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DISTRICT IV

September 9, 2022

To:

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Circuit Court Judge
Electronic Notice

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Kirk Edwin Lupton
P.O. Box 250625
Milwaukee, WI 53225

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

2019AP1644-CR State of Wisconsin v. Kirk Edwin Lupton (L.C. # 2016CF128)

Before Blanchard, P.J., Kloppenburg, and Graham, 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).

Kirk Lupton, proceeding pro se, appeals a judgment of conviction and an order denying his postconviction motion. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).[1] We affirm the order denying Lupton's postconviction motion, but reverse one of the orders denying Lupton's motion for suppression of video surveillance evidence, and remand for an evidentiary hearing on that issue. We are not affirming or reversing the judgment because the

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

challenge to the non-final suppression order that led to that judgment is still ongoing. If the circuit court denies the suppression motion, or does not allow Lupton to withdraw his pleas after granting it, the appellant can appeal the denial of that motion and the judgment of conviction.

In a complaint filed in April 2016, Lupton was charged with one count of possession of a firearm by a felon. The complaint referred to video surveillance by law enforcement of a particular property that captured an image of Lupton holding a firearm in April 2016. The complaint alleged that nine days later police applied for a search warrant for that property to search for firearms, and for other evidence such as firearm receipts, and that the warrant was granted and executed. The complaint alleged that numerous firearms were seized during the execution of the search warrant.

The information filed in June 2016 added nine more counts of possession of a firearm by a felon. In September 2018 Lupton pled no contest to and was convicted of two counts of possession of a machine gun. Before entering those pleas, as discussed in more detail below, Lupton sought suppression of the video surveillance evidence three times. All of the motions were denied without an evidentiary hearing.

Lupton first raised the video surveillance issue in a pro se motion to reconsider the circuit court's denial of his first suppression motion which had concerned issues unrelated to the issue of the video surveillance. The motion to reconsider, which did raise the video surveillance issue, was filed on October 6, 2016. It was denied in a written order on October 7, 2016. The court stated that it denied the motion because law enforcement obtained permission from the neighboring property owner to install the surveillance equipment and police are permitted to observe any property "from a public vantage point."

Lupton, by counsel, raised the video surveillance issue a second time in a suppression motion and memorandum of law filed on November 7 and November 28, 2016, respectively. There does not appear to have been a hearing or oral decision, and the motion was denied without a statement of reasons in a written order entered April 13, 2017.

Lupton, by counsel, raised the video surveillance issue a third time in a suppression motion filed on May 15, 2018. The circuit court denied this motion orally on September 28, 2018. It said that the video surveillance was conducted from "a public setting. That being the neighbor's property." Therefore, the court concluded, Lupton did not have a reasonable expectation of privacy.

After sentencing, Lupton, pro se, filed a postconviction motion in July 2019 raising several issues, including the video surveillance issue. The circuit court denied the motion without a hearing in August 2019. Lupton, pro se, appealed, and briefing was completed in January 2021. As discussed further below, we ordered supplemental letter briefs in November 2021, which we have received.

One of the arguments in Lupton's opening appellate brief is that evidence should have been suppressed due to the unconstitutional warrantless surveillance of the property where he resided. The State responds by arguing that Lupton's argument lacks legal merit because, based on allegations of fact referenced by the State, he did not have a reasonable expectation of privacy, and therefore the surveillance is not legally considered a "search."

We ordered further briefing in this appeal to address whether the circuit court should have held an evidentiary hearing regarding potential suppression of the video surveillance evidence. We did so after discovering that most of the factual allegations that the State relies on

in its discussion of this issue are not supported by its citations to the record, as described in more detail in our order of November 15, 2021. We further observed that all of the case law cited by the State on this issue is based on evidentiary hearings or detailed information, but that the record here does not appear to contain even some of the basic information that is ordinarily used to decide a suppression issue of this nature, such as meaningful information about the type of surveillance equipment used, the location and placement of the equipment, and the particular area or areas targeted by the surveillance. Accordingly, we ordered further briefing on whether an evidentiary hearing should have been held in the circuit court.

