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CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS

NO. A-19-474

IN THE NEBRASKA
COURT OF APPEALS

STATE OF NEBRASKA,

Appellee,

v.

CHARLES E. GARZA, Jr.,

Appellant.

APPEAL FROM THE DISTRICT COURT
OF SCOTTS BLUFF COUNTY, NEBRASKA

Honorable Leo P. Dobrovolny, District Judge

REPLY BRIEF OF APPELLANT

Respectfully submitted:

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STATEMENT OF THE CASE/ FACTS

The Statements of the Case and Facts from Garza's initial brief are adopted herein.

PROPOSITIONS OF LAW

1. *State v. Sprunger*, 283 Neb. 531 (2012), requires a search warrant affidavit to explain how (1) the described items are connected with criminal activity and the basis for believing (2) they are to be found in the place to be searched.

2. In order for a warrant based on the court's personal knowledge to be valid, the face of the warrant must (1) set forth the facts giving rise to probable cause for the issuance of the warrant and (2) affirmatively state that the issuing judge either (a) personally witnessed the events recited in the warrant or (b) personally reviewed the official records of the court, thus ensuring that the validity of the data in the court records is adequately scrutinized by the issuing judge or magistrate. *State v. Davidson*, 260 Neb. 417 (2000).

3. When the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, or where the warrant is so facially deficient that the executing officer cannot reasonably presume it to be valid, the evidence seized must be suppressed. *State v. Davidson*, 260 Neb. 417 (2000).

4. The exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. *State v. Nuss*, 279 Neb. 648, 657 (2010).

ARGUMENT

1. THE WARRANTS FOR THE SCHMID DRIVE RESIDENCE AND THE RV FAILED TO ESTABLISH PROBABLE CAUSE TO SEIZE GUNS FOUND THEREIN BECAUSE THE STATE PROVIDED NO LINK BETWEEN THE GUNS AND CRIMINAL BEHAVIOR.

As explained in the initial brief, the affidavits supporting each search provide no information about Charles Garza being a prohibited person for the purposes of firearm possession, nor do they provide any link between gun use and drug sales. Omitting such information violates *State v. Sprunger*, 283 Neb. 531 (2012), which requires a search warrant affidavit to explain how (1) the described items are connected with criminal activity and the basis for believing (2) they are to be found in the place to be searched. *Id*. Here, Sergeant Jackson failed to explain how these items are connected with criminal activity and why they would be found in Garza's residences. By contrast, he was able to provide such information in subsequent affidavits relating to the various electronic items seized. *Compare*, E24,1-5:768-769, VolV; E25, 1-5:768-769, VolV; E26,1-5:768-769, VolV; E27, 1-5:768-769, VolV; E28, 1-5:768-769, *with* E5, 1-11:44.

<u>State v. Pelletier:</u>

By Counsel's reading of the State's brief, the State does not dispute that this information was lacking from the affidavits. Instead, the State relies on an unpublished Court of Appeals opinion despite this state's rules that such cases lack precedential value. See, Neb. Ct. R. App. P. § 2-102(E) (2015); see, also, Neb. Rev. Stat. § 24-1104(2) (Reissue 2016). Specifically, the State argues that under *State v. Pelletier*, No. A-98-345, 1999 WL 313197 (Neb. Ct. App. May 18, 1999) (not designated for permanent publication), "firearms, which are 'tools of the trade' for drug offenses, [fall] within the scope of a warrant" authorizing only a search for drugs and drug-related items. (State's brief, p. 30). However, in doing so the State ignores a crucial fact distinguishing *Pelletier* from the instant case. Namely, in *Pelletier*, the gun seized by law enforcement had a defaced serial number, making its possession a crime by itself and making its

seizure legitimate under the plain view doctrine independent from any link to the drug crimes.

Moreover, the warrant in *Pelletier* authorized law enforcement to search for "any. . .other property of any kind or nature which relate to or evidence the use, sale, or distribution of any controlled substance. . ." and the affidavit provided specific information that guns would be found in the area to be searched. Additional factors that distinguish *Pelletier* from the instant case are that the confidential informant (CI) on whose information the affidavit relied was corroborated in numerous ways including checking the criminal histories of the owners of cars whose license plates the CI reported seeing at the house and the affidavit contained information that the CI was known to be reliable.

