

RECEIVED

11-16-2015

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN
COURT OF APPEALS

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

REPLY OF DEFENDANT-APPELLANT

KARA L. MELE
Assistant State Public Defender
State Bar No. 1081358
melek@opd.wi.gov

STEVEN D. GRUNDER
Assistant State Public Defender
State Bar No. 1069023
grunders@opd.wi.gov

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8374

Attorneys for Defendant-Appellant

TABLE OF CONTENTS

| | Page |
|--|------|
| ARGUMENT | 1 |
| I. Probable Cause Did Not Support the Warrant to Search Mr. Linde's Cabin | 1 |
| A. Because the entirely anonymous informant has limited reliability, the tip must contain other indicia of reliability, such as significant details and future predictions, in addition to police corroboration, to justify the search, none of which are present here | 1 |
| B. Mr. Linde's tipster was entirely anonymous, unlike the informants in the cases relied upon by the state | 4 |
| II. The Good Faith Exception to the Exclusionary Rule Does Not Apply | 7 |
| A. Applicable principles of law | 7 |
| B. The police failed to act in objectively reasonable reliance on the search warrant..... | 8 |
| CONCLUSION | 12 |

CASES CITED

| | |
|--|---|
| <i>Florida v. J.L.</i> , 529 U.S. 266, 271-72 (2000)..... | 3 |
|--|---|

| | |
|-----------------------------------|-----------|
| <i>State v. Dearborn,</i> | |
| 2010 WI 84, 327 Wis. 2d 252, | |
| 786 N.W.2d 97 | 7 |
| <i>State v. Eason,</i> | |
| 2001 WI 98, 245 Wis. 2d 206, | |
| 629 N.W.2d 625 | 8, passim |
| <i>State v. Foster,</i> | |
| 2014 WI 131, 360 Wis. 2d 12, | |
| 856 N.W.2d 847 | 8 |
| <i>State v. Kolk,</i> | |
| 2006 WI App 261, 298 Wis. 2d 99, | |
| 726 N.W.2d 337 | 1, 2, 5 |
| <i>State v. Limon,</i> | |
| 2008 WI App 77, 312 Wis. 2d 174, | |
| 751 N.W.2d 877 | 6 |
| <i>State v. Marquardt,</i> | |
| 2005 WI 157, 286 Wis. 2d 204, | |
| 705 N.W.2d 878 | 9, 10, 11 |
| <i>State v. Miller,</i> | |
| 2012 WI 61, 341 Wis. 2d 307, | |
| 815 N.W.2d 349 | 1, passim |
| <i>State v. Powers,</i> | |
| 2004 WI App 143, 275 Wis. 2d 456, | |
| 685 N.W.2d 869 | 1, passim |
| <i>State v. Richardson,</i> | |
| 156 Wis. 2d 128, | |
| 456 N.W.2d 830 (1990)..... | 3, 5 |

| | |
|------------------------------------|------|
| <i>State v. Robinson,</i> | |
| 2010 WI 80, 327 Wis. 2d 302, | |
| 786 N.W.2d 463 | 6, 7 |
| <i>State v. Scull,</i> | |
| 2015 WI 22, 361 Wis. 2d 288, | |
| 862 N.W.2d 562 | 8, 9 |
| <i>State v. Sherry,</i> | |
| 2004 WI App 207, 277 Wis. 2d 194, | |
| 690 N.W.2d 435 | 5 |
| <i>State v. Sisk,</i> | |
| 2001 WI App 182, 247 Wis. 2d 443, | |
| 634 N.W.2d 877 | 2, 6 |
| <i>State v. Williams,</i> | |
| 2001 WI 21, 241 Wis. 2d 631, | |
| 623 N.W.2d 106 | 1 |
| <i>United States v. Leake,</i> | |
| 998 F.2d 1359 (6th Cir. 1993)..... | 11 |
| <i>United States v. Wilhelm,</i> | |
| 80 F.3d 116 (4th Cir. 1996)..... | 11 |

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

United States Constitution

| | |
|-----------------------|------|
| Fourth Amendment..... | 4, 9 |
|-----------------------|------|

ARGUMENT

I. Probable Cause Did Not Support the Warrant to Search Mr. Linde's Cabin.

- A. Because the entirely anonymous informant has limited reliability, the tip must contain other indicia of reliability, such as significant details and future predictions, in addition to police corroboration, to justify the search, none of which are present here.

