No. 1-13-1336

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- CHUKWUEMEKA EBELECHUKWU Defendant-Appellant.	))))))))	Appeal from the Circuit Court of Cook County, Illinois 07-CR-1336 Honorable Neera Walsh, Judge Presiding.

REPLY BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

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ORAL ARGUMENT REQUESTED

ARGUMENT

I:

THE TRIAL COURT ERRED BY FAILING TO SUPPRESS THE EVIDENCE SEIZED FROM 9038 SOUTH COMMERCIAL STREET IN THE CITY OF CHICAGO

In his opening brief, Chukwuemeka Ebelechukwu argued that the trial court erred by denying his motion to suppress the evidence seized from a warrantless search of his business premises at 9038 south Commercial. He argued that the trial court erred by holding that this warrantless search could be justified based upon the fact that the officer had probable cause to seize the evidence. He also argued that the court erred by applying the inevitable discovery doctrine to hold that the evidence was admissible.

In response, the prosecution agrees that "the police improperly entered 9038 S. Commercial and seized evidence." (St. Br., at 15). The prosecution, however, first argues that the exclusionary rule does not apply because the police officer did not engage in "flagrant misconduct." (St. Br., at 16-22). In the alternative, the prosecution argues that the evidence was inadmissible under the inevitable discovery doctrine. (St. Br., at 22-26). The prosecution is wrong on both counts.

First, as to the prosecution's "flagrant misconduct" argument.

In so far as this argument can be understood, it is really an argument for a new "good faith" exception. Under this exception, the exclusionary rule would not be applied

where the searching or seizing officer believed, in good faith, that he or she was not violating the fourth amendment.

This "good faith" argument is apparently what the prosecution means it claims that "nothing in the record suggests that Officer Stanek deliberately disregarded defendant's *Fourth Amendment* rights. The record instead indicates that Officer Stanek, like the circuit court, believed that his entry into 9038 S. Commercial (and his subsequent seizure of evidence) was justified in light of having seen counterfeit merchandise in plain view [from] outside the premises." (St. Br, at 21). The prosecution further argues that since the trial court, "surely well trained in the law," (St. Br., at 21), erred in believing that probable cause was an independent exception to the warrant requirement, Officer Stanek's identical error, "while perhaps negligent, does not amount to a deliberate disregard of constitutional rights such that the remedy of exclusion can meaningfully deter it." (St. Br., at 21-22).

One initial problem with this argument is that there is nothing in the record to support it. Officer Stanek never testified that he believed that probable cause was an independent exception to the warrant requirement. Even assuming that the exclusionary rule should not be applied where an officer makes a reasonable, good faith mistake as the substance of fourth amendment law, there is nothing in this record to suggest that Officer Stanek made such a mistake. And since it would be the prosecution's burden to prove this exception to the exclusionary rule applies, the prosecution failed to meet that burden when it introduced no evidence below as to Officer Stanek's thought processes or beliefs.

But the prosecution's argument for a general good faith exception to the fourth amendment exclusionary rule is not, in any event, well taken. If a general good faith exception were to be recognized, the prosecution could always argue that the exclusionary

rule should not be applied because the searching or seizing officer was unaware of fourth amendment law. The exception would deprive police departments and police officers of any incentive to familiarize themselves with the law of search and seizure. Contrary to the prosecution's position, the exception, far from furthering the deterrent purpose of the exclusionary rule, would rob the rule of any deterrent effect. The usual maxim, ignorance of the law is no excuse, would not apply. Ignorance of the law would be an excuse. The exception would swallow the rule.

Moreover, if the prosecution could always argue, as it does here, that the good faith exception should apply because the trial judge made the same mistake as the officer, appellate review of fourth amendment decisions would be a nullity. Every time a trial judge mistakenly denied a motion to suppress, he would be affirmed because, it would be argued, the searching officer had made the same mistake. The constable's violation would be excused because the reviewing magistrate blundered.

The cases adduced by the prosecution in support of its position, as well as other "good faith" exception cases do not support a general good faith exception.

