STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2014AP2445-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 SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

Page

Page

STATUTE

STATE OF WISCONSIN

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

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ISSUES PRESENTED

1. Did probable cause support the warrant to search Paul Linde's cabin?

The circuit court answered: Yes. The circuit court concluded that probable cause supported the search warrant because an informant told police that she "personally

observed" a marijuana "grow operation" in Linde's cabin and police "corroborat[ed]" this tip by discovering that Linde was arrested "about a year ago" for possessing marijuana plants that admittedly came from his cabin (59:6-7).

2. Alternatively, did the officers rely in good faith on the search warrant such that the exclusionary rule does not apply?

The circuit court did not address this issue.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent, and because resolution of this appeal requires only the application of well-established precedent to the facts of the case.

STATEMENT OF THE CASE

As the plaintiff-respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § (Rule) 809.19(3)(a)2. The State will supplement the statement of the facts and case as appropriate in its argument.

ARGUMENT

I. Probable cause supported the warrant to search Linde's cabin.

A. Background.

An informant called the Forest County Sheriff's Department and stated that she had been at Paul Linde's cabin and observed "a large indoor marijuana grow" operation there approximately one week earlier (8:2-3; 4:4; R-Ap. 107).[1] Specifically, the informant said that she had observed several marijuana plants at Linde's cabin (8:3). The informant provided the address of Linde's cabin (4:4; R-Ap. 107).

The informant did not provide her own name or any other identifying information (*see* 4:4; 1:5; 59:4-5; R-Ap. 107). However, officers used "current technology" to obtain the informant's phone number (4:4; R-Ap. 107), including the fact that the number was from "the Portage, Steven[s] Point or Plover area" (1:5). The circuit court, at a motion hearing, stated, "Apparently, [the informant's] identity was obtained at the later date" (59:5). Officers sought to keep the informant's identity and phone number confidential (4:6; 1:5; R-Ap. 109).

[1] Because Linde is male, the State uses feminine pronouns to refer to the informant for sake of clarity. However, the record does not disclose the informant's sex.

After receiving the informant's tip, Forest County officers corroborated that Linde owned a cabin at the address that the informant provided (4:3-4, 6; R-Ap. 106-07, 109). By reviewing sheriff's department records, Forest County officers also learned that Linde was arrested approximately one year earlier for possessing marijuana plants in his truck in Octono County, and that Linde admitted to an Oconto County officer that the plants came from his cabin in Forest County (1:5; 4:3; 59:6-7; R-Ap. 106).

A circuit court commissioner subsequently issued a warrant to search Linde's cabin (8:3). Officers executed the search warrant and seized eighteen marijuana plants, a bong, and containers of dried marijuana (8:3; 5:1-2). Linde filed a motion to suppress the evidence obtained pursuant to the search of his cabin, arguing that the search warrant lacked probable cause (20:1). The circuit court denied the motion and concluded that the informant's tip and the information about Linde's prior arrest provided probable cause to search his cabin (59:3-10).[2]

On appeal, Linde argues that probable cause did not support the search warrant (Linde's Br. at 8-19).

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[2] The circuit court denied the motion in part and declined to resolve Linde's argument that a circuit court commissioner has no authority to issue a search warrant, because that issue was then pending before the supreme court (59:10-11). Since then, the supreme court held that a commissioner may issue a search warrant, *State v. (Douglas) Williams*, 2012 WI 59, 341 Wis. 2d 191, 814 N.W.2d 460. Appropriately, Linde has abandoned this argument (Linde's Br. at 6).

Linde is not entitled to relief. Probable cause supported the warrant to search Linde's cabin due to the informant's tip, law enforcement's corroboration that Linde owned a cabin at the address given by the informant, and law enforcement's discovery that Linde had been arrested previously for possessing marijuana plants that came from his cabin. Alternatively, if the search warrant was invalid, the circuit court nonetheless correctly denied the suppression motion because the officers executed the search of Linde's cabin in good faith reliance on the search warrant.