The State's supplemental brief does not address that issue. Instead, in practical effect, the State now argues that we need not decide that issue. We discern two such arguments in its supplemental brief. However, they both fail for the following reasons.

The State argues that Lupton's opening appellant's brief does not provide an argument challenging the constitutionality of the video surveillance. This position is not consistent with the State's original respondent's brief, which attempts to respond to such an argument on the merits. More specifically, the State now asserts that Lupton in his opening brief "does not here pursue" the claim that the alleged long-term warrantless video surveillance violated the Fourth Amendment.

The State's assertion is wrong. At pages six through eight, Lupton's opening brief contains a section with a title asserting that the circuit court's "findings of facts on thermal warrantless search" of Lupton's property are "contrary to established federal & Wisconsin law on use of hi-tech equipment." The first sentence of the section asserts that the video camera was prohibited under Wisconsin statutes and "Federal law under the 4th & 14th Amendments." The

argument discusses a particular case that Lupton asserts placed "4th Amendment limits on the use of police surveillance" technology. It also discusses a second case. It is followed by a section explaining why Lupton concludes that the video image was infrared-enhanced. Then, at pages fourteen through sixteen, there is a further discussion of potentially applicable case law. The argument is, as the State itself apparently originally concluded before we requested supplemental briefs, enough to require a substantive response from the State.

The State's second argument in its supplemental brief is that Lupton's postconviction motion to withdraw his plea should be denied because he did not explain why suppression of evidence would have caused him to reject the plea offer. This argument fails because Lupton's postconviction plea withdrawal motion is irrelevant to the suppression issue.

Lupton was not required to argue the suppression issue in a postconviction motion because he filed suppression motions before his plea, and they were denied. As a result, those issues were preserved for appeal without a postconviction motion. *See* WIS. STAT. §§ 971.31(10) and 974.02(2). The State cites one case for the proposition that a defendant's postconviction motion must explain why he would not have pled guilty, but that case was not in the same procedural posture as Lupton's. That case involved a plea-withdrawal claim based on ineffective assistance of counsel, and not, as here, a review of a pre-plea suppression motion.

However, there is a different legal context in which the potential effect of suppression on the defendant's plea decision would be considered, namely, a claim by the State of harmless error. If a circuit court improperly denies a defendant's suppression motion, the State can try to prove beyond a reasonable doubt on appeal that the error did not contribute to the result by proving that the defendant would have pled even if the motion had been granted. ***State v.***

Geyser, 2020 WI App 58, ¶41, 394 Wis. 2d 96, 949 N.W.2d 594. The factors we may consider in a harmless error analysis include: the persuasiveness of the evidence in dispute; whether the evidence in dispute duplicates untainted evidence; the relative strength and weakness of the State's case and the defendant's case; the reasons, if any, expressed by the defendant for choosing to plead guilty; and the benefits obtained by the defendant in exchange for the plea. ***State v. Semrau***, 2000 WI App 54, ¶22, 233 Wis. 2d 508, 608 N.W.2d 376; ***State v. Rockette***, 2005 WI App 205, ¶26, 287 Wis. 2d 257, 704 N.W.2d 382.

Here, even if we liberally construe the State's supplemental argument as an attempt to prove harmless error, it still fails. Lupton requested an order suppressing not just the video surveillance evidence, but also the fruits of that evidence, in the form of the warrant and any evidence obtained in or as a result of the search. The State argues that suppression would have "knocked out" only one or two of the ten counts in the information against Lupton, and therefore the offer to plead no contest to two counts would still have been attractive. In raising and addressing the suppression issue, both parties assume that police relied on the video surveillance evidence to obtain the warrant that led to the search. Although that is a reasonable inference, the assumption is not actually confirmed by the record. The complaint does not allege that the police relied on the video surveillance to obtain the search warrant, and the search warrant affidavit is not in the record.