The United States Supreme Court has found that the exclusionary rule does not apply where: (1) the police acted "in objectively reasonable reliance" on the probable cause contained in a subsequently invalidated search warrant, *United States v. Leon* 468 U.S. 897 (1984), or (2) there were clerical errors in a search warrant, *Massachusetts v. Sheppard*, 468 U.S. 981, 991 (1984), or (3) officials conduct warrantless administrative searches performed in good faith reliance on a statute later held to be unconstitutional. *Illinois v. Krull*, 480 U.S. 340, 352–53 (1987), or (4) police reasonably rely upon mistaken

information in a court's database that an arrest warrant was outstanding. *Arizona v. Evans*, 514 U.S. 1, 10 (1995).

None of these cases apply. As the Supreme Court has recently observed, *Leon* and its progeny flow from the principle that a rule designed to "curb police rather than judicial misconduct" has no bearing where police rely on information provided by judicial employees. *Herring v. United States*, 555 U.S. 135, 139 (2009). Here, of course, Officer Stanek's entry into 9038 south Commercial and his seizure of items found therein was not based upon information provided by judicial employees.

That leaves the only case even arguably applicable, *Herring v. United States*, 555 U.S. 135 (2009). In *Herring*, a 5-4 decision, the United States Supreme Court held that the exclusionary rule does not apply where the police violate the fourth amendment by negligently failing to update a computer database and therefore mistakenly arrest someone based upon false belief that a warrant for their arrest is outstanding. *Herring v. United States*, 555 U.S. at 147-48.

Obviously, the specific holding of *Herring* does not apply. Officer Stanek did not mistakenly rely upon a negligently generated error in a database. Indeed, according to the prosecution, he made no factual error at all; instead he made a legal error as to whether probable cause was an independent exception to the warrant requirement. But beyond the specific holding of *Herring*, various statements in *Herring*, which the prosecution cites, do not support a general good faith exception for legal errors.

For example, the *Herring* Court cited its statement in *Krull* that "evidence should be suppressed 'only if it can be said that the law enforcement officer had knowledge, or

may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.' " *Herring*, 555 U.S. at 143, quoting *Krull*, 480 U.S., at 348–349. Here, based upon ample United States Supreme Court and Illinois precedent, see, e.g., *Payton v. New York*, 445 U.S. 573, 586 (1980), *Coolidge v. New Hampshire* 403 U.S. 443, 468 (1970), *People v. Kelley*, 104 Ill. App. 3d 51, 53–54 (1982), *People v. Hassan*, 253 Ill.App.3d 558, 569, (1st Dist. 1993), Officer Stanek was chargeable with the knowledge that he could not enter the premises.

The *Herring* court also opined that to trigger the exclusionary rule, police misconduct must be "deliberate, reckless, or grossly negligent." *Herring*, 555 U.S. at 144. Here, Stanek deliberately entered the premises at 9038 south Commercial and deliberately seized evidence. He was not blown into the premises by a sudden gust of subterranean wind. The prosecution does not argue that Stanek's entry was due to ordinary negligence, unless an imperfect understanding of the basic commands of the Fourth Amendment, can be considered ordinary negligence.

The prosecution's "good faith" argument should therefore be rejected.

Even assuming that the federal courts would accept the prosecution's "good faith" argument it should be rejected as a matter of Illinois law.

The Illinois Supreme Court accepted the original *Leon* good faith exception in *People v. Stewart*, 104 Ill.2d 463, 477, 85 473 N.E.2d 1227 (1984). However, as a matter of Illinois law -- under article I, section 6, of the Illinois Constitution of 1970 and the Illinois exclusionary rule – the Illinois Supreme Court has moved in only "limited lockstep" with federal precedent.

For example, the United States Supreme Court extended *Leon* to a warrantless search for the first time in *Illinois v. Krull,* 480 U.S. 340 (1987). *Krull* held that the federal exclusionary rule does not bar evidence seized by a police officer who reasonably relies, in objective good faith, on a statute authorizing a warrantless administrative search, where the statute is later held to be unconstitutional. 480 U.S. at 349–50. In *People v. Krueger,* 675 N.E.2d 604 (1996), however, the Illinois Supreme Court declined to recognize *Krull's* expansion of the *Leon* good-faith exception as a matter of state constitutional law.