B. Applicable legal standards.

"In the search context, probable cause requires a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Robinson*, 2010 WI 80, ¶ 26, 327 Wis. 2d 302, 786 N.W.2d 463 (quoted source and quotation marks omitted). "Whether there is probable cause to believe that evidence is located in a particular place is determined by examining the totality of the circumstances." *State v. Ward*, 2000 WI 3, ¶ 26, 231 Wis. 2d 723, 604 N.W.2d 517 (quotation marks and quoted source omitted). "Probable cause does not mean more likely than not." *State v. Erickson*, 2003 WI App 43, ¶ 14, 260 Wis. 2d 279, 659 N.W.2d 407 (citation omitted). "It is only necessary that the information support a reasonable belief that guilt is more than a possibility." *Id.* (citation omitted).

"Considered within the totality of the circumstances, the value and reliability of an informant's tip 'may usefully

illuminate the commonsense, practical question whether there is "probable cause" to believe that contraband or evidence is located in a particular place.'" *Robinson*, 327 Wis. 2d 302, ¶ 27 (quoting *Illinois v. Gates*, 462 U.S. 213, 230 (1983)).

Wisconsin courts "'view citizens who purport to have witnessed a crime as reliable, and allow the police to act accordingly, even though other indicia of reliability have not yet been established.'" *State v. Powers*, 2004 WI App 143, ¶ 9, 275 Wis. 2d 456, 685 N.W.2d 869 (citing *State v. Williams*, 2001 WI 21, ¶ 36, 241 Wis. 2d 631, 623 N.W.2d 106). Further, "'[b]ecause an informant is right about some things, he is more probably right about other facts.'" *Robinson*, 327 Wis. 2d 302, ¶ 27 (quoting *Gates*, 462 U.S. at 244) (quotation marks omitted). "That is, police corroboration of innocent, although significant, details of an informant's tip lend reliability to the informant's allegations of criminal activity." *Id.* (citing *Williams*, 241 Wis. 2d 631, ¶¶ 39-40). "For purposes of making a practical, common-sense determination of probable cause, that is sufficient." *Id.* (citing *Gates*, 462 U.S. at 244-45).

"In reviewing whether there was probable cause for the issuance of a search warrant, [the reviewing court] accord[s] great deference to the determination made by the warrant-issuing magistrate." *Ward*, 231 Wis. 2d 723, ¶ 21 (citation omitted). "The magistrate's determination will stand unless the defendant establishes that the facts are

clearly insufficient to support a probable cause finding." *Id.* (citation omitted). This "deferential standard of review is appropriate to further the Fourth Amendment's strong preference for searches conducted pursuant to a warrant." *State v. Lopez*, 207 Wis. 2d 413, 425, 559 N.W.2d 264 (Ct. App. 1996) (citation omitted). Although review is deferential, this Court "independently review[s] whether police conduct violated the constitutional guarantee against unreasonable searches, which presents a question of constitutional fact." *State v. Tate*, 2014 WI 89, ¶ 14, 357 Wis. 2d 172, 849 N.W.2d 798 (quoted source and quotation marks omitted).

C. The informant's tip, coupled with law enforcement's investigation, provided probable cause to search Linde's cabin.

Probable cause to search Linde's cabin was based on the following facts: (1) an informant called the Forest County Sheriff's Department and said that she had personally observed a large marijuana grow operation at Linde's cabin approximately one week earlier (4:4; 8:2-3; R-Ap. 107); (2) the informant provided the address of Linde's cabin (4:4; 8:2; R-Ap. 107); (3) officers subsequently corroborated that Linde owned a cabin at the address provided by the informant (4:3-4; R-Ap. 106-07); and (4) officers learned that Linde was arrested approximately one year earlier for possessing marijuana plants that admittedly came from his cabin (4:3; 59:6-7; R-Ap. 106).

These facts are not "clearly insufficient to support a probable cause finding." *Ward*, 231 Wis. 2d 723, ¶ 21 (citation omitted). In *Robinson*, the supreme court concluded that almost identical facts provided probable cause to search the defendant's residence for marijuana. *See Robinson*, 327 Wis. 2d 302, ¶¶ 27-29. In *Robinson*, "an anonymous citizen" walked into a police department and told an officer that Robinson "was selling marijuana out of his apartment." *Id.*, ¶ 4. The informant provided Robinson's address and cell phone number. *Id.* The officer "conducted a warrant check" and learned that Robinson had two open warrants, one of which was for possession or delivery of a controlled substance. *Id.*, ¶ 5.

