STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT 1

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs. App. No. 2014 AP 2855 CR

ERIBERTO VALADEZ,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, WISCONSIN ON JULY 23, 2014, THE HON. WILLIAM S. POCAN, CIRCUIT COURT JUDGE, PRESIDING

BRIEF OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUES

1. Did the trial court commit error in denying the defense motion to suppress statements made by Appellant to law enforcement, in violation of Appellant's Constitutional rights under the 4th, 5th and 14th Amendments to the United States Constitution and Article 1, Section 8 of the Wisconsin Constitution?

2. Did the trial court commit error in denying the defense motion to disclose the identity and statement of a confidential informant, in violation of sec. 905.10 Stats. and Appellant's Constitutional rights to Due Process under the 5th and 14th Amendments to the United States Constitution and Article 1, Section 1 of the Wisconsin Constitution?

3. Did the trial court err in imposing a more severe sentence on Appellant for exercising his right to take his case to trial, in violation of Appellant's Constitutional rights to Due Process under the 5th and 14th Amendments of the United States Constitution and Article 1, Section 1 of the Wisconsin Constitution, and United States v. Jackson, 390 U.S. 570, 581 (1968)

The court below ruled against Defendant-Appellant on the first two issues, and the third issue is raised for the first time here on appeal.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is requested because the arguments of the appellant are consistent with relevant legal authority, have merit and involve questions of law, and because oral argument will assist this court in understanding and applying appellant's arguments to

the facts of this case.

Publication is requested because an opinion by the court in this case will clarify an existing rule of law, will contribute to the legal literature by collecting case law, and will decide a case of substantial and continuing public interest.

STATEMENT OF THE CASE

A criminal complaint charging Appellant with possession of cocaine with intent to deliver (between 5-15 g) was filed on October 22, 2013. (R.2) On January 7, 2014, Appellant filed a suppression motion pursuant to sec. 971.31 Stats. (R.14) and a motion to disclose the identity and statement of the confidential informant pursuant to sec. 905.10(3)(b) Stats. (R.15) which were heard on April 1, 2014 (R.47) and May 22, 2014 (R.48); the motions were denied in an oral ruling on May 22, 2014.

Trial took place between July 21-23, 2014 (R.51, 52, 53, 54) At the conclusion of trial, a verdict of guilty was returned, and the case was set for sentencing, which took place on July 28, 2014. (R.55)

At sentencing, Appellant was sentenced to a total length of imprisonment of 5 years, consecutive to any other sentence. The initial term of confinement in the Wisconsin State Prisons was set at 3 years with credit for 10 days time served. The trial court further ordered Appellant to serve a maximum term of extended supervision of 2 years. (R.55:26-13)

Notice of Appeal was timely filed December 10, 2014 (R.43), and this appeal follows.

Relevant excerpts from the motion hearings, trial, and sentencing are quoted

below.

A. Motion to Disclose Identity and Statement of Confidential Source

On April 1, 2014, the defense motion for disclosure of the confidential informant was argued pursuant to sec. 905.10(3)(b) Stats., which creates a two-step procedure to determine whether the government's general privilege to protect the identifies of confidential informants applied. At the close of this hearing, the trial court found the defense had articulated a position why identification of the confidential informant and his statements would be potentially helpful to the defense, and so decided to hold an *in camera* review. (R.47:15-12)

The trial court then turned to the suppression motion (R.47:19-14), and rescheduled it to hear both motions at the same time (R.47:20-21) Both motions were continued to May 22, 2014. (R.48)

Trial counsel argued he was at a disadvantage in that he had not seen the sealed items which were reviewed by the court *in camera*, noting the legal standard is that the defense must show these items contain evidence supporting an assertive defense which could or would create reasonable doubt (R.48:4-16), and that court must balance Appellant's right to present a complete defense against government's right to protect its informants. (R.48:4-25)

The search warrant at issue here listed Appellant's brother Miguel as the target, Miguel was taken into custody, and cocaine was found in one of the bedrooms in the home where both Appellant and Miguel stayed. The warrant affidavit said Miguel was seen with a gun in "his" bedroom, without saying which bedroom this was, and that

Miguel was seen selling cocaine out of the residence in the past. (R.48:5-5, 11)

The defense argued Appellant was unaware cocaine was in the bedroom and that it was not his cocaine but could belong to someone else in the residence. These facts would make it reasonable for a jury to assume that Miguel could have left (R.48:5-17) cocaine hidden; here it was found hidden in a shoe. (R.48:6-1)

According to counsel, informant testimony that he observed Miguel selling cocaine would create doubt that Appellant knew cocaine was in the residence, and the informant identified a bedroom in the house as Miguel's room. (R.48:6-3) The searched home had two bedrooms, one with a crib, Appellant's son lived with him there, and at trial the informant might say the room he believed to Miguel's was in fact where the cocaine was found; counsel asserted this would create doubt for a jury that it was Appellant versus Miguel who possessed the cocaine. (R.48:6-9)

In ruling on this motion, the trial court noted the sealed memorandum reviewed *in camera* included evidence about Appellant's activities as well as Miguel's, and so determined it would not be appropriate on balancing defense and state interests to disclose the identity of the confidential informant, and denied this motion. (R.48:19-3) The court made no further record as to what was included in the sealed memorandum.