As noted in Mr. Linde's brief-in-chief, the affidavit in support of the search warrant in this case substantially relies on hearsay information provided by an anonymous informant. (Appellant's Brief at 4). Under such circumstances, two factors are relevant toward a determination of probable cause. "The first is the quality of the information, which depends upon the reliability of the source." *State v. Miller*, 2012 WI 61, ¶31, 341 Wis. 2d 307, 815 N.W.2d 349. "The second is the quantity or content of the information." *Id.*

Regarding the first factor, our case law indicates the reliability of the informant turns on his or her classification as a citizen informant or an anonymous informant. *State v. Kolk*, 2006 WI App 261, ¶12, 298 Wis. 2d 99, 726 N.W.2d 337; *see also Miller*, 341 Wis. 2d 307, ¶31 n.18. A citizen informant is "someone who happens upon a crime or suspicious activity and reports it to police." *Id.* A citizen informant is a known citizen. *State v. Powers*, 2004 WI App 143, ¶9, 275 Wis. 2d 456, 685 N.W.2d 869. Wisconsin courts view citizen informants "as reliable, and allow the police to act accordingly, even though other indicia of reliability have not yet been established." *State v. Williams*, 2001 WI 21, ¶36,

241 Wis. 2d 631, 623 N.W.2d 106. In other words, citizen informants are subject to a relaxed test of reliability. *Kolk*, 298 Wis. 2d 99, ¶12.

By contrast, an anonymous informant is “one whose identity is unknown even to the police. . . .” *Id.* There is variation “within the realm of informants who wish to remain anonymous depending upon whether the informant risked disclosing his or her identity to police.” *Miller*, 341 Wis. 2d 307, ¶33. An informant who reveals some self-identifying information “is likely more reliable than an [entirely] anonymous informant. . . .” *Id.* However, an entirely anonymous informant is subject to the most stringent test of reliability: his or her tip must contain significant details and future predictions along with police corroboration. *Id.*, ¶37.

Here, there is no question the informant was entirely anonymous. He or she did not provide any self-identifying information to police, such as a name or address. The absence of such facts distinguishes this case from those involving citizen informants whose tips were accorded a presumption of reliability. See *Powers*, 275 Wis. 2d 456, ¶¶2-9 (considering a caller who provided her first name and employer a citizen informant); *State v. Sisk*, 2001 WI App 182, ¶8, 247 Wis. 2d 443, 634 N.W.2d 877 (holding that the circuit court erred in viewing the caller as anonymous because he provided his full name). Although the police apparently obtained the number of the cell phone used to call the tip (4:4), the record does not indicate the number was used to identify the caller prior to the execution of the affidavit in support of the search warrant. Under these circumstances, the circuit court correctly viewed the tip as entirely anonymous. (59:5).

However, the circuit court failed to appreciate that an entirely anonymous tip is subject to the most stringent test of reliability. The supreme court has gone so far to state it is “critical that the informant provide significant, specific details and future predictions that police are able to corroborate” in cases involving an entirely anonymous informant. *Miller*, 341 Wis. 2d 307, ¶37. A variety of details concerning easily obtained facts and conditions existing at the time of the tip will not suffice; rather, the tip must include information not easily known or predicted. *Id.*, ¶¶37-41.

As argued in Mr. Linde’s brief-in-chief, the anonymous tip in this case is completely devoid of significant details and predictive information. (Appellant’s Brief at 12-14). The tip simply contains Mr. Linde’s name and address and a vague allegation that the tipster had seen marijuana plants somewhere at Mr. Linde’s cabin. This is hardly the type of inside information necessary to meet the standard of reasonable suspicion, let alone probable cause. See *State v. Richardson*, 156 Wis. 2d 128, 133-34, 456 N.W.2d 830 (1990) (finding reasonable suspicion to support a stop based on an entirely anonymous tip because the tip contained significant details (along with predictive information) such as the suspect’s physical description; prior criminal record; current location; vehicle description; and the quantity and type of drugs he possessed). Moreover, the tip contains no predictive information, likening this case to *Florida v. J.L.*, 529 U.S. 266, 271-72 (2000), wherein the Supreme Court declined to find reasonable suspicion to support a stop based on an entirely anonymous tip.