Several officers then "went to the address identified by the anonymous informant as Robinson's apartment." *Id.*, ¶ 7. The officers did not seek a search warrant because they intended to conduct a "knock and talk."[3] *Id.* While the officers were outside of the door to Robinson's apartment, an officer called the cell phone number provided by the informant, and a cell phone rang on the inside of the apartment. *Id.*, ¶ 8. An officer knocked on the apartment door and called out Robinson's name, and a male voice on the other side of the door responded, "Yeah." *Id.*

[3] Although the police entered Robinson's home without a warrant, the supreme court held that exigent circumstances justified the warrantless entry. *State v. Robinson*, 2010 WI 80, ¶ 31, 327 Wis. 2d 302, 786 N.W.2d 463.

The supreme court concluded that the foregoing facts established probable cause to search Robinson's apartment. *Id.*, ¶¶ 27-29. The supreme court reasoned that "the officers corroborated each of the three preliminary details provided by the anonymous informant: Robinson's name, his address, and his cell phone number." *Id.*, ¶ 29. "The officers' corroboration of innocent, although significant, details of the informant's tip lent reliability to the informant's allegation that Robinson was selling marijuana out of his apartment." *Id.* (citing *Williams*, 241 Wis. 2d 631, ¶ 40). "The officers may not have corroborated the substantive allegation of criminal activity, but that is not what probable cause demands[.]" *Id.* (quoting *Gates*, 462 U.S. at 243 n.13). The supreme court further reasoned that "the officers were cognizant of the fact that Robinson was previously charged with illegal drug activity. That knowledge further lent reliability to the informant's allegation that Robinson was selling marijuana." *Id.* Moreover, the supreme court reasoned that the informant "jeopardized his anonymity" by going to the police department in person. *Id.*, ¶ 28 (citation omitted). The informant's willingness to jeopardize his anonymity and the "specificity of information" he provided—that is, Robinson's name, address, and cell phone number and the fact that he was selling marijuana out of his apartment—"supported his credibility." *Id.*

This case is on all fours with *Robinson*. Like in *Robinson*, the informant here provided Linde's name and

address and said that Linde had marijuana at that address (4:4; 8:2; R-Ap. 107). Further, like in *Robinson*, officers here corroborated that the informant correctly provided Linde's address (4:3-4, 6; R-Ap. 106-07, 109). Like the officers in *Robinson* who learned that the defendant had an outstanding warrant for a drug offense, the officers here learned that Linde was arrested approximately one year earlier for possessing marijuana plants (4:3; 59:6-7; R-Ap. 106). Finally, the informant here, like in *Robinson*, jeopardized her anonymity by contacting police. An informant's use of a traceable phone number may jeopardize his or her anonymity and thus bolster his or her credibility. *See Williams*, 241 Wis. 2d 631, ¶¶ 35, 37 (lead opinion). Here, law enforcement officers used "currently technology" to obtain the informant's phone number (4:4; R-Ap. 107), and the circuit court stated that they "[a]pparently" obtained the informant's "identity" (59:5).

Although, unlike in *Robinson*, the informant here neither provided Linde's phone number nor spoke to officers in person, the facts supporting probable cause are stronger here because the informant's tip was based on her personal observation (4:4; 8:3; R-Ap. 107). *See Robinson*, 327 Wis. 2d 302, ¶ 28 (noting that "the informant failed to explain how he came to know of the inside information"). Whether an informant explains his or her basis of knowledge of the reported crime "bears significantly on the reliability of the informant." *State v. Kolk*, 2006 WI App 261, ¶ 15, 298

Wis. 2d 99, 726 N.W.2d 337. An informant's tip is inherently reliable if it is based on the informant's personal observation of a crime. *See Powers*, 275 Wis. 2d 456, ¶ 9. Here, the informant personally saw a large marijuana grow operation in Linde's cabin (4:4; 8:3; R-Ap. 107).

Linde tries to analogize his case to cases in which courts determined that an informant's tip, by itself, failed to provide probable cause or reasonable suspicion (Linde's Br. at 11-14, 16-17). However, those cases are distinguishable because the informants in those cases did *not* tell the police that they personally observed the defendants commit a crime and did *not* otherwise explain their basis of knowledge of the defendants' wrongdoing. *See Florida v. J.L.*, 529 U.S. 266, 271 (2000); *Gates*, 462 U.S. at 225-27; *United States v. Danhauer*, 229 F.3d 1002, 1006 (10th Cir. 2000); *Kolk*, 298 Wis. 2d 99, ¶¶ 14-15. As indicated earlier, an informant's personal observation of a crime is significant for establishing probable cause. *See Kolk*, 298 Wis. 2d 99, ¶¶ 12-15, 19; *Powers*, 275 Wis. 2d 456, ¶¶ 9-11. Here, the informant explained that her basis of knowledge was her personal observation of several marijuana plants in Linde's cabin (4:4; 8:2-3; R-Ap. 107).

