

United States Court of Appeals  
For the Eighth Circuit

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No. 22-1408

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United States of America

*Plaintiff - Appellee*

v.

Elmer Wayne Zahn

*Defendant - Appellant*

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Appeal from United States District Court  
for the District of South Dakota - Northern

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Submitted: October 21, 2022  
Filed: March 23, 2023

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Before KELLY, WOLLMAN, and KOBES, Circuit Judges.

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WOLLMAN, Circuit Judge.

Elmer Wayne Zahn entered a conditional guilty plea to possessing with intent to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. § 841(a)(1). He appeals the district court's<sup>1</sup> denial of his motion to suppress evidence. We affirm.

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<sup>1</sup>The Honorable Charles B. Kornmann, United States District Judge for the District of South Dakota, adopting the Report and Recommendation of the Honorable Mark A. Moreno, United States Magistrate Judge for the District of South Dakota.

After delivering Zahn to jail staff, Kolb retrieved the warrant from the sheriff's office's file, signed it, gave it to jail staff, and gave a copy to Zahn. Kolb thereafter obtained a warrant authorizing a search of Zahn's apartment, during which the execution thereof resulted in the discovery of additional methamphetamine and other evidence of drug distribution. Zahn was eventually released, and a warrant was later issued relating to the November 7 incident.

Investigator Wes Graff and other law enforcement officers were dispatched to an Aberdeen hotel on November 23, 2020. After officers resolved the issue, hotel staff requested further assistance with an unrelated commotion in one of the hotel's rooms. Graff went to the room and saw Zahn and three other occupants therein. Knowing that Zahn and two of the other occupants had active arrest warrants, Graff entered the room, handcuffed Zahn, and saw drug paraphernalia lying on the floor. During the subsequent warrant-authorized search of the room, officers discovered methamphetamine, heroin, and other evidence of drug distribution.

A federal grand jury returned an indictment that charged Zahn with drug offenses stemming from the November 7, 2019, and the November 23, 2020, arrests and related searches. Zahn moved to suppress the evidence, arguing that it should be excluded as fruits of his unconstitutional November 7 arrest. Neitzel, Kolb, and Graff testified during the suppression hearing, following which the district court denied the motion after declining to apply the exclusionary rule.

"The Fourth Amendment forbids 'unreasonable searches and seizures,' and this usually requires the police to have probable cause or a warrant before making an arrest." Herring v. United States, 555 U.S. 135, 136 (2009). Kolb had neither when he arrested Zahn. Accepting the parties' assumption that the November 7, 2019, arrest violated Zahn's Fourth Amendment rights, we must determine whether the district court should have applied the exclusionary rule. In doing so, we review for clear error the court's findings and *de novo* its conclusions of law. United States v. Szczerba, 897 F.3d 929, 936 (8th Cir. 2018).

failed to remove a recalled warrant, Neitzel replied, “Very rarely.” Similarly, Deputy Kolb testified that he had no doubt that Zahn’s warrant was valid when he saw it in his in-car computer system. Both Neitzel and Kolb testified that there likely had been occasions during their decades-long careers with the sheriff’s office when a warrant was not removed after it was recalled. Neither could point to any specific incidents, however, in which a recalled warrant was not removed or in which a defendant had been arrested on a recalled warrant. On this record, then, we conclude that it was employee negligence—not reckless disregard of constitutional requirements—that resulted in the failure to remove Zahn’s recalled warrant from the file and the computer system.

Like the officer in Herring, Kolb wrongly but reasonably believed that there was an outstanding warrant for Zahn’s arrest. Neitzel’s and her co-worker’s negligent conduct “was not so objectively culpable as to require exclusion” of the evidence garnered after Zahn’s arrests. See Herring, 555 U.S. at 146; id. at 147–48 (“[W]hen police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not ‘pay its way.’” (quoting Leon, 468 U.S. at 907–08 n.6)).

In light of our conclusion that the exclusionary rule does not apply, we need not consider the government’s alternate ground for admission of the evidence, *i.e.*, that Zahn’s resistance to his illegal arrest furnished grounds for a second, legitimate arrest. See United States v. Schmidt, 403 F.3d 1009, 1016 (8th Cir. 2005).

The judgment is affirmed.

UNITED STATES COURT OF APPEALS  
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Appeal from U.S. District Court for the District of South Dakota - Northern  
(1:21-cr-10005-CBK-1)

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**JUDGMENT**

Before KELLY, WOLLMAN and KOBES, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

March 23, 2023

Order Entered in Accordance with Opinion:  
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E. Gans

**Additional material  
from this filing is  
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