In *Krueger,* police officers executed a search warrant issued pursuant to a "no-knock" statute (725 ILCS 5/108–8(b) (West 1994)), which the Illinois Supreme Court held was unconstitutional under both the fourth amendment and article I, section 6, of the Illinois Constitution of 1970. *Krueger,* 175 Ill.2d 60, 69. The State argued that the Illinois Supreme Court should reverse the circuit court's suppression order pursuant to the *Krull* good-faith exception. The court rejected the State's argument, holding that the exclusionary rule arising from article I, section 6, provides greater protection from unconstitutional searches and seizures than the federal exclusionary rule. 175 Ill.2d at 73–74. The court observed that it has the authority to interpret state constitutional provisions more broadly than the Supreme Court interprets similar provisions of the federal constitution. 175 Ill. 2d at 74. The Court also noted that the exclusionary rule is a judicially created remedy with a long history in Illinois, traced back to *People v. Brocamp,* 307 Ill. 448, 138 N.E. 728 (1923). In *Brocamp,* this court adopted an independent state exclusionary rule almost 40 years before *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6

L.Ed.2d 1081 (1961), made the federal exclusionary rule applicable to the states. *Krueger*, 175 Ill.2d at 74–75

In rejecting *Krull* as a matter of state law, the Illinois Supreme Court balanced the legitimate aims of law enforcement against the right of Illinois citizens to be free from unreasonable governmental intrusion. They found that the citizens' rights prevailed, holding:

"[w]e are not willing to recognize an exception to our state exclusionary rule that will provide a grace period for unconstitutional search and seizure legislation, during which time our citizens' prized constitutional rights can be violated with impunity. We are particularly disturbed by the fact that such a grace period could last for several years and affect large numbers of people. This is simply too high a price for our citizens to pay. We therefore conclude that article I, section 6, of the Illinois Constitution of 1970 prohibits the application of *Krull* 's extended good-faith exception to our state exclusionary rule." *Krueger*, 175 Ill.2d at 75.

In the case of the good faith mistake of law exception urged by the prosecution, the damage to the exclusionary rule would last not only for "several years" but forever. And the damage would be incalculable, not only in terms of violation of people's rights, but also in terms of sheer confusion. Which legal rules would the police be expected to know? Which rules would be enforced? How many times would innocent citizens be subjected to unlawful searches and seizures because the police believed that the exclusionary rule would not be enforced?

In the alternative, the prosecution argues that, under the inevitable discovery doctrine, the evidence would have been seized because the police would have obtained a warrant, even though they did not do so. This argument should be rejected.

First, contrary to the prosecution's suggestion, (See State Br., at 24, n. 6) Illinois precedent does hold that the doctrine of inevitable discovery requires, as a necessary condition, that the evidence would have been discovered or seized pursuant to an independent investigation which was already in progress at the time of the challenged illegality. In *People v. Alvarado*, 268 Ill. App. 3d 459, 470 (4th Dist. 1994), the court stated the test for inevitable discovery as follows:

"Generally, courts will find evidence inevitably would have been discovered if (1) the condition of the evidence when actually found by lawful means would have been the same as that when improperly obtained; (2) the evidence would have been discovered through an independent line of investigation untainted by the illegal conduct; *and* (3) the independent investigation was already in progress at the time the evidence was unconstitutionally obtained. (Emphasis supplied).

An even more emphatic statement of the rule, without the qualifier "Generally," appears in *People v. Shanklin*, 250 Ill. App. 3d 689, 696 (5th Dist. 1993), where the court stated the test as follows:

"For the inevitable discovery doctrine to apply, *three criteria must be met*: (1) the condition of the evidence must be the same when found illegally as it would have been when found legally; (2) the evidence would have been found by an independent line of investigation untainted by the illegal conduct; and (3) the independent line of investigation must have already begun when the evidence was discovered illegally." (Emphasis).