The cases on which Linde relies are further distinguishable because the officers in those cases were unable to corroborate much, if any, useful information provided by the informants. *See J.L.*, 529 U.S. at 271-72; *Danhauer*, 229 F.3d at 1006; *Kolk*, 298 Wis. 2d 99, ¶¶ 16-17;

cf. Gates, 462 U.S. at 243-45 (holding that police corroboration of facts in an otherwise insufficient anonymous letter provided probable cause for a search warrant). Here, the officers significantly corroborated the veracity of the informant's tip by confirming that the informant provided Linde's correct address and by discovering that Linde had previously been arrested for possessing marijuana plants. *See Robinson*, 327 Wis. 2d 302, ¶ 29.

D. Linde's arguments are not persuasive.

Although the foregoing discussion shows that probable cause supported the search warrant, Linde argues that probable cause is lacking here because the factual assertions in the tip and affidavit were insufficient in several respects. Linde is wrong.

For example, Linde suggests that his one-year-old arrest for marijuana possession was stale and thus unreliable to support a finding of probable cause (Linde's Br. at 16, 19). However, that arrest is not stale because marijuana growing is a long-term, continuous activity and because the informant's tip provided recent evidence that Linde's marijuana grow operation was ongoing. *See State v. Jones*, 2002 WI App 196, ¶ 23, 257 Wis. 2d 319, 651 N.W.2d 305; *State v. Loranger*, 2002 WI App 5, ¶ 24, 250 Wis. 2d 198, 640 N.W.2d 555. Indeed, Linde's prior arrest indicated that he was growing a large amount of marijuana at his cabin because he was arrested for possessing several

marijuana plants, and he admitted that they came from his cabin (4:3; 59:6-7; R-Ap. 106).

Linde also complains that the informant had no personal history of reliability (Linde's Br. at 10-11). However, an informant who purports to have witnessed a crime is inherently reliable, even if the informant has no "history of providing reliable information to law enforcement." *Powers*, 275 Wis. 2d 456, ¶ 9; *see also Ward*, 231 Wis. 2d 723, ¶ 35 (holding that the informant was reliable although he had "no past record of reliability"). Here, the informant was inherently reliable because she purported to have witnessed several marijuana plants in Linde's cabin (4:4; 8:2; R-Ap. 107).

Linde faults the informant's tip for not having any predictive information (Linde's Br. at 14). However, "[p]redictive information is not necessary for a tip to be reliable, but it is one of the indicia of reliability that can bolster a tip's credibility." *Kolk*, 298 Wis. 2d 99, ¶ 18 (citing *Williams*, 241 Wis. 2d 631, ¶ 42). In the absence of "predictive information," an informant's "direct observation" of a crime "can provide reason to believe that the tipster has truthful and accurate information." *Id.*, ¶ 19.

Linde also faults the informant's tip for not providing more information, calling the tip "bare-boned" (Linde's Br. at 13-14, 17-18). However, if a tip has a high degree of reliability, then it need not provide as much information. *State v. Sisk*, 2001 WI App 182, ¶ 7, 247 Wis. 2d 443, 634

N.W.2d 877 (quoting *Williams*, 241 Wis. 2d 631, ¶¶ 21-23). As noted earlier, a tip is inherently reliable if based on an informant's personal observation of a crime, even if other indicia of reliability have not yet been established. *See Powers*, 2004 WI App 143, ¶ 9. Because the informant's tip here was based on her personal observation of a crime, it was reliable although it did not provide the level of detail that Linde desires.

Finally, Linde faults the officers for not conducting surveillance or a controlled buy at his cabin (Linde's Br. at 17). However, officers need not conduct surveillance or a controlled buy to establish probable cause for a search. *Williams*, 241 Wis. 2d 631, ¶ 41 (lead opinion) (surveillance not required); *see State v. Hanson*, 163 Wis. 2d 420, 423, 471 N.W.2d 301 (Ct. App. 1991) (citation omitted) (noting that a controlled buy is one way to establish an informant's veracity).