Further, even if we were to accept that assumption for purposes of considering a harmless error argument by the State, the State still could not prevail for reasons we now explain.

The State argues that only one or two charges would have been knocked out by suppression of the search, but this is based on the State's assertion that "[m]ost of the original 10

charges [in the information] were unaffected by the surveillance and search in April 2016." The State cites only the complaint to support its factual assertion about the charges, and it does not explain how the complaint supports that assertion.

As it did in its original respondent's brief, the State again argues more than is supported by the record. To recap, only one of the ten charges in the information was charged in the complaint. The other nine firearm counts first appeared later, in the information. But there was no amended complaint to provide details about the new counts. It is true that the complaint, in addition to describing the facts supporting the original charge, also described other conduct with firearms that might be criminal. However, it appears that at least some, and possibly many, of the nine additional charges in the information were not described in the complaint.

It is certainly possible that some of those nine charges were unaffected by the April 2016 search because the dates of some of the charged conduct predate the search. However, we do not know what evidence many of those counts were based on. For example, count 2 charged possession of a Kimber 9mm between June and October 2013, well before the 2016 search. But the complaint does not describe any events during that time period with such a firearm. This charge may have been supported by eyewitness observation, but it could also have been supported by material that the State obtained in the 2016 search after the video surveillance, such as photos, video, or paper records such as receipts.

In short, the State has failed to prove how many of the ten charges would be affected by suppression of evidence from the 2016 search. Without a sufficiently detailed, record-based description from the State of the evidence supporting each count, or even a citation to a source in the record that provides this, we cannot say how many of the counts would be unaffected by

suppression. And, therefore, we are unable to accept the State's argument that Lupton's plea decision would have been unaffected by suppression.

In our order for further briefing, we observed that the State could argue in its supplemental brief that "the suppression motions were properly denied without an evidentiary hearing because of deficiencies in the motions." However, the State did not address that issue. We take that silence as a concession that Lupton's motions satisfied the applicable standard, and we accept that concession.

When a defendant moves to suppress evidence on the ground that a warrantless search occurred, the defendant is entitled to an evidentiary hearing when the defendant shows a reasonable possibility that a hearing is needed to develop the record to allow the defendant to establish the necessary factual basis to succeed on the motion. ***State v. Radder***, 2018 WI App 36, ¶¶13-15, 382 Wis. 2d 749, 915 N.W.2d 180. This is a question of law that we review de novo. ***Id.***, ¶14.

Lupton's suppression motion in May 2018 satisfied that test. The motion included the following: a description of the rural nature of the property; an allegation that law enforcement continually recorded his backyard for over sixty days; an assertion that this violated his reasonable expectation of privacy; and case law cited in support. The motion showed a reasonable possibility that a hearing was needed to develop the record with necessary facts. Accordingly, we reverse the order denying the May 2018 suppression motion and remand for an evidentiary hearing.

Finally, we briefly address Lupton's other arguments on appeal. Some of the arguments are difficult to understand and are not well developed with a factual or legal explanation. Some

of them are not legally correct, and others were waived by Lupton's no contest pleas. In short, none of them have persuaded us that the circuit court erred by denying his postconviction motion.

After the supplemental briefs were filed, Lupton filed a motion to take judicial notice of a certain published case. This type of motion is not necessary for us to consider case law, and therefore we deny the motion.

In summary, we reverse the denial of Lupton's May 2018 suppression motion, and affirm the order denying his postconviction motion. On remand the circuit court shall hold an evidentiary hearing on the suppression motion and, if suppression is granted, determine whether Lupton may withdraw his pleas. We are not affirming or reversing the judgment because the challenge to the non-final order that led to that judgment is still ongoing.

IT IS ORDERED that the motion to take judicial notice is denied.

IT IS FURTHER ORDERED that the order denying postconviction motion is affirmed; the May 2018 order denying suppression motion is reversed; and the cause is remanded with directions.

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

Sheila T. Reiff
Clerk of Court of Appeals