The entirely anonymous tip’s substantial deficiencies are compounded by minimal police corroboration. It did not take substantial investigation to confirm that Mr. Linde lived at the address provided by the tipster. True, the police

discovered Mr. Linde was arrested approximately one year prior to the anonymous tip for possession of marijuana plants that had been kept at his cabin. (4:3-4). However, the tip contains no information linking the prior arrest to the current allegation. Should a suspect with a one-year-old conviction for possession of marijuana plants be subject to a search based upon an unidentified person's bare-boned allegation that he or she had seen marijuana plants somewhere at the suspect's home? This cannot satisfy the particularity requirements of the Fourth Amendment.

The bottom line is that an entirely anonymous tip must contain significant details and future predictions in addition to police corroboration to meet the standard for probable cause. *Miller*, 341 Wis. 2d 307, ¶37. Here, the tip does not come close to meeting such a stringent test of reliability. Thus, the affidavit in support of the search warrant was insufficient to meet probable cause, and this court should reverse the circuit court's denial of Mr. Linde's motion to suppress.

B. Mr. Linde's tipster was entirely anonymous, unlike the informants in the cases relied upon by the State.

The State's position that probable cause supported the warrant to search Mr. Linde's cabin heavily relies on a relaxed test of reliability that simply does not attach to an entirely anonymous tip like the one in this case. Despite the circuit court's finding that the tip was entirely anonymous (and notwithstanding any argument to the contrary), the State's response brief is replete with citations to cases involving citizen informants, wherein courts applied a relaxed test of reliability to assess whether reasonable suspicion had been met (State's Brief at 6-14). The State's reliance is misplaced.

For example, the State relies on *Powers* for the proposition that Wisconsin courts view citizens who claim to have witnessed a crime as reliable. (State's Brief at 6). Of course, *Powers* is a case involving a citizen informant, *Powers*, 275 Wis. 2d 456, ¶9, so the court appropriately applied a presumption of reliability to the tip. Here, however, we are dealing with an entirely anonymous informant; thus, the most stringent test of reliability applies. *Miller*, 341 Wis. 2d 307, ¶37.

The State also cites to *Powers* and *Kolk* to argue that an informant's tip is inherently reliable if it is based on the informant's personal observation (State's Brief at 11). This is true where citizen informants are concerned, because the focus in those cases is on observational reliability, not personal reliability. *Kolk*, 298 Wis. 2d 99, ¶13; *see also Powers*, 275 Wis. 2d 456, ¶9. But in a case like this one, where the informant's personal reliability is difficult to ascertain, there must be more than a bare-boned allegation that the informant witnessed a crime. *See Richardson*, 156 Wis. 2d at 133-34; *see also State v. Sherry*, 2004 WI App 207, ¶11, 277 Wis. 2d 194, 690 N.W.2d 435.

Similarly unpersuasive is the State's reliance on *Kolk* for the proposition that predictive information is not necessary to meet the standard for probable cause in this case. (State's Brief at 13). *Kolk* involved a citizen informant. *Kolk*, 298 Wis. 2d 99, ¶12. Consequently, there did not need to be much information in the tip in order for the police to act. *Miller*, 341 Wis. 2d 307, ¶32. By contrast, this case deals with an entirely anonymous informant, and *Miller* requires the tip to contain predictive information in order to justify police action. *Id.*, ¶¶37-41.

Finally, the State offers *Sisk* in support of its position that the tip's bare-boned allegation in this case comports with probable cause. (State's Brief at 13). *Sisk* involved a citizen informant whose tip was afforded a high degree of reliability. *Sisk*, 247 Wis. 2d 443, ¶¶9-10. The court correctly noted that a tip with a high degree of reliability does not need much information to satisfy the lower standard of reasonable suspicion. *Id.*, ¶7. Since this case involves an entirely anonymous informant whose tip carries a low degree of reliability, *Sisk* is inapposite.

Stripped of its reliance on cases involving citizen informants, the State's argument in support of probable cause depends on *State v. Robinson*, 2010 WI 80, ¶26, 327 Wis. 2d 302, 786 N.W.2d 463. Problematically for the State, *Robinson* is materially distinguishable from the facts of this case.

