STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2014AP002445 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PAUL L. LINDE,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
Entered in the Forest County Circuit Court, the
Honorable Fred W. Kawalski, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

ISSUE PRESENTED

> Did the trial court err in denying Mr. Linde's motion to suppress, where the only suggestion of recent drug activity was an anonymous tip providing Mr. Linde's name and address, and the bare conclusion that the caller had "seen" marijuana plants "at" Mr. Linde's cabin approximately a week earlier?

The trial court found that there was probable cause to issue a search warrant, based on the tip and the fact that Mr. Linde had been arrested for cultivating marijuana plants approximately one year prior to the tip.

STATEMENT OF THE CASE AND FACTS

According to the criminal complaint, a caller informed the Forest County Sheriff's Department that the caller had been in Paul Linde's cabin and had observed "a large indoor marijuana grow." (8:2). The caller had observed a number of marijuana plants. (8:3). Based on this tip, received on August 26, 2011 (4:4) and additional information, officers obtained a search warrant for the cabin (8:3). On August 30, 2011, officers searched the cabin and the vehicles parked there. (8:3). Eighteen marijuana plants were seized from the cabin, along with a bong and numerous containers of dried marijuana. (*Id.*). A truck parked in the driveway contained a pipe, rolling papers, marijuana, planting pots and fertilizer. (*Id.*).

Mr. Linde was charged with five counts: 1) Manufacture / Delivery of THC (between 200 and 1000 grams, or between 4 and 20 plants), as a party to the crime, contrary to Wis. Stat. §§ 961.41(1)(h)(2) & 939.05;

2) Possession of Drug Paraphernalia,[1] as a party to the crime, contrary to Wis. Stat. §§ 961.573(1) & 939.05; 3) Possession of Drug Paraphernalia,[2] contrary to Wis. Stat. § 961.573(1); 4) Possession of THC, as a party to the crime, contrary to Wis. Stat. §§ 961.41(3g)(e) & 939.05; and 5) Felony Bail Jumping, contrary to Wis. Stat. § 946.49(1)(b). (8:1-2). At the time of his arrest in the above-captioned case, Mr. Linde was under bond conditions in Oconto County Case No. 10-CF-137. (8:4).

Mr. Linde waived his right to a preliminary hearing. (14; 62). On October 11, 2011, an information was filed charging the same counts alleged in the complaint. (13).

Mr. Linde's attorney filed a motion to suppress evidence derived from the search warrant, alleging that the warrant was defective for three reasons. (20). First, the tip was not proven reliable, and therefore was to be afforded no weight. (20:1). Second, the warrant affidavit included information regarding a July, 9, 2010, seizure of marijuana from Mr. Linde's truck,[3] which was too remote in time to support probable cause. (*Id.*). Third, the search warrant was issued by a court commissioner, who did not have the constitutional authority to do so. (*Id.*) Counsel acknowledged that the third issue was pending in the Wisconsin Supreme Court, with oral argument scheduled for December 1, 2011. (*Id.*).

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[1] This count was for the bong in the cabin.

[2] This count was for the pipe and rolling papers in the truck.

[3] CCAP indicates that this seizure was the basis of the charges in Oconto County Case No. 10-CF-137, for which, as indicated above, Mr. Linde was under bond conditions at the time of his arrest in the instant case.

The suppression motion was further briefed by the parties. (22; 23; 24). A partial oral decision, denying suppression, was rendered by the circuit court on February 24, 2012. (59; App. 104-120). First, the court found that the tip had indicia of reliability.

> And the court's analysis of an anonymous tip is basically considering two factors. These are my review and summary from all of the case law that's been submitted by counsel. And the first of which is whether or not the informing can be determined to be truthful or whether information has an indicia of veracity.
>
> And secondly the court has to look at what is the informant's basis of knowledge. And that has to be viewed in light of the totality of the circumstances. In this particular case in here we have the anonymous tip was that the Linde household contained within that structure was a, what was referred to as a grow operation. And this was the basis of the tip.
>
> The identity of the informant was not provided. Apparently his identity was obtained at the later date but I would agree with defense counsel that that later date acknowledgement of his identity does not I believe solve that problem. But at least in any event, when the information was provided the tip was anonymous. So in view of that, an anonymous tip is not improper. It's just that it changes what the duties or obligations of law enforcement are with respect to such a tip.
>
> ….
>
> Here there was not a working relationship between the tipster and law enforcement and that doesn't necessarily make the tip improper, but what it does do is require law enforcement to engage in further examination before taking action such as to seek and obtain a warrant for the search of the property.