Although the *Pelletier* Court did conclude that the guns located were within the scope of the search warrant because guns are "tools of the trade," the Court also noted that *"the alteration of the serial numbers on the guns was properly discoverable,"* thus concluding that the district court was not clearly wrong in denying the motions to suppress the two defaced handguns. *Id.* at 6. (emphasis added). While the State asks this Court to read this language as relieving an affiant's obligation under *Sprunger*, a more thorough consideration of the *Pelletier* opinion counsels otherwise.

First, the *Pelletier* Court hinged its analysis on the Nebraska Supreme Court's opinion in *State v. Groves*, 239 Neb. 660, 676 (1991) (quoting *U.S. v. Milham*, 590 F.2d 717 (8th Cir.1979)), which is inapposite. A close examination of *Groves*, demonstrates the impropriety of reading this language as supplanting an affiant's obligations in the Fourth Amendment context. Specifically, *Groves* presents a very different procedural posture in that the "tools of the trade" language cited in *Pelletier* pertained to an admissibility question under Neb. Rev. Stat. §§ 27-

404(2), 27-403 and 27-401, not probable cause supporting a search warrant. In *Groves,* the trial court overruled the defendant's motion *in limine* under the rules cited above, when Groves sought to exclude two of three guns found in his home because the State had only charged one count of felon in possession. The Supreme Court affirmed the trial court's decision, citing the "tools of the trade" language for the proposition that "in drug-related prosecutions, evidence relating to guns in a defendant's possession is ***relevant***" to the distribution charge, not just the gun charge. *Groves*, 239 Neb. at 676 (emphasis added).

The federal cases on which the *Groves* Court relied similarly relate only to the trial admissibility of gun possession when the principle charge is drug distribution. Thus, although the Nebraska Supreme Court has recognized evidence relating to guns in a defendant's possession is relevant for the purpose of admissibility at a trial for drug distribution, there is no binding precedent in Nebraska that firearms are widely regarded as tools of the trade for drug related activity such that a search warrant affidavit need not explain why possessing that gun is illegal. It is also worth noting for comparison's sake that in *Groves*, the affiant explicitly stated in the affidavit that the defendant was a convicted felon.

State v. Davidson:

Second, the State's interpretation of *Pelletier* must fail as contrary to the Supreme Court's holding in *State v. Davidson*, 260 Neb. 417 (2000), which was decided one year after *Pelletier*. *Davidson* was convicted of possessing a controlled substance after methamphetamine (meth) fell from his hand when he was arrested pursuant to an arrest warrant that was not accompanied by an affidavit or sworn document establishing probable cause for the arrest. Davidson moved to suppress the meth, arguing that the arrest was invalid for lack of a supporting affidavit. The

district court held that the officers acted in good faith, but, the Court of Appeals reversed, finding the warrant invalid for lack of an affidavit or any record upon which the officers could rely. The State argued that no affidavit was required because the information establishing probable cause was already in the possession of the court. Both the Court of Appeals and Supreme Court acknowledged that other jurisdictions recognize that the lack of an affidavit can be overcome by other competent evidence in the record upon which the validity of the warrant may be judged.

> For example, if the face of the warrant reflects the fact that it was issued based upon the personal knowledge of the issuing magistrate or judge or has a complaint attached which sets forth in sworn form the facts upon which the allegation of the defendant's failure to appear is based, the warrant's validity may be judged without an available affidavit.

