary to file a postconviction motion raising it. *See* WIS. STAT. § 974.02(2). Accordingly, we order the appeal to proceed with regular briefing under WIS. STAT. RULE 809.19. If Wendling's attorney does not agree that the issue is sufficiently preserved, and believes that it may be necessary to address this issue as, for example, one of ineffective assistance of counsel, counsel should promptly inform us of that and we will permit a postconviction motion.

We emphasize that nothing in this order should be read as indicating that we have reached any final conclusion about any point discussed in it. The purpose of this order is to indicate only that we have found arguments that are not frivolous and must be made by counsel. In later briefing it is still necessary for counsel to provide a complete presentation to demonstrate the correctness of any argument made.

IT IS ORDERED that the no-merit report is rejected.

IT IS FURTHER ORDERED that within forty days of the date of this order the appellant shall file a brief under WIS. STAT. RULE 809.19.

Sheila T. Reiff
Clerk of Court of Appeals