B. Motion to Suppress Statement

The trial court then moved on to the suppression motion. (R.48:19-23) Det. Slomczewski of the Milwaukee Police Department testified he saw Appellant's door knocked in using a ram to execute the search warrant and also heard loud verbalization and a PA system, at which time he went in. Appellant and his 4 year old son were found

in the living room of the home to be searched. (R.48:22-4, 24)

When the detective went in, Appellant was seated on the couch (R.48:23-25) in plastic zip tie handcuffs. Det. Slomczewski guessed he came in within 10 minutes of original entry by other members of the search team. Det. Slomczewski read the face of the search warrant to Appellant, took photos, stood Appellant up, cut off his cuffs, walked him into the dining room where Appellant sat in a chair, and interrogated him. (R.48:24-2, 13, 18, 20)

At that time, Det. Slomczewski was not aware cocaine was in the residence. (R.48:25-15) He discussed with Appellant how long he had lived there, his rent, which bedroom was his, where he worked, what the monthly rent was, and determined that Appellant's bedroom was the room to the right of the bathroom; Det. Slomczewski had not read Appellant Miranda by that point, but contended Appellant was not under arrest when this interrogation occurred. (R.48:26-2, 5, 11, 15)

On cross, defense counsel established with Det. Slomczewski that it was important to ask him these questions to establish who had control of certain rooms because of contraband that was recovered (R.48:27-18). The defense clarified this was a no knock search, forced entry was made with a battering ram (R.48:28-12, 19), Det. Slomczewski drove there in an armored vehicle known as the Bear Cat, the others announced their presence with a loud speaker (R.48:29-6, 18), 11 people were in the entry team, 8 more officers were in the search team not including him, a couple of police supervisors were there too, Appellant was searched before this interrogation occurred (R.48:31-3), and was cuffed with hands behind his back for at least 10 minutes before he saw Appellant.

(R.48:32-6)

The defense established Appellant would not have been free to just walk out of the residence during this interrogation (R.48:32-24), was not told he was not under arrest before being questioned, no Miranda warnings had been given, the time from the police entry into his home until their leaving was more than an hour (R.48:33-2), and Appellant was in fact formally arrested at the end of the search. (R.48:34-15)

The court asked the state why Appellant would not have considered himself in custody when he was handcuffed before he was put in the kitchen (R.48:41-16), and said it seemed to be expecting a lot of this reasonable person to understand the distinction between "in custody" or not in custody when he was in cuffs after someone had taken a battering ram to his door. (R.48:42-18) Per the court, someone who had had a battering ram taken to his door and felt cops screwed up and must have the wrong house would have a different view on custody. (R.48:43-19)

The defense argued that being detained for a search warrant is not a bright line test. Counsel noted police rushed in with a reasonable inference that weapons were drawn at the time. (R.48:45-1)

The court asked why Appellant would assume he was in custody just because police entered the residence with a search warrant, and the defense again noted the 22 officers rushing in, Appellant was searched, handcuffed and not allowed to leave, was not told he was not under arrest, there was no indication in the Goetz case of a no knock search (R.48:45-10) but instead Goetz was told there was no arrest unless he interfered with the search, a reasonable person in Goetz would not believe he was under arrest

because he was told he was not under arrest, Goetz was allowed to walk around the residence which also supports this (R.48:46-15), and she was not handcuffed until after everything, while Appellant was handcuffed for 10 minutes before being spoken to. (R.48:47-1) See State v. Goetz, 249 Wis.2d 380 (2001), 2001 WI App 294, 638 N.W.2d 386.