Davidson, 260 Neb. at 423-4. The Court reasoned there is no point in a judge executing an affidavit when that judge has personal knowledge of facts establishing probable cause. But, the Court limited the "personal knowledge of the court" to "**events that have taken place in the physical presence of the court and facts that are contained in the official records of the court**." *Id.* at 426 (emphasis added). Moreover, the Court explained that in order for such a warrant to be valid, the face of the warrant must (1) set forth the facts giving rise to probable cause for the issuance of the warrant and (2) affirmatively state that the issuing judge either (a) personally witnessed the events recited in the warrant or (b) personally reviewed the official records of the court, thus ensuring that the validity of the data in the court records is adequately scrutinized by the issuing judge or magistrate. *Id.*

What the State asks this Court to do is read *Pelletier* as a personal knowledge exception to the affidavit requirement when linking guns to the drug trade. This becomes clear when one

considers that *U.S. v. Milham*, 590 F.2d 717, 721 (8th Cir. 1979), upon which the *Pelletier* Court relied, justified its conclusion as follows: "Experience on the trial and appellate benches has taught that substantial dealers in narcotics keep firearms on their premises as tools of the trade almost to the same extent as they keep scales, glassine bags, cutting equipment and other narcotics equipment." *Id*. Thus, both *Milham* and *Pelletier* apply the collective personal experiences of the judiciary when determining the link between guns and drug distribution for relevancy determinations. However, problems arise when stretching this reasoning to the contexts of warrants because a year after *Pelletier* was decided, the Nebraska Supreme Court explicitly limited "the personal knowledge of the court" to events like failures to appear that take place in the court's presence. Thus, applying *Pelletier* as urged by the State, is not only contrary to the circumstances and reasoning underlying the opinion, it also flies in the face of Nebraska Supreme Court precedent like *Davidson*.

<u>Good Faith</u>*:*

Finally, it is wholly unreasonable for officers to believe they can search a house for guns and ammunition without some indication in the affidavit that possessing those guns is against the law or linked to other criminal behavior. Although a good faith analysis takes into consideration the totality of the circumstances known to the officers present at the time of the search, no evidence was presented regarding Garza's prior felony convictions until trial. See, *State v. Davidson,* 260 Neb. 417 (2000); *U.S. v. Blom*, 242 F.3d 799 (2001). Although Jackson did testify at the suppression hearing that "[w]hen you have someone who's using or that's selling drugs, *firearms are usually* ***or can be used in conjunction*** *with them*," this statement is insufficient to support a conclusion that the officers were acting in good faith when seizing the guns. Certainly,

the Court made no such conclusion in its order, and Jackson's follow-up to this statement punctuates that seizing the firearms and body armor had more to do with a concern for future violence than any link to drug distribution. (T71-76; See, e.g., 49:11-24 (providing, "The body armor thing, it just appeared like they were preparing for something that could have possible been bad for us" immediately following the firearms comment above)). Under the totality of the circumstances, it cannot be said that Jackson and the other officers believed they had demonstrated to the magistrate that any guns found in the home were linked to criminal behavior as is required by long-standing Fourth Amendment precedent.

Similarly, Jackson made no effort to tie the guns found in Matthew's room to Garza's purported drug activity and did not correct these mistakes even though he sought a second search warrant of the Schmid Drive residence specifically for the guns. When Jackson demonstrates in other affidavits (Exhibits 24-31) that he knows how to draft the kind of language required to link his training and experience to the evidence sought, overlooking such omissions merely encourages future neglect. Thus, officers cannot be said to have acted in good faith when seizing such items. When the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, or where the warrant is so facially deficient that the executing officer cannot reasonably presume it to be valid, the evidence seized must be suppressed. *State v. Davidson*, 260 Neb. 417 (2000). Although the evidence in *Davidson* was not suppressed because the officers were deemed to have relied on it in good faith, no such argument can be made 19 years after *Davidson* was decided and 7 years after *Sprunger* reiterated the general requirements.

Even if this Court determines that Jackson's statements at the hearing that firearms can be

used in conjunction with drug use or sales is sufficient to justify good faith, further problems arise in that Jackson was not present when the RV was searched; nor, when the RV safe was opened. (66:18-67:5; 75:11-14). See, *U.S. v. Blom*, 242 F.3d at 808 (finding that the government must prove the officers knew the Defendant was a felon when they seized the disputed ammunition under the plain view doctrine when the probable cause affidavit averred the defendant was a felon, but, the warrant did not authorize the seizure of ammunition). In sum, the record contains no evidence that the officers conducting the search were aware of Garza's status as a felon, nor the purportedly occasional connection between drug use/ sale and firearms. Thus, at minimum, the guns found in the RV safe must be suppressed.