Accord, *People v. Winsett*, 222 Ill. App. 3d 58, 69 (2d Dist. 1991), *rev'd on other grounds*, 153 Ill. 2d 335, 606 N.E.2d 1186 (1992) ("three criteria must be met before a court will find that evidence would have been inevitably discovered).

Moreover, it is not true, as the prosecution suggests, that the Illinois Supreme Court has held that evidence of an independent investigation is only one factor in determining whether the prosecution has met its burden of proving inevitable discovery. In *People v. Mitchell*, 189 Ill. 2d 312, 341 (2000), the Illinois Supreme Court merely quoted the statement of Professor LaFave that "circumstances justifying application of the 'inevitable discovery' rule are most likely to be present if * * * investigative procedures were already in progress prior to the discovery via illegal means." 5 W. LaFave, Search & Seizure § 11.4(a), at 249 (3d ed. 1996). Whether application of the inevitable discovery doctrine absolutely requires an independent investigation in progress or whether, instead, inevitable discovery is "most likely" when an independent investigation is in progress, may be a fine point, but in either event the lack of an independent request for a warrant weighs heavily against inevitable discovery.

` The prosecution next relies upon the Seventh Circuit case of *United States v. Tejada*, 524 F.3d 809, 812-13 (7th Cir. 2008) which held that the exclusionary rule did not apply to the illegal search of a gym bag since the police would have inevitably been successful in obtaining a warrant to search the contents of the bag, a warrant they never sought. There are four problems with the prosecution's reliance upon this case.

First, insofar as the case conflicts with Illinois precedent interpreting the Fourth Amendment, this court should follow the Illinois precedent as explained in *Alvarado*, *Shanklin*, and *Winsett*, and not the Seventh Circuit precedent of *Tejada*.

Second, *Tejada* itself conflicts with other federal cases, such as *United States v. Virden*, 488 F.3d 1317, 1323 (11th Cir. 2007), *United States v. Conner*, 127 F.3d 663, 667–68 (8th Cir. 1997), and *United States v. Mejia*, 69 F.3d 309, 320 (9th Cir.1995), which hold that the inevitable discovery doctrine "should be confined to the situation in which the police are gathering evidence with a view toward obtaining a search warrant and it is certain or nearly so that had one of them not jumped the gun and searched without a warrant the investigation would have culminated in a successful warrant application." *Tejada*, 524 F.3d at 812.

Third, the *Tejada* scenario was based upon an application of the now discredited doctrine of *New York v. Belton*, 453 U.S. 454, 460 (1981), which allowed searches of areas and objects in the area under the arrestee's control at the time of his arrest, even though the arrestee had subsequently been removed from that area. As the Third Circuit noted in *U.S. v. Shakir*, 616 F.3d 315 (2010), the holdings in *Belton* and *Tejada* were overruled by the United States Supreme Court's decision in *Arizona v. Gant*, 556 U.S. 332 (2008). *Tejada*'s holding as to the search of the gym bag found within the area under the arrestee's control has therefore been superceded by later precedent.

Fourth, as the prosecution acknowledges (See St. Br., 25-26) *Tejada* itself stated that its holding would only apply to a search of a closed container and not to cases "in which the police, having probable cause to search a person's house, barge in and search without the benefit of a warrant and defend their conduct by invoking inevitable discovery. 524 F.3d at 813. In this case, the police did not open a closed container but, instead, having probable cause, barged into and searched Chukwuemeka Ebelechukwu's premises

without benefit of a warrant and then defended their conduct by invoking inevitable discovery.

The circuit court's decision should therefore be reversed.

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CONCLUSION

For the reasons given this court should reverse defendant's conviction.

Respectfully submitted,

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COUNSEL FOR DEFENDANT-APPELLANT

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CERTIFICATE OF COMPLIANCE

I, Stephen L. Richards, certify that this reply brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief is 13 pages.

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