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DISTRICT I

June 20, 2023

To:

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Circuit Court Judge
Electronic Notice

Eric Michael Muellenbach
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Martin R. Tanz
Electronic Notice

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

2021AP1740-CR State of Wisconsin v. Antonio Darnell Payne
(L.C. # 2019CF3942)

Before Brash, C.J., Dugan and White, 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 an order suppressing evidence that police found during a search of Antonio Darnell Payne and his vehicle following a traffic stop. The Milwaukee County circuit court concluded that suppression was required because the State failed to establish venue in Milwaukee County during the suppression hearing. Based upon the State's brief and the record, we conclude that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21

(2021-22).¹ We agree with the State's arguments, and we therefore hold that the State is not required to prove venue during a suppression hearing. Accordingly, we summarily reverse the suppression order, and we remand for further proceedings.

The State filed an appellant's brief and appendix in this court as required by WIS. STAT. RULE 809.19(1)-(2), but Payne failed to file a respondent's brief within the deadline imposed by RULE 809.19(3). We subsequently granted Payne several briefing extensions, and we warned him repeatedly that failure to file a respondent's brief tacitly concedes error. We further cautioned him that if he did not file a brief, the circuit court's order could be summarily reversed as a sanction for his failure to participate in this appeal. Payne did not file a brief.

Because Payne did not undertake to refute the State's position on appeal, he concedes the State's facts and arguments. *See United Coop. v. Frontier FS Coop.*, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578. We accept that concession, and we, therefore, could resolve the appeal without further discussion. *See id.* Our review of the matter satisfies us, however, that even if Payne had filed a brief, we would conclude that the circuit court erred when it suppressed evidence on the ground that the State failed to establish venue at the suppression hearing.

The relevant facts are few. According to the criminal complaint, City of Milwaukee police officers conducted a traffic stop and arrested the driver, subsequently identified as Payne, after observing a clear plastic baggie containing a green leafy substance that officers suspected was marijuana protruding from under the driver's seat. The officers searched Payne, and in his pocket

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

they found methylenedioxymethamphetamine. The State charged Payne with two counts of possessing with intent to deliver a controlled substance as a second or subsequent offense.

Payne moved to suppress the evidence found during the search. The circuit court conducted a hearing at which two Milwaukee police officers were the sole witnesses. Following the hearing, Payne argued that the evidence at issue should be suppressed because the police improperly extended the traffic stop.

The circuit court entered a written order on August 27, 2021, granting the motion to suppress. The basis for the order was the circuit court's conclusion that "[t]he State failed to produce evidence to show that there was reason to believe that any element of any offense occurred in Milwaukee County."

The State filed a motion for reconsideration but elected not to pursue it. Instead, the State moved to withdraw its request for reconsideration and, on October 4, 2021, the State filed a timely notice of appeal from the order of August 27, 2021. *See* WIS. STAT. §§ 974.05(1)(d)2., 808.04(4). Three days later, on October 7, 2021, the circuit court entered another decision and order granting Payne's suppression motion. In this decision, the circuit court stated that the police were not justified in looking inside of Payne's vehicle.

As a preliminary matter, we address the scope of our jurisdiction. *See Carla B. v. Timothy N.*, 228 Wis. 2d 695, 698, 598 N.W.2d 924 (Ct. App. 1999) (providing that this court has an independent duty to determine its jurisdiction). We conclude that the circuit court's order of October 7, 2021, although included in the record, is not before us for appellate review. The applicable rule is that a notice of appeal "does not bring before the appellate court orders filed *after* the judgment or order appealed from is entered." *See State v. Baldwin*, 2010 WI App 162, ¶161

n.13, 330 Wis. 2d 500, 794 N.W.2d 769. There is an exception to that rule, but the exception applies only when the appellant “sufficiently identified” the later order in the notice of appeal; and the later order had been made but not entered at the time that the notice of appeal was filed. *See id.*, ¶61 n.14 (citation omitted). Here, the State’s notice of appeal identified solely the August 27, 2021 order as the subject of the appeal. Indeed, the State could not have also identified the October 7, 2021 order because that order had not been made when the State filed its notice of appeal on October 4, 2021. *See id.*, ¶61. Therefore, the October 4, 2021 notice of appeal did not bring the October 7, 2021 order before us for review, and we may not consider that order. *See id.*, ¶61.

We turn, then, to a review of the August 27, 2021 order, in which the circuit court suppressed evidence on the ground that the State failed to prove that any criminal conduct occurred in Milwaukee County. We conclude that suppression on this ground was improper.

A criminal case must normally be tried in the county where the crime occurred. *See* WIS. STAT. § 971.19(1). Wisconsin law requires the State to prove the fact of venue beyond a reasonable doubt “at trial.” *See State v. Anderson*, 2005 WI 54, ¶22 n.5, 280 Wis. 2d 104, 695 N.W.2d 731. When venue is contested and the State fails to prove venue at trial beyond a reasonable doubt, the defendant must be found not guilty. *See* WIS JI—CRIMINAL 267. Venue, however, has no bearing on the issues pursued at a suppression hearing.

“[W]hile the purpose of a trial is to ascertain a defendant’s guilt or innocence, the function of a suppression hearing is to determine whether the police violated the defendant’s constitutional rights.” *State v. Zamzow*, 2017 WI 29, ¶25, 374 Wis. 2d 220, 892 N.W.2d 637. Because the purpose of the exclusionary rule is to deter police misconduct, suppression of evidence is not

appropriate unless police misconduct is shown. *See State v. Kerr*, 2018 WI 87, ¶6, 383 Wis. 2d 306, 913 N.W.2d 787. Thus, the State had no obligation to present evidence at the suppression hearing that would prove Payne guilty of the charges that he faced. Rather, the State was required to show that the evidence at issue was not tainted by misconduct. *See State v. Felix*, 2012 WI 36, ¶30, 339 Wis. 2d 670, 811 N.W.2d 775; *State v. Matejka*, 2001 WI 5, ¶17, 241 Wis. 2d 52, 621 N.W.2d 891. Proof of venue must await the trial. *See Anderson*, 280 Wis. 2d 104, ¶22 n.5.

The law is clear. The State is not required to prove venue at a suppression hearing. Accordingly, we reverse the August 27, 2021 order of the circuit court, and we remand the matter for further proceedings consistent with this opinion and order.

IT IS ORDERED that the circuit court's order of August 27, 2021, is summarily reversed, *see* WIS. STAT. RULE 809.21, and the cause is remanded for further proceedings.

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

Samuel A. Christensen
Clerk of Court of Appeals