Moreover, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. *State v. Nuss*, 279 Neb. 648, 657 (2010). As demonstrated in the initial brief, the seemingly minor errors committed repeatedly by law enforcement throughout the affidavits at issue continue to occur even after two years of litigation. As discussed in relation to the second search of the houseboat and RV, despite the looming specter of suppression, Jackson and the WING Task Force remained sloppy and undeterred. It is clear these Fourth Amendment transgressions are recurring and systemic, if not deliberate, reckless, and grossly negligent. Suppressing the firearms seized in the matter is not only warranted, it is the only method of deterrence that will be heeded.

2. THE STATE WAIVED ANY GOOD FAITH ARGUMENT BY FAILING TO DEMONSTRATE THAT IT PRESENTED THIS ARGUMENT IN THE TRIAL COURT AND FAILING TO ARTICULATE ITS GOOD FAITH CLAIM HERE IN A NON-CONCLUSORY FASHION.

In *State v. Tomkins*, 272 Neb. 547 (2006), *opinion modified on denial of rehearing by State v. Tompkins,* 272 Neb. 865 (2007), another case originating in Scotts Bluff County, the Nebraska Supreme Court concluded that the State waived the Good Faith Exception by failing to raise it. The Court of Appeals determined the search warrant affidavit was not supported by probable cause, but, found the officers acted in good faith even though the State did not raise the issue with the trial court. The Supreme Court reasoned that the appellate court's reliance on the good faith exception *sua sponte* after the parties did not argue the issue, deprived the defendant of the opportunity to fully defend himself because doing so forces a defendant to anticipate the State's argument and prove the officers did ***not*** act in good faith.

Here, the parties submitted the bulk of their arguments to the trial court in the form of written briefs submitted simultaneously. (77:18-83:25). At trial, Garza offered copies of his brief to preserve his suppression arguments. (250:6-252:11). The State did not do so; rather, the State's in-court arguments were brief and limited to whether separate warrants were needed for the safes. (77:18-83:25). Much like *Tompkin*s, the record before this Court does not show the State argued good faith to the trial court. And, although the Court's order cites the law on good faith, its analysis does not. (T71-78). Nor, does the order reference any arguments by the State that would indicate to this Court that the State raised the issue below. Unlike the defendant in *Tomkins*, Garza did pre-emptively and alternatively argue against good faith at the trial level, as he did here. And, as the *Tompkins* Court reasoned, doing so relieves the State of their burden to prove the officers acted in good faith. This shifts the burden to the defendant to respond to arguments not even yet raised.

Instead, this Court should find that the State failed to preserve the issue of good faith both

below and at the appellate level. Although the State argues on appeal that it "assert[ed] and preserv[ed good faith] since it's waived if we don't raise it on appeal," the State provided no explanation for how the good faith exception applied in this case. (State's brief, p. 24). Garza submits that much like in the postconviction context, conclusory assertions are insufficient. *See*, *e.g.*, *U.S. v. Lambros*, 614 F.2d 179, 181 (8th Cir. 1980) (disallowing conclusory allegations in the postconviction context). Following the reasoning of *Tompkins,* a defendant cannot fully defend himself if he does not know how the State is arguing the officers acted in good faith. Allowing the State to preserve the issue by making only conclusory assertions or requiring a defendant to anticipate any potential good faith argument undermines the policy underlying *Tompkins* and the waiver doctrine in general, which was "developed not only out of a sense of fairness to an opposing party but also as a means of promoting jurisprudential efficiency by avoiding appellate court determinations of issues which the appealing party had failed to preserve." *See*, *e.g.*, *Lenhard v. Wolff*, 444 U.S. 807, 812 (1979) (Marshall and Brennan, JJ, dissenting) (quoting *Pennsylvania v. McKenna*, 383 A.2d 174, 181 (1978)).

Respectfully submitted,
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Certificate of Service

I hereby certify that on Monday, April 27, 2020 I provided a true and correct copy of this *Reply Brief* to the following:

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Signature: /s/ Sarah P. Newell (23220)