First and foremost, the informant in *Robinson* was not entirely anonymous. *State v. Robinson*, 2010 WI 80, ¶4, 327 Wis. 2d 302, 786 N.W.2d 463. Rather, he risked disclosing his identity by walking into the police station. *Id.*, ¶28. The import of this fact is clear: an informant that risks disclosing his or her identity "is likely more reliable than an [entirely] anonymous informant. . ." *Miller*, 341 Wis. 2d 307, ¶33. This is particularly true where the informant presents himself or herself to police, thereby allowing the police to assess the informant's credibility. See *State v. Limon*, 2008 WI App 77, ¶18, 312 Wis. 2d 174, 751 N.W.2d 877.

In this case, unlike *Robinson*, the informant did not provide a shred of self-identifying information to police, let alone reveal his or her physical identity. Although the police apparently obtained the number of the cell phone used to call the tip, the record does not indicate the number was used to

identify the caller prior to the execution of the affidavit in support of the search warrant. Thus, the informant in this case was entirely anonymous, and the tip is subject to a more stringent test of reliability than that applied in *Robinson*. See *Miller*, 341 Wis. 2d 307, ¶37.

A second material fact distinguishes this case from *Robinson*. In *Robinson*, the informant provided the police with the suspect's cell phone number. *Robinson*, 327 Wis. 2d 302, ¶4. The supreme court considered this information a significant detail, *Id.*, ¶29, likely because it suggested a personal relationship between the informant and the suspect. Moreover, the police later corroborated that significant detail, which bolstered the informant's credibility. *Id.*, ¶29.

Contrary to the situation in *Robinson*, the informant in this case provided no significant details to police. That the informant offered easily obtainable information (Mr. Linde's name and address) does not suggest a personal relationship between the two. The absence of police corroboration of a significant detail further distances this case from *Robinson*.

Because citizen informant cases are inapposite to the instant action, and because *Robinson* is materially distinguishable, the State's arguments in support of probable cause are wholly unpersuasive.

II. The Good Faith Exception to the Exclusionary Rule Does Not Apply.

A. Applicable principles of law.

"When there has been an unlawful search, a common judicial remedy for the constitutional error is exclusion." *State v. Dearborn*, 2010 WI 84, ¶15, 327 Wis. 2d 252,

786 N.W.2d 97. Because the primary purpose of the exclusionary rule is to deter unlawful police conduct, *State v. Foster*, 2014 WI 131, ¶47, 360 Wis. 2d 12, 856 N.W.2d 847, an exception to the rule exists “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.

Objectively reasonable reliance on a search warrant requires that (1) officers conduct a significant investigation prior to obtaining a warrant; (2) a knowledgeable police officer or government attorney reviews the warrant application; and (3) a reasonably well-trained police officer would not know the search was illegal despite the magistrate’s authorization. *State v. Scull*, 2015 WI 22, ¶38, 361 Wis. 2d 288, 862 N.W.2d 562.

B. The police failed to act in objectively reasonable reliance on the search warrant.

The State alternatively argues there should be no remedy for the violation of Mr. Linde’s personal liberty due to the good faith exception to the exclusionary rule. To prevail, the State must show that the standard of objective reasonableness has been met. *Eason*, 245 Wis. 2d 206, ¶3. It cannot.

First, the police failed to conduct a significant investigation. Upon receiving a bare-boned tip from an entirely anonymous informant, the police simply performed an address check and reviewed criminal records. The State relies on *Eason* and *Scull* to show that these facts constitute a significant investigation, (State’s Brief at 18), but in both cases police took additional steps prior to obtaining the warrant. *See Eason*, 245 Wis. 2d 206, ¶70 (police arranged

a controlled buy and later tested the substance); *Scull*, 361 Wis. 2d 288, ¶¶7-8 (police took a drug-sniffing dog to Scull's front door). It cannot reasonably be argued that the instant investigation is on par with *Eason* and *Scull*, particularly because it centered on a tip from an informant who is not presumed reliable. The police needed to do more to satisfy the requirement that there be a significant investigation prior to obtaining the search warrant. See *State v. Marquardt*, 2005 WI 157, ¶¶48-53, 286 Wis. 2d 204, 705 N.W.2d 878 (holding there was a significant investigation because police dedicated a substantial amount of time and resources and relied on detailed information from a credible source).