In short, the informant's tip based on personal observation, coupled with law enforcement's subsequent corroboration, established probable cause to search Linde's cabin. This conclusion is consistent with controlling case law. *See, e.g.*, *Robinson*, 327 Wis. 2d 302, ¶ 29 (finding probable cause because "the officers were cognizant of the fact that Robinson was previously charged with illegal drug activity" and because "the officers corroborated" the informant's information about the defendant's name, address, and cell phone number); *Ward*, 231 Wis. 2d 723,

¶ 34 (finding probable cause to search Ward's house because an informant drug dealer told police that Ward was his drug supplier, the informant said that Ward lived on Royce Street, and records confirmed that Ward's house was on that street).

II. Alternatively, the exclusionary rule does not apply here because the officers relied in good faith on the search warrant.

A. Applicable legal standards.

"Under the exclusionary rule, evidence obtained in violation of the Fourth Amendment is generally inadmissible in court proceedings." *State v. Scull*, 2015 WI 22, ¶ 20, 361 Wis. 2d 288, 862 N.W.2d 562 (citation omitted). "The exclusionary rule is a judicially created remedy, not a right[.]" *State v. Dearborn*, 2010 WI 84, ¶ 35, 327 Wis. 2d 252, 786 N.W.2d 97 (citations omitted). Under the good faith exception, "the exclusionary rule is not applied when the officers conducting an illegal search 'acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment.'" *Id.*, ¶ 33 (quoting *United States v. Leon*, 468 U.S. 897, 918 (1984)). In *Leon*, the Supreme Court "formulated a good faith exception to the exclusionary rule where police officers act in objectively reasonable reliance on a search warrant issued by a neutral and detached magistrate." *State v. Eason*, 2001 WI 98, ¶ 27, 245 Wis. 2d 206, 629 N.W.2d 625.

The Supreme Court "in *Leon* described four sets of circumstances under which the good faith exception does not apply":

> [1] the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth . . . [2] the issuing magistrate wholly abandoned his judicial role. . . . [3] *Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.* [4] Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.

State v. Marquardt, 2005 WI 157, ¶ 25, 286 Wis. 2d 204, 705 N.W.2d 878 (emphasis and alterations added in *Marquardt*) (quoting *Leon*, 468 U.S. at 923) (quotation marks omitted).

"However, rather than adopting *Leon* outright," our supreme court in *Eason* "added to the test." *Scull*, 361 Wis. 2d 288, ¶ 35.

> Thus, in order for the good faith exception to apply to scenarios involving a warrant, the State must "show that the process used in obtaining the search warrant included a significant investigation and a review by either a police officer trained and knowledgeable in the requirements of probable cause and reasonable suspicion, or a knowledgeable government attorney."

Id. (quoting *Eason*, 245 Wis. 2d 206, ¶ 74).

Thus, the three-factor test from *Eason* considers whether (1) officers conducted a significant investigation prior to the search at issue; (2) there was review by a

knowledgeable police officer or government attorney; and (3) a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization. *Id.*, ¶ 38.

This Court will uphold the circuit court's findings of fact "unless they are clearly erroneous." *Id.*, ¶ 16 (citing *Eason*, 245 Wis. 2d 206, ¶ 9). However, this Court determines *de novo* whether the good faith exception to the exclusionary rule applies. *Id.*, ¶ 17 (citation omitted).

B. The officers relied in good faith on the search warrant.

If this Court concludes that the search warrant lacked probable cause, it should nevertheless hold that the circuit court correctly denied Linde's suppression motion because the officers relied in good faith on the search warrant.[4]

Turning to the first factor of the *Eason* test, the officers here conducted a significant investigation. The officers received a tip from an informant, confirmed that the informant correctly provided Linde's address, and reviewed

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[4] Although the issue of good faith was not raised before the circuit court, the State as respondent may raise this issue before this Court. *See State v. Ortiz*, 2001 WI App 215, ¶ 25, 247 Wis. 2d 836, 634 N.W.2d 860 (citing *State v. Holt*, 128 Wis. 2d 110, 124-26, 382 N.W.2d 679 (Ct. App. 1985)). Likewise, this Court may rely on the good faith exception to affirm although this issue was not presented to the circuit court. *See State v. Jensen*, 2011 WI App 3, ¶ 75, 331 Wis. 2d 440, 794 N.W.2d 482 (citation omitted). The State believes that the record is sufficient to conclude that the officers here relied in good faith on the search warrant. If this Court disagrees, it should remand for a hearing at which the State may develop the record with respect to good faith.