> So in this particular instance what law enforcement did is take into account that there was an incident that took place approximately a year ago where Mr. Linde was apprehended and some plants were at a different location and the knowledge that came to law enforcement is that these plants came from this location on Lake Lucerne in Forest County.
>
> But the other aspect that the court I believe finds is determinative with respect to the information provided by the tipster, was of course there has to be some determination as to what the informant's basis of knowledge is.
>
> ….
>
> But in this particular instance what I think becomes important for this case is that the anonymous tip that was received by law enforcement contained the additional information that the tipster knew about the location of this grow operation because he had been there. He was personally there and personally observed it. So that satisfies, at least in this court's judgment, the basis of this tipster knowledge.
>
> Now, that does not mean that the inquiry stops there. I think law enforcement has to certainly go beyond that as well to determine whether or not the tipster's information can be corroborated and in this particular instance, that corroboration was in the nature of the information obtained by Forest County law enforcement about a year ago regarding these plants that were obtained by Mr. Linde.

(59:4-7; App. 107-110).

The court also found that the information regarding the July 9, 2010, arrest was not too stale to support probable cause for a search warrant.

> All right. So in any event however, this involved what we call as a grow operation, and that is a, an endeavor that is of considerable investment in terms of time, in terms of property. We've had several cases in Langlade County involving grow operations and I'm aware of the fact that they involve plants, they involve soil, they involve lighting apparatus of sorts to apparently to provide substantial light to these plants, there is fertilizers. And so therefore, you know, these are things that are more of a permanent nature so I'm not convinced that the fact that the information which corroborated the anonymous tipster was information that was obtained a year earlier, that it is stale for reasons of the nature of the information that was eventually provided.

(59:8-9; App. 111-112).

Trial counsel objected to the court's reference to the court's knowledge of grow operations, arguing that the longevity of grow operations was not addressed within the four corners of the search warrant and its supporting affidavit. (59:11-13; App. 114-116).[4] The court overruled the objection.

> Well again, the terminology that was used in the warrant was a grow operation. When I'm describing is what is typically associated with a grow operation, I don't know that a warrant has actually got to go into analysis what a grow operation is regarding smell, number of plants or

[4] The suppression motion was argued and briefed by both counsel for Mr. Linde, and his wife, Rita, who had been charged with similar drug and paraphernalia counts in Forest County Case No. 11-CF-87. Because both cases arose from evidence derived from one warrant, the suppression litigation was resolved at a common hearing. Henry Schultz, Mrs. Linde's attorney, made the substantive argument about extraneous information; Bayne Allison, Mr. Linde's attorney, joined the objection.

> lighting. I don't know that the warrant has to be that verbose as to cover all of those areas.

(59:14-15; App. 117-118).

Because the court commissioner's authority to issue a warrant was soon to be decided by the supreme court, the circuit court deferred its ruling on that issue until a decision was released. (59:10-11; App. 113-114). On May 30, 2012, the supreme court issued its decision in ***State v. Douglas Williams***, 2012 WI 59, 341 Wis. 2d 191, 814 N.W.2d 460. The court concluded that a commissioner does have the authority to issue a search warrant. ***Id.***, ¶¶ 56-58. Based on that decision, the circuit court denied the suppression motion's outstanding claim at a hearing on June 28, 2012.[5] (58:4). That claim is not renewed in this appeal.

The parties negotiated a settlement, including a joint recommendation for sentencing. (46). Mr. Linde would enter pleas to two counts: Manufacture / Delivery of THC and Felony Bail Jumping. (*Id.* at 1-2). The paraphernalia and possession charges were to be dismissed and read-in. (*Id.*). For the Manufacture/Delivery count, the parties jointly recommended a withheld sentence, three years of probation with conditions including 90 days in jail, and a fine of $1,000. (46:1, 3). For the Felony Bail Jumping Count, the parties recommended three years of probation with conditions. (46:2-3).

[5] In counsel's pagination of the record, the transcript is identified as "6/28/13 hearing." This appears to be a typographical error; there was no hearing on that date and the cover page of the transcript identifies the correct year.

The plea and sentencing hearing took place on April 2, 2013. (55). The terms of the plea agreement and sentencing recommendation were placed on the record. (*Id*. at 2-5). The state also stipulated that Mr. Linde was entitled to five days of presentence credit should his probation be revoked. (*Id*. at 2).

Mr. Linde then entered no-contest pleas to the two counts. (55:8). The court dismissed and read-in the remaining counts. (55:9).

