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DISTRICT IV

November 12, 2020

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

2019AP1465-CR State of Wisconsin v. Joshua J. Luther (L.C. # 2015CF341)

Before Fitzpatrick, P.J., Kloppenburg, and Nashold, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

The State of Wisconsin appeals a circuit court order denying a motion for reconsideration of a suppression order. After reviewing the briefs and record, we conclude at conference that

this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).¹ We summarily affirm.

Luther was charged with causing injury by use of a vehicle while having a detectable amount of a restricted controlled substance in his blood, contrary to WIS. STAT. § 940.25(1)(am). Luther moved to suppress all evidence found as a result of his consent to a blood draw. Luther argued that his consent was obtained by unconstitutionally coercive means, relying on *State v. Blackman*, 2017 WI 77, ¶¶61-67, 377 Wis.2d 339, 898 N.W.2d 774 (concluding that defendant's consent to blood draw was not voluntary and free where law enforcement incorrectly informed defendant that his operating privilege would be revoked if he refused the request for a blood draw). The circuit court granted Luther's suppression motion after an evidentiary hearing. The State moved for reconsideration. The court denied the motion for reconsideration, and the State appealed.

The State frames the issue on appeal as whether the circuit court erred by suppressing Luther's blood-draw evidence. However, the State did not appeal the original circuit court order granting Luther's suppression motion. The State appealed only the order denying its motion for reconsideration. Accordingly, the sole issue before us on appeal is whether the circuit court properly exercised its discretion in denying the State's reconsideration motion. *See Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶6, 275 Wis. 2d 397, 685 N.W.2d 853 (a decision on a motion for reconsideration is reviewed under the erroneous exercise of discretion standard).

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

To prevail on a motion for reconsideration, a movant must either present newly discovered evidence or establish a manifest error of law or fact. *Id.*, ¶44. On appeal, the State does not present any newly discovered evidence or assert that any error of fact occurred. Rather, the State renews its legal argument, made for the first time in its reconsideration motion, that the blood-draw evidence should not be excluded pursuant to the good faith exception to the exclusionary rule. Under the good faith exception, “the exclusionary rule is not applied when the officers conducting an illegal search ‘acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment.’” *State v. Dearborn*, 2010 WI 84, ¶33, 327 Wis. 2d 252, 786 N.W.2d 97 (quoted source omitted).

Luther argues that the State is precluded from relying on the good-faith exception as a basis for reversal because the State did not raise that argument in the suppression proceedings but rather brought it up for the first time only in its reconsideration motion. We agree with Luther’s position. “[R]econsideration assumes that the question has previously been considered.” *O’Neill v. Buchanan*, 186 Wis. 2d 229, 234, 519 N.W.2d 750 (Ct. App. 1994). The record reflects that the State did not raise the question of whether the good-faith exception should be applied in this case until after Luther’s suppression motion had been granted. In its order denying the State’s reconsideration motion, the circuit court noted that the State “clearly had the ability to make the argument” regarding the good faith exception in response to Luther’s suppression motion but that it chose not to do so. We cannot conclude that the circuit court

erroneously exercised its discretion by failing to consider, in making its suppression ruling, an issue not raised until after that ruling was made. We affirm on that basis.²

IT IS ORDERED that the order is summarily affirmed under WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals

² While the circuit court concluded that it did not believe there was an adequate basis for the State to be allowed to request reconsideration, the court nonetheless went on to address the good faith exception issue “simply to complete the record in this case.” [69:2] Because we are deciding the appeal on another basis, we need not reach that issue. *See Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (we need not address all issues when deciding case on other grounds).