sheriff's department records to learn that Linde was previously arrested for possessing marijuana (4:3; 8:2-3; 59:6-7; R-Ap. 106). These actions constitute significant investigation for purposes of the *Eason* good faith exception. *See Eason*, 245 Wis. 2d 206, ¶ 70 (holding that officers conducted a significant investigation by working with a confidential informant to purchase a controlled substance, testing the substance, reviewing utility records to confirm Eason's address, and researching Eason's "criminal arrest records"); *see also Scull*, 361 Wis. 2d 288, ¶¶ 39-41 (holding that officers conducted a significant investigation by receiving a tip from a confidential informant, confirming Scull's address and vehicle registration, learning that Scull was on probation, and taking a drug-sniffing dog to Scull's front door).

The second *Eason* factor requires "a review [of the warrant application process] by a police officer trained in, or very knowledgeable of, the legal vagaries of probable cause and reasonable suspicion, or a knowledgeable government attorney." *Eason*, 245 Wis. 2d 206, ¶ 63. In *Eason*, the supreme court held that this factor was met although the warrant and supporting affidavit did "not explicitly indicate that this process was followed[.]" *Id.*, ¶ 72. The supreme court concluded that "it certainly can be reasonably inferred from the face of those documents that there was some involvement and review by a government attorney" and that this review process "was apparently followed[.]" *Id.* The

supreme court reasoned that "[t]he warrant and affidavit reflect advanced legal training, beyond that given to a well-trained police officer. The warrant and affidavit are replete with terms normally found in attorney-drafted documents, including 'whereas,' 'curtilage,' 'to-wit,' and other such similar terms." *Id.*, ¶ 71. The supreme court further reasoned that "[t]he affidavit uses phrases that indicate that it was written to comport with the dictates of Fourth Amendment law" and "the affidavit relates [the affiant's] extensive training and experience in order to support a finding of reasonable suspicion." *Id.* (citations omitted).

Here, like in *Eason*, this second factor is met. Although the warrant and supporting affidavit here do not expressly indicate whether a supervising officer or government attorney reviewed the application process, it can be inferred from these documents that this review process was followed. Like in *Eason*, the warrant and affidavit here use the terms "curtilage" and "to-wit," and the warrant uses the term "whereas" (3:1, 3; 4:3; R-Ap. 106). The use of these terms implies that a knowledgeable officer or government attorney reviewed those documents. *Eason*, 245 Wis. 2d 206, ¶ 71.

Further, the affidavit here "uses phrases that indicate that it was written to comport with the dictates of Fourth Amendment law[.]" *See id.* For example, the affidavit states that the affiant finds the Oconto County officer, who found marijuana plants in Linde's truck approximately one year

earlier, "'to be credible and reliable'" and the affiant explains the basis for this belief (4:3-4; R-Ap. 106-07). *See State v. DeSmidt*, 155 Wis. 2d 119, 134, 454 N.W.2d 780 (1990) (quoting *Bast v. State*, 87 Wis. 2d 689, 694, 275 N.W.2d 682 (1979)) ("'The assertions in an affidavit seeking a search warrant may be based on hearsay provided the affiant indicates that the informant is credible and reliable.'").

Similarly, the affidavit here discusses the affiant's extensive training and experience regarding controlled-substance investigation (4:4-6; R-Ap. 107-09). The affidavit explains that the affiant received more than forty hours of training regarding controlled substances (4:4; R-Ap. 107). It also explains that in other investigations involving controlled substances, the affiant worked with confidential informants and executed search warrants (4:4; R-Ap. 107). The affidavit further explains the affiant's knowledge of drug dealers' common practices, including what kind of contraband they often have and where they keep it (4:4-6; R-Ap. 107-09). The affiant states that his belief that illegal drugs would be found in Linde's cabin was partly based on the affiant's "experience in controlled substance investigations" (4:6; R-Ap. 109). By discussing the affiant's "extensive training and experience," the affidavit indicates that it was reviewed by a knowledgeable officer or government attorney. *Eason*, 245 Wis. 2d 206, ¶ 71 (citing *State v. Meyer*, 216 Wis. 2d 729, 752–53, 576 N.W.2d 260 (1998)).