Proceeding to sentencing, Mr. Linde exercised his right of allocution, describing the difficult personal and medical situations he had recently faced. (55:16-17). He admitted making foolish choices and getting himself in trouble, saying that he did not expect that to happen again. (*Id*. at 17).

There was some discussion regarding whether Mr. Linde was due sentence credit on a probation hold in another case, a hold placed due to the charges in the above-captioned case. (55:19-23). The only case for which Mr. Linde was on probation at the time was Oconto County No. 10-CF-137.[6] The court declined to award the time to the instant case, because the court believed that to do so would be to give Mr. Linde double credit. (55:22-23). The court went on to adopt the joint recommendation of the parties. (*Id*. at 23; App. 101-103).

Mr. Linde filed a timely notice of intent to seek postconviction relief under Wis. Stat. § (Rule) 809.30, and

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[6] *See* CCAP entry at http://wcca.wicourts.gov/caseDetails.do;jsessionid=44FC1FE386FE30C8E4E9DD14523C6BC1.render6?countyNo=42&caseNo=2010CF000137&cacheId=E99A089D65C6E996B2D67F5B0925EA66&recordCount=16&offset=10&mode=charges

undersigned counsel was appointed to represent him.

On January 9, 2015, undersigned counsel filed a no-merit brief pursuant to Wis. Stat. § 809.32 and ***Anders v. California***, 386 U.S. 738 (1967).

On August 12, 2015, this court rejected the no-merit brief, finding that, "Upon our independent review of the record, we are unable to conclude that there is no arguable basis for appeal of the circuit court's order denying the motion to suppress evidence based on lack of probable cause to support the search warrant." (August 12, 2015, Order in case no. 2014AP2445-CRNM).

This appeal follows. Additional facts will be set forth as appropriate in the argument section below.

ARGUMENT

I. The Affidavit in Support of the Search Warrant Was Insufficient Because It Relied on an Anonymous Informant Whose Veracity Was Unknown, Who Supplied Only Widely Known or Observable Information, and Whose Observational Reliability Was Only Nominally Corroborated.

A. Applicable principles of law.

Citizens are protected from unreasonable search and seizure by the Fourth Amendment to the U.S. Constitution and Article I, Section 11 of the Wisconsin Constitution, which mandate that no warrants shall issue without probable cause.

The standard of review for search warrants was stated by the Wisconsin supreme court in ***State v. Higginbotham,*** 162 Wis. 2d 978, 989, 421 N.W. 2d 24 (1991)**:**

> A search warrant may issue only on a finding of probable cause by a neutral and detached magistrate. We accord great deference to the warrant-issuing judge's determination of probable cause and that determination will stand unless the defendant establishes that the facts are clearly insufficient to support a finding of probable cause.
>
> In reviewing whether there was probable cause for the issuance of a search warrant, we are confined to the record that was before the warrant-issuing judge….The duty of the reviewing court is to ensure that the magistrate had a substantial basis for concluding that the probable cause existed.

(internal citations omitted).

The task of the warrant-issuing magistrate is to make a decision whether, given all the circumstances set forth in the affidavit before him or her, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. ***State v. Ward***, 2000 WI 3, ¶23, 231 Wis. 2d 723, 604 N.W.2d 517, citing ***Illinois v. Gates***, 462 U.S. 213, 238 (1983). An "informant's 'basis of knowledge' and 'veracity' (*i.e.*, how he knows and why we should believe him) remain highly relevant to a determination of either probable cause or reasonable suspicion." ***United States v. Elmore***, 482 F.3d 172, 179 (2nd Cir. 2007), citing ***Alabama v. White,*** 496 U.S. 325, 328-29 (1990).

The affidavit in support of the search warrant in this case provided an insufficient basis for the issuing

magistrate to assess the veracity of the informant, whose knowledge base was not shown to extend beyond a Mr. Linde's name and address, followed by a single conclusory allegation.

B. Because the tipster was anonymous, he or she had no personal history of reliability and no personal reputation to risk by supplying misinformation.

The only information about the anonymous tip in this case appears in paragraph four of the affidavit:

> On August 26th, 2011 I Captain/Deputy Jeffery A Marvin received a complaint from dispatch, a anonymous report had been called in from a cell phone that Paul L Linde had a large marijuana grow at his cabin which is located at 3479 Lake Lucerne Drive. The reporting party stated that they had been at the cabin approx. 1 week prior and seen the marijuana plants. Due to current technology the reporting party's phone number was able to be obtained.