Second, the record does not establish that a knowledgeable police officer or government attorney reviewed the warrant application. The State concedes the warrant application does not expressly indicate whether a supervising officer or government attorney reviewed the application process. (State's Brief at 19). However, the State is persuaded the requirement has been met because the affidavit and warrant contain magic words like "curtilage" and "to-wit." *Id.* But this legalese "is often used by non-lawyers in an effort to sound like lawyers." *Eason*, 245 Wis. 2d 206, ¶87 (Abrahamson, C.J., dissenting).

The State also notes that the affidavit uses phrases that purportedly indicate it was drafted to comply with the Fourth Amendment. (State's Brief at 19). For example, the affiant states he finds the police officer involved in Mr. Linde's prior conviction to be credible and reliable. (4:3-4). He further avers he has experience in controlled substance investigations and has used confidential informants in the past. (4:4). But notably absent from the affidavit is any indication the affiant finds the entirely anonymous informant

in this case to be credible and reliable, or that he has worked with entirely anonymous informants in such investigations in the past. Such language would tend to support the inference that there was some involvement and review by a knowledgeable police officer or government attorney.

Third, a reasonably well-trained officer would have known the search of Mr. Linde's cabin was illegal despite the magistrate's authorization. That is because the affidavit in support of the warrant lacks sufficient indicia of probable cause. Police cannot "rely upon a warrant that was based upon . . . a bare bones affidavit that she or he reasonably knows could not support probable cause. . . ." *Eason*, 245 Wis. 2d 206, ¶36. Sufficient indicia of probable cause "requires sufficient signs of probable cause, not probable cause per se." *Marquardt*, 286 Wis. 2d 204, ¶37.

Marquardt is the leading authority on what constitutes sufficient indicia of probable cause. In *Marquardt*, there were a number of facts in the warrant application that led to reasonable inferences concerning Marquardt's commission of a crime. *Id.*, ¶38. For example, Marquardt's father had told police Marquardt had not been seen or heard from since his mother's death two days earlier. *Id.*, ¶40. The evidence suggested the perpetrator was inside the Marquardt home, yet there was no sign of a forced entry. *Id.*, ¶¶42-43. In addition, Marquardt's mother was found covered in a blanket, which intimated the killer felt remorse or guilt. *Id.*, ¶41. The supreme court held these were sufficient signs of probable cause. *Id.*, ¶44.

The affidavit in *Marquardt* contains considerably more valuable information than the affidavit at issue here. Whereas the police in *Marquardt* learned significant information from Marquardt's father, the police here received

a vague and conclusory tip from an entirely anonymous informant. Further, the police in *Marquardt* were able to meaningfully corroborate Marquardt's father's suggestion that Marquardt might have been involved in his mother's death. In this case, however, there was little or no corroboration of an unknown, unproven informant's bare-boned allegation that he or she had seen marijuana somewhere at Mr. Linde's cabin.

Although the State would have this court hold that a bare-boned tip from an entirely anonymous informant constitutes sufficient indicia of probable cause if police can minimally corroborate that tip by confirming an address (State's Brief at 23), courts have rejected such an unconvincing position under substantially similar facts. *See United States v. Leake*, 998 F.2d 1359, 1367 (6th Cir. 1993); *United States v. Wilhelm*, 80 F.3d 116, 123 (4th Cir. 1996).

Because the State cannot show the *Eason* standard of objective reasonableness has been met, the court should hold that the good faith exception to the exclusionary rule is inapplicable.

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 16th day of November, 2015.

Respectfully submitted,

KARA L. MELE
Assistant State Public Defender
State Bar No. 1081358
melek@opd.wi.gov

STEVEN D. GRUNDER
Assistant State Public Defender
State Bar No. 1069023
grunders@opd.wi.gov

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8374

Attorneys for Defendant-Appellant

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 2,997 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 16th day of November, 2015.

Signed:

KARA L. MELE
Assistant State Public Defender
State Bar No. 1081358

STEVEN D. GRUNDER
Assistant State Public Defender
State Bar No. 1069023

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8374
Attorneys for Defendant-Appellant