The court asked whether a reasonable person would assume the cuffs were taken off because he was not under arrest, but the defense pointed out because police had already searched Appellant, had already secured his entire residence, 22 officers, forced entry, weapons drawn, handcuffed were used before he was questioned, all distinctions (R.48:47-7, 13), including that he was frisked, a reasonable person would believe they were under arrest. (R.48:48)

Defense counsel noted there was no forced entry in Goetz (48:48-25), no indication as to number of officers, or weapons drawn. (R.48:49-1) A reasonable person in Appellant's position would have felt themselves under arrest. (R.48:50-1)

In denying the motion, the trial court said the defense was arguing the dissent in Goetz (R.48:51-14) Before conversation took place the cuffs came off, which would tell a reasonable person they were not under (R.48:52-23) arrest, the court found it significant that Det. Slomczewski at that time did not know cocaine was in the residence, wasn't asking where the drugs were as in Goetz, and was basically engaging Appellant in small talk, which overcomes Appellant not being told he was not under arrest. (R.48:53-2) According to the court, a reasonable person would not believe he was in custody, and so the motion to suppress denied. (R.48:54-11)

C. Trial and the Theory of the Defense

After losing these motions, defense counsel laid out his theory of the case at trial in his opening statement on July 21, 2014. (R.51:47) Counsel indicated Appellant was not aware of cocaine in the house, which cocaine was not his and most likely belonged to his brother Miguel. Miguel was listed on the face of the warrant, was seen driving away, was arrested and taken into custody. Appellant was present in house during the search, but not in bedroom where cocaine was found. (R.51:48-15, 22, 51-2)

Counsel noted this was a small apartment (R.51:48-25) with two bedrooms, one with an adult and a child bed while the cocaine was found in the other bedroom, Appellants' fingerprints were not on the baggie holding the cocaine which was found, and no DNA of Appellant was on that baggie or the shoe in which the cocaine baggie was found. Miguel's identifiers were found throughout the house (R.51:49), officers did not know who stayed in the house the night before but did see Miguel leave, and no one ever saw Appellant with this cocaine. He noted the jury would not hear that Appellant was observed selling cocaine, nor admit knowing cocaine was there, Appellant's fingerprints were not found on a scale recovered during the search, Miguel's identifiers were found in same drawer as the scale, none of the cocaine, baggies or scale were in plain view (R.51:50), and Appellant denied knowing of the cocaine, recovered from this residence where at least 2 people lived. (R.51:51-3)

During cross-examination of Off. Cross on that first day of trial, defense counsel brought out that police arrested Miguel prior to search of the house, Off. Frank was aware identifiers of Miguel and photos of him were found throughout the house (R.51:78-4, 13),

and police looked in the southeast bedroom but did not search it. In Ex. 7, the bed had no bedding (R.51:79-15), a woman's bag was hanging in there, a number of different shoes were in there (R.51:80-10, 16), and he did not know where in the room the shoe with money in it was found. The Appellant's WE Energies bill and photo ID and some photos were in a shoe box lying on the bed (R.51:81-8, 18) with no cocaine or scale or money in it, and Off. Frank did not know who slept in there the night before nor who was in the residence. (R.51:82-11)

In his testimony, Off. Frank admitted there were significant balances on the WE Energies bill found during the search, so that possibly the found money (R.51:82-18) was set aside to apply to that bill. Ex 12 showed the southeast bedroom which had a large bed with bedding and also a children's bed; the only child present in that house was Appellant's son. (R.51:83)

According to Off. Frank, Appellant was searched and no contraband was found on his person. (R.51:84-8) Off. Frank admitted he had no idea how long the cocaine found during their search of the residence had been there or if Miguel left it there. (R.51:84-15)

Ex. 24 (R.51:85-4) was a photo of the Escalade being driven by Miguel at the time of his arrest, Off. Frank inventoried the Escalade's title and did not recall where he found it in the residence; Ex. 25 was a photo of municipal paperwork addressed to Miguel (R.51:85-24); Ex. 26 was Miguel's Wisconsin driver's license (R.51:87-14) which was found in the southeast bedroom (R.51:87-18); Ex. 27 was a citation to Miguel, but Off. Frank was not sure where it was found (R.51:88-13, 19); Ex. 28 was a photo of a plastic wristband with Miguel's name and photo on it from the county jail (R.51:88-25), and

again Off. Frank was not sure where it was found (R.51:89-2); and Ex. 29 was a photo of a Department of Corrections ID with Miguel's picture on it, with Off. Frank not sure where it was found, either. (R.51:898, 16) Photos of Miguel were found throughout the residence (R.51:90-3), and in fact Off. Frank was not sure who lived there or shared bedrooms. (R.51:95-19)

On the morning of July 22, 2014, Off Molina testified he saw Miguel leave the residence around 5, and so called for a squad to stop and detain him (R.52:25-16, 22) He did not know if anyone else lived there or spent the night, even Appellant or Miguel (R.52:27-21)

Off. Conway testified regarding how things were taken out of the china cabinet and put there to photograph. Ex. 14 was a photo of the drawer where the scale was found, with a photo in it (R.52:37-12), the subject of which was Miguel. Ex. 34 was a photo of 4 people, one of whom was Miguel, found in the drawer with the scale. (R.52:40-7) Ex. 27 was Miguel's citation, (R.52:40-18) Ex. 15 was a WE Energies bill (R.52:38-8) that Off. Conway thought was found in the drawer. He indicated the scale and baggies were not in plain view (R.52:41) and that he did not find any baggies missing their corners (R.52:42-5)