(4:4).

The tipster in this case was anonymous. Nothing in the affidavit suggests that the police knew the identity of the informant. The police apparently obtained the number of the cell phone used to call in the tip (4:4), but there is no indication that the number was used to identify the caller. Indeed, there is no evidence that the phone was associated with any particular user.

Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if his or her allegations turn out to be fabricated, "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or

veracity[.]" ***Florida v. J.L.***, 529 U.S. 266, 270 (2000), quoting ***Alabama v. White,*** 496 U.S. 325, 329 (1990). An anonymous informer's veracity must be assessed by non-identity-based means, particularly police corroboration. ***State v. Kolk***, 2006 WI App 261, ¶12, 298 Wis. 2d 99, 110, 726 N.W. 2d 337. "[The issuing magistrate's] action cannot be a mere ratification of the bare conclusions of others." ***Illinois v. Gates***, 462 U.S. 213, 239 (1983).

C. The tipster's conclusory statement contained none of the "inside" information needed to assess the reliability of an anonymous tip.

Illinois v. Gates, 462 U.S. 213 (1983), is the landmark case regarding anonymous information as the basis for a search warrant. In that case, police received an anonymous letter that identified two individuals by name and alleged that they transported and sold large amounts of drugs. ***Gates***, 462 U.S. at 225. The letter described the travel arrangements through which the individuals brought drugs from Florida to Illinois. ***Id***. The letter went on to inform police of the details of an upcoming drug run. ***Id***. The ***Gates*** majority opined that the letter, standing alone, would be an insufficient basis upon which to issue a warrant. ***Gates*** at 227. There was nothing known about the letter writer, or about his or her basis for predicting the next drug run. ***Id***. However, police verified that the two individuals named by the tipster were indeed going to be traveling when and how the letter writer had predicted. ***Gates*** at 243-244. It was this corroboration that provided a sufficient basis for the issuance of a warrant. ***Id***. The corroboration sufficed because the information in the letter included "a range of details relating not just to easily obtained facts and conditions existing at the

time of the tip, but to future actions of third parties ordinarily not easily predicted." ***Gates*** at 245.

The information provided to police in Mr. Linde's case comprised "easily obtained facts and conditions." Mr. Linde's name and address were provided by the informant. The tipster alleged that he or she had "seen the marijuana plants" "at" Mr. Linde's cabin. (4:4). This vague accusation could be made by anyone with a telephone directory, against anyone listed therein.

In ***Florida v. J.L.***, the Supreme Court considered an anonymous tip as the basis for reasonable suspicion, a lower standard than the probable cause at issue in Mr. Linde's case. 529 U.S. 266 (2000). An anonymous caller had given a vague description that matched J.L., along with an assertion that the individual described had a gun. ***Id***. at 268. The Court held that the tip was not enough for reasonable suspicion:

> The anonymous call concerning J. L. provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility…. All the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J. L.

J.L., 529 U.S. at 271.

> An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion

> of illegality, not just in its tendency to identify a determinate person.

J.L., 529 U.S. at 272.

In Mr. Linde's case, as in ***J.L.***, there was none of the predictive information that supported probable cause in ***Gates***. There was no "means to test the informant's knowledge or credibility." There was only Mr. Linde's name, his address, and a conclusory allegation. As in ***J.L.***, Mr. Linde's tipster provided information identifying an individual. The anonymous informant said that he or she had "seen" marijuana plants. But that is scarcely more informative than asserting that J.L. had a gun. There was no inside information about Mr. Linde, his residence, or his activities.

This court has declined to find reasonable suspicion where a tip provided widely ascertainable information along with a prediction that an individual would be traveling to pick up narcotics. The informant, whose identity was known to police, had identified Calvin Kolk, described his car, and alleged that Kolk would be driving to Milwaukee to pick up drugs.[7] ***State v. Kolk***, 2006 WI App 261, ¶2, 298 Wis. 2d 99, 104, 726 N.W. 2d 337. Kolk was stopped in his car, detained and searched. The search produced oxycodone for which Kolk had no prescription. ***Kolk***, 2006 WI App 261, ¶¶5-7, 298 Wis. 2d 99 at 105-106. This court was unimpressed by the quantity and quality of information in the tip, and it held that the detention and search of Kolk were illegal. ***Kolk***, 2006 WI App 261, ¶24,

[7] The informant later amended this suggestion in a separate phone call, alleging that the driver had already been to Milwaukee and would soon be heading to Madison. Police eventually stopped the driver for speeding when he was westbound in Washington County. ***Kolk***, 2006 WI App 261, ¶¶2-3, 298 Wis. 2d 99 at 104-105.