Turning to the third *Eason* factor, a reasonably well trained officer would not have known that the search was illegal despite the magistrate's authorization. Although Linde's brief-in-chief does not address the good faith exception, there is no dispute that this case does *not* match three of the four circumstances in which the good faith exception does not apply. In other words, Linde does not allege that the magistrate "was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth," that "the issuing magistrate wholly abandoned his judicial role," or that the search warrant was "so facially deficient . . . that the executing officers cannot reasonably presume it to be valid." *Marquardt*, 286 Wis. 2d 204, ¶ 25 (quoting *Leon*, 468 U.S. at 923) (quotation marks omitted). The circuit court record would not support any such allegation.

However, Linde argues that "the affidavit in support of the search warrant was insufficient to meet probable cause" (Linde's Br. at 19). Accordingly, the State will assume that Linde will argue in his reply brief that the affidavit here was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *See Marquardt*, 286 Wis. 2d 204, ¶ 25 (quoting *Leon*, 468 U.S. at 923) (quotation marks omitted).

A "conclusion that the warrant application was insufficient to support the warrant-issuing judge's probable

cause determination does not mean that the affidavit in support of the warrant was lacking in indicia of probable cause within the meaning of *Leon*." *Id.*, ¶ 30. In other words, a conclusion that a warrant lacked probable cause does *not* mean that the warrant affidavit "is 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable[.]'" *Id.*, ¶ 28 (quoting *Leon*, 468 U.S. at 923). "Were it otherwise, the third *Leon* disqualifying circumstance, which limits the applicability of the good faith exception, would be superfluous." *Id.*, ¶ 29.

"[A]n 'indicia' of probable cause is not the same as a probable cause determination. Rather, the standard for 'indicia' is less demanding. It requires sufficient signs of probable cause, not probable cause per se." *Id.*, ¶ 37. An affidavit fails to provide indicia of probable cause if it provides "no facts" to support the warrant. *Eason*, 245 Wis. 2d 206, ¶ 67 (citing *State v. Brady*, 130 Wis. 2d 443, 454, 388 N.W.2d 151 (1986)). However, an affidavit provides indicia of probable cause if "there were facts alleged to support the . . . warrant," even if the allegations were "not sufficiently particularized facts." *Id.* "In determining whether an affidavit contains sufficient indicia of probable cause, any competing reasonable inferences are resolved in favor of the State." *Marquardt*, 286 Wis. 2d 204, ¶ 44 (citations omitted).

Here, the affidavit in support of the search warrant provided indicia of probable cause. Specifically, the affidavit

alleged that an informant called law enforcement and said that she observed "a large marijuana grow" at Linde's cabin approximately one week ago (4:4; R-Ap. 107). The informant provided the address of Linde's cabin, and officers subsequently confirmed that Linde owned the cabin at that address (4:4; R-Ap. 107). Even if the alleged facts in the affidavit were insufficient to establish probable cause, the affidavit nevertheless alleged facts to support the search warrant and therefore provided indicia of probable cause. *See Eason*, 245 Wis. 2d 206, ¶ 67. "[T]he good faith exception will not apply when the warrant is based on an affidavit so lacking in indicia of probable cause that a law enforcement officer—who ordinarily should not be expected to second-guess the warrant-issuing judge—can be said to have unreasonably relied on the warrant." *Marquardt*, 286 Wis. 2d 204, ¶ 34. Given the facts alleged in the affidavit—and given this case's many factual similarities with *Robinson*, as discussed above—the law enforcement officers here reasonably relied on the search warrant instead of second-guessing the magistrate who issued it.

In short, the three-factor *Eason* test is met. Specifically, the officers here conducted a significant investigation, a knowledgeable police officer or government attorney reviewed the warrant-application process, and a reasonably well trained officer would not have known that the search was illegal despite the magistrate's authorization. *See Scull*, 361 Wis. 2d 288, ¶ 38. Accordingly, the good faith

exception to the exclusionary rule applies, so the circuit court correctly denied Linde's suppression motion. *See id.*, ¶¶ 45-46.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the circuit court's judgment of conviction.

Dated this 28th day of October, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5119 words.

_____
Scott E. Rosenow
Assistant Attorney General

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I hereby certify that:

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

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Dated this 28th day of October, 2015.

_____
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