State of Wisconsin: **Circuit Court:** **Milwaukee County:**

State of Wisconsin,

Plaintiff,

v. Case No. 2010CF002928

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Tony Raybon,

Defendant.

Defendant's Motion to Suppress Evidence

Now comes the above-named defendant, by his attorney, Jeffrey W. Jensen, and hereby moves to suppress the statement made by the defendant, Tony Raybon ("Raybon"), on the day following his arrest for the reason that there was no probable cause to arrest Raybon; and, instead, the police used Raybon's probation officer as a "stalking horse" to put a probation hold on Raybon so the police could evade the Fourth Amendment warrant requirement to arrest Raybon. Thus, the statement given by Raybon was obtained by exploitation of the original illegal detention of Raybond.

This motion is further based upon the attached Memorandum of Law.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2010.

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Law Offices of Jeffrey W. Jensen
Attorneys for the Defendant

By:_____
Jeffrey W. Jensen
State Bar No. 01012529

735 W. Wisconsin Avenue
Suite 1200
Milwaukee, WI 53233
414.671.9484

State of Wisconsin: **Circuit Court:** **Milwaukee County:**

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Plaintiff,

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Tony Raybon,

Defendant.

Memorandum of Law in Support of Defendant's Motion to Suppress Evidence

Factual Background

On June 10, 2010, Milwaukee Police stopped Raybon's vehicle for speeding. Raybon had a passenger in the vehicle named LeEvelyn Brown. When the officer approached the driver's window, Raybon produced a valid driver's license. The officer took the license to his squad car and, after calling in the information, learned that Raybon was on probation for a drug offense. Raybon and Brown were then removed from the vehicle.

At that point, Raybon and Brown were detained while the officers obtained a drug-sniffing dog. The dog was permitted to sniff both the outside of the vehicle, and the inside of the vehicle. According to police reports, the dog "indicated" the presence of controlled substances at both the driver's door, and at the passenger door. No drugs were found inside the vehicle, though.

An officer then pat-searched Brown and, during the search, a package of heroin was found in her crotch. When questioned about the heroin, Brown claimed that the heroin belonged to Raybon.

Raybon was also questioned at the scene. He denied any knowledge of the heroin, and he claimed that he had picked up Brown only moments earlier.

Thus, the officers contacted Raybon's probation officer, and the probation officer put a hold on Raybon. The next day, while Raybon was in custody on the hold, he was interrogated by police and gave an inculpatory statement.

Raybon now seeks to suppress that statement for the reason that the statement was obtained by exploitation of the original violation of Brown's Fourth Amendment rights.

Argument

I. The police used Raybon's probation officer as a "stalking horse" to evade the Fourth Amendment requirement that there be an arrest warrant for Raybon, or probable cause to arrest Raybon and, therefore, Raybon's statement to police must be suppressed on Fourth Amendment grounds.

At the outset a distinction must be made between statements made which are found to be voluntary for Fifth Amendment purposes, and statements which are the product of a person's "free will" so as to be sufficiently purged of the taint of the unlawful conduct under the Fourth Amendment. Statements made to the police may be voluntary for Fifth Amendment purposes, regardless of prior police misconduct, but their voluntariness for Fourth Amendment purposes is merely a threshold requirement. *Dunaway v. New York*, 47 U.S. U.S.L.W. 4635, 4640 (June 5, 1979); *Brown v. Illinois*, 422 U.S. at 604.

Here, Raybon does not claim that his Fifth Amendment rights were violated. His statements were voluntary for Fifth Amendment purposes. The issue is whether they were freely given for Fourth Amendment purposes. Under the Fourth Amendment, the relevant inquiry is, "[W]hether [the] statements were obtained by exploitation of the illegality of [the police conduct]." *Brown v. Illinois*, 422 U.S. at 600. If there is a close causal connection between the illegal police conduct and the statements, the statements are inadmissible under the Fourth Amendment. *Dunaway v. New York*, 47 U.S.L.W. at 4640; *See Brown v. Illinois*, 422 U.S. 603-04. To permit the admission of a statement and evidence obtained by police exploitation of their own illegal conduct would destroy the policies and interests of the Fourth Amendment. *Dunaway v. New York*, 47 U.S.L.W. at 4640-41; Brown v. Illinois, 422 U.S. at 602.

Here, there clearly was no probable cause to arrest Raybon for possession of controlled substances. No drugs were found on Raybon, nor were the drugs found in an area that was under his dominion and control-- rather, the drugs were found in Brown's crotch, an area that is decidedly not under Raybon's dominion and control. The only information the police had was Brown's claim-- made only after the drugs were found in her crotch-- that Raybon had given the drugs to her. In *Leroux v. Stat*e, 58 Wis.2d 671, 683-84, 207 N.W.2d 589, 595-96 (1973), the Wisconsin Supreme Court made clear the rule that probable cause for arrest exists if the facts and circumstances

known to the police officer, and of which he has *reasonably trustworthy information* warrant a prudent man in believing an offense has been committed and that the defendant probably committed it. In determining whether probable cause existed for the arrest without warrant, the test is whether, on the basis of the information he had, the arresting officer could have obtained a warrant for the defendant'sarrest. *State v. Paszek*, 50 Wis.2d 619, 627, 184 N.W.2d 836, 840-41 (1971)." (Emphasis supplied.) Id. at 523.

Brown's bald assertion, under the circumstances it was made, is hardly the sort of *trustworthy information* that would permit a reasonable police officer to make a warrantless arrest. To their credit, the officers did not even pretend that probable cause existed to arrest Raybon.

Instead, the officers contacted Raybon's probation officer and persuaded her to place a probation hold on Raybon. This, of course, transforms the situation into a probation investigation, rather than a police investigation. A statement given during a probation investigation may not be used against the defendant in a criminal prosecution. *See, State v. Thompson,* 142 Wis. 2d 821, 831 (Wis. Ct. App. 1987).

Likewise, the police may not use the probation procedure as a "stalking horse" to avoid the Fourth Amendment requirements. In, State v. Hajicek, 2001 WI 3 (Wis. 2001), the Wisconsin Supreme Court explained that,

> A "stalking horse" is "something used to cover one's true purpose; a decoy." The American Heritage Dictionary 1751 (3d ed. 1992). In the context of determining whether a search is a police or probation search, a "stalking horse" is a probation officer who uses his or her authority "to help the police evade the Fourth Amendment's warrant requirement." *United States v. Harper*, 928 F.2d 894, 897 (9th Cir. 1991).

Here, Raybon's detention was not instituted by the probation officer. Rather, it was the police who contacted the probation officer for the purpose of having a hold placed on Raybon. Additionally, there does not appear to be a substantial basis for the probation hold to have been placed on Raybon. The only information that the authorities had at the time was that Raybon was in the company of someone who, unbeknownst to Raybon, possessed a controlled substance. Then, once Raybon was in custody, the police interrogated him further, and eventually they obtained the confession they desired.

Conclusion

For these reasons it is respectfully requested that the court suppress the statement given to police by Raybon on June 11, 2010.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2010.

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Law Offices of Jeffrey W. Jensen
Attorneys for the Defendant

By:_____
Jeffrey W. Jensen
State Bar No. 01012529

735 W. Wisconsin Avenue
Suite 1200
Milwaukee, WI 53233

414.671.9484
jensen@milwaukeecriminaldefense.pro