298 Wis. 2d 99 at 118. "The record reveals that the informant correctly gave police Kolk's identity and described his vehicle. That the informant possessed such readily available information does not, to us, significantly bolster the reliability of the informant's other claims." ***Kolk***, 2006 WI App 261, ¶16, 298 Wis. 2d 99 at 112.

In Mr. Linde's case, the informant was anonymous, there was no predictive information at all, and the standard was higher: probable cause. Each of these facts makes Mr. Linde's claim for suppression stronger than Calvin Kolk's.

Furthermore, in Mr. Linde's case, the anonymous tip lacked not only predictive detail. The tip also provided no factual support for its singular, conclusory allegation of criminality. The affidavit states simply that the informant had "seen" marijuana plants "at" Mr. Linde's cabin. This begs the question: how did the informant know what marijuana plants looked like? How did the informant observe the plants referenced in the affidavit: Inside the cabin? Through a window? With binoculars? The affidavit provides no factual basis for the informant's contention that he or she had actually observed marijuana plants. "Where an informant does not give some indication of how he or she knows about the suspicious or criminal activity reported… it bears significantly on the reliability of the information." ***Kolk***, 2006 WI App 261, ¶15, 298 Wis. 2d 99 at 111.

To the extent that the caller in Mr. Linde's case may have been a citizen, the Linde tip is easily distinguished from the tip analyzed in ***State v. Roosevelt Williams***, 2001 WI 21, ¶6, 241 Wis. 2d 631, 623 N.W.2d. There, the state supreme court held that "In particular, we view citizens who purport to have witnessed crime as reliable, and allow

the police to act accordingly, even though other indicia of reliability have not yet been established."

In ***Roosevelt Williams***, a citizen called 911 to report suspicious activity occurring contemporaneously. ***Roosevelt Williams***, 241 Wis. 2d 631, ¶4. The caller was reporting drug transactions as they were taking place, and provided a description of the suspicious vehicle as well as its location. ***Id***. The call was recorded, and a transcript was admitted at the suppression hearing. ***Roosevelt Williams***, ¶37.

The court found the tip sufficiently reliable to support reasonable suspicion (***Roosevelt Williams***, ¶¶19-20), a lower standard than the probable cause at issue in Mr. Linde's case. Specifically, the court in ***Roosevelt Williams*** focused on:

- The contemporaneous observation and reporting of suspicious activity by the caller (***Id***., ¶33);
- Identifying details provided by the caller about herself: specifically, her address, which put her anonymity at risk (***Id***., ¶¶34-35);
- The recording of the call, which added to its reliability through context, tone and delivery (***Id***., ¶37); and
- The nature of the 911 call system, which also put the tipster's anonymity at risk (***Id***., ¶¶35, 38).

The court concluded that "Risking one's identification intimates that, more likely than not, the informant is a genuinely concerned citizen as opposed to a fallacious prankster." ***Id***., ¶35.

None of the ***Roosevelt Williams*** indicia of reliability are present in the Linde affidavit. There was a cell phone number identified, but just a number: not, apparently, a name or address. Thus, it is just as likely that the Linde caller was a "fallacious prankster" rather than a "genuinely concerned citizen."

D. Police corroboration of easily observed facts does not confer reliability upon an anonymous tip.

The problem with corroboration in this case was that there was nothing except easily observed, widely available information in the tip. Corroboration of such information does not bolster the reliability of the informer; it is merely an exercise in circularity and evidentiary bootstrapping. In this case, the police did corroborate the identifying information in the tip and affirmed that Paul Linde lived at the address given by the tipster. (4:3-4).

The trial court was persuaded that Mr. Linde's prior arrest corroborated the informant's allegation of marijuana being grown at Mr. Linde's cabin a year later. (59:6-9, 12-14; App. 109-112, 115-118). However, the informant said nothing about criminal or even suspicious activity transpiring between the 2010 arrest and the August, 2011, tip. There were no facts in the affidavit linking the 2010 arrest and the 2011 tip.

In ***United States v. Danhauer*****,** 229 F.3d 1002 (2000), the 10th Circuit Court of Appeals held that corroboration was insufficient to lift a bare-boned tip over the threshold of probable cause. The tip and the resulting affidavit in ***Danhauer*** were remarkably similar to those in Mr. Linde's case. The ***Danhauer*** tip identified two individuals and alleged that they were cooking methamphetamine on their property.

Id. at 1004. The court held that the tip was inadequate to establish probable cause, even with corroboration, because the only corroboration was verification of readily-observed details:

> The only police corroboration of the informant's information was the affiant's verification of the Danhauer residence's physical description, a records check to confirm that the Danhauers resided at the premises in question, an observation of Robbi Danhauer coming and going from the house to the garage, and a search of the Danhauers' criminal histories, which brought to light Robbi Danhauer's latest urinalysis revealing the presence of methamphetamine. The detective made little attempt to link methamphetamine to the Danhauer residence.

***Danhauer*,** 229 F.3d 1002 at 1006.

In Mr. Linde's case, police corroboration of the tip went no farther than records checks and verifications of the tip's identifying information. Indeed, that is just about all the corroboration that *could* have been done, given the non-specific information in the tip. But the police did not do more investigation to support probable cause for a warrant. There was no surveillance to observe drug activity. There were no controlled buys.

The tip by itself had no indicia of reliability: no identifiable source, no predictive information, no potential for substantive corroboration. As a trigger for additional observation or investigation, the tip may have been useful. As a basis for probable cause, the tip was insufficient.

An anonymous tipster provided Mr. Linde's name and address, and alleged that the tipster had "seen" marijuana plants "at" Mr. Linde's cabin approximately one week earlier.

A more conclusory accusation would be difficult to formulate. The Fourth Amendment is not satisfied by such an allegation, offered in the context of a bare-boned tip, phoned in by an unknown individual and undeveloped by police investigation.

E. There is nothing else in the affidavit suggesting that there was ongoing drug activity at Mr. Linde's cabin, or that contraband would be found there when the search warrant was issued.

As noted above, the affidavit reports that Mr. Linde had been arrested approximately one year prior to the anonymous tip. During the arrest, Mr. Linde admitted that the marijuana plants in his pickup truck had been kept at his cabin.

The warrant affidavit describes the arrest and seizure:

> On July 9th, 2010 at approx. 10:04 AM, Oconto County Deputy Ryan Zahn was dispatch to a report by DNR Warden Joe Paul. Warden Paul observed what he believed to be Marijuana plants in the bed of a pick up truck parked at the gas pumps of a station located at Highway STH 32 and STH 64. The truck had a plate # of GM9734 and was registered to Paul L Linde of Green Bay. The plants were in burnt orange pots and approx. 2½ to 3 feet in height . Paul Linde was questioned about the plants. Paul advised Deputy Zahn they were a friends and he was tending to the plants and had watered and fertilized and pruned the plants. Paul advised Deputy Zahn they had been located at his cabin in Forest County Wisconsin. Deputy Zahn had contacted Captain Walrath and Deputy Mertig of Forest County and advised him of his findings. Through our in house records it was determined the cabin was located at 3479 Lake Lucerne Drive, Town of Lincoln, Forest County, Wisconsin. Paul Linde was arrested for possession the plants and had

> paraphernalia in his possession. Paul also had a journal about plant cloning, soil supplements and notes pertaining to the care of marijuana plants.

(4:3).

However, if this were sufficient to generate probable cause, then anyone arrested for growing marijuana would be subject to warrant searches of his or her residence in perpetuity.

The state and federal constitutions, and the cases interpreting them, require more: that there is a fair probability that contraband or evidence of a crime will be found in a particular place. ***State v. Ward***, 2000 WI 3, ¶23, 231 Wis. 2d 723, 604 N.W.2d 517, citing ***Illinois v. Gates***, 462 U.S. 213, 238 (1983).

The affidavit in support of a search warrant failed to support probable cause, because the linchpin conclusory tip could have been made by anyone with a disposable cell phone and knowledge that Mr. Linde had a cabin at a particular address. Mr. Linde's prior arrest occurred a year before the tipster called. The information from that arrest would have supported a search warrant in 2010, but not a year later. There was no evidence of intervening suspicious activity, nor was there evidence that Mr. Linde had continued tending any plants associated with the 2010 arrest.

In sum, the affidavit in support of the search warrant was insufficient to meet probable cause. This court should reverse the circuit court's denial of Mr. Linde's suppression motion.

CONCLUSION

For the reasons set forth above, Mr. Linde respectfully requests that this court reverse the trial court's denial of the suppression motion and remand the case with instructions to permit Mr. Linde to withdraw his pleas.

Dated this 28th day of September, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 4,973 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 28th day of September, 2015.

Signed:

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 28th day of September, 2015.

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