At trial on the afternoon of July 22, 2014, the State produced Appellant's statement from the interview with Det. Slomczewski in the dining room indicating that he, his brother, and mom when she is fighting with her boyfriend, all live there, as well as his son on occasion, and that the southwest bedroom where the cocaine was found was his. (R.53:12) The cocaine was found in a shoe, the Crime lab would do DNA testing in

a drug case on request but the police did not make the request in this case, and the shoe was not taken into evidence, nor did the police check to see if it fit Appellant or his brother to determine whose it was. (R.53:14)

The State also played Det. Slomczewski's interview with the Appellant taken shortly after his arrest. (R.53:5-16) In it, the detective asked Appellant how much cocaine was in the residence, and Appellant said he did not know anything about it and couldn't even guess how much it was; the detective then told Appellant he had the wrong attitude (R.53:6-14) and asked if he or his brother was bringing cocaine into the residence, and Appellant said he did not know anything about it (R.53:7-18), told Appellant he had dope there, him living there, his name on a utility bill, and that was all he needed, and Appellant still denied awareness of the cocaine; Appellant then went on to say he did not care and this was the life he chose to live (R.53:8-11), that he has to face the consequences, that if he truly did not know about the cocaine, then there was nothing for him to cooperate about, the detective told Appellant maybe Miguel would take a deal, and that it was on Appellant if he wanted to make a deal or not, at which point Appellant said "Does it look like I care". (R.53:9) and told Det. Slomczewski a number of times he knew nothing of and was not selling cocaine. (R.53:10-4)

At the close of the State's case, the Defense moved to (R.53:17-25) dismiss, pointing out there was a bag of cocaine in a shoe found in a residence where there were at least 2 occupants, and identifiers for both were found throughout the residence. The defense motion was denied. (R.53:19-4)

During deliberations, the following question came in from the jurors: "Does

Eriberto have to have knowledge that cocaine has been in the house from time to time for us to say he shared possession and control of the cocaine? Does Eriberto have to have knowledge that cocaine is (R.53:74-21) currently in the house somewhere but not specifically where for us to say he has control, shared control and possession? Does Eriberto have to know that cocaine is specifically in that by and in that shoe for him to have control and or shared control, therefore possession? Can he have control without knowledge?" (R.53:75) The Court indicated the jury could find all the answers in instruction number 6035 (R.53:77-20) and that he would tell them to fill out the verdict based upon the testimony and evidence presented at trial and the instructions of law presented by the court; the case was then adjourned for the night. (R.53:78-1)

On the next morning, the jury completed its deliberations and came back with a verdict of guilty. (R.54:4) No request was made for a presentence investigation (R.54:9-4), and the case was then set over for sentencing. (R. 54:10-19)

D. Sentencing

Sentencing was held July 28, 2014. In sentencing him, the court pointed out the three sentencing objectives (R.55:20-18), noting Appellant had a substantial juvenile record including Wales until age 18, extensive drug crimes as a juvenile for this 23 year old man; there was an antisocial or socially undesireable behavioral problem that had developed, Appellant was age 23 with no high school degree and 2 kids, and that possession with intent to deliver meant Appellant was adversely affecting the community as well as himself. (R.55:21)

The court then went on to say Appellant was remorseful but went to trial and

motions alleging these were not his crimes, so that the court was not sure if Appellant was really accepting responsibility. Appellant submitted a letter from a family member saying he was innocent, leading court to believe Appellant had not fully accepted the crime nor had his family, which bothered the court. (R.55:22-6) The court indicated it very much bothered him that a child lived there and was present during the warrant's execution, was concerned with the danger he was exposing that child to, putting his child at risk in a house with drugs in it, as often violence follows drugs. The court noted the allegation and denial of gang affiliation. (R.55:23)

The court said he did not penalize him for taking case to trial, but this was the opposite of (R.55:24-20) accepting responsibility, telling police this is the life he chose to live and a couple years prison is not a big deal, the jury found him guilty, and all of this concerned him. The court said he was not sure Appellant really accepted responsibility even today, and that probation would not be appropriate. (R.55:25) The court noted this was a 10 year felony; based on his record and the other factors discussed, it found somewhere in the middle to low range was appropriate, and gave Appellant three years initial confinement followed by two years of extended supervision. (R.55:26-3)

Notice of Appeal was timely filed (R.43), and this appeal follows.

ARGUMENT

1. THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION TO SUPPRESS STATEMENTS MADE BY APPELLANT TO LAW ENFORCEMENT, IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE 4TH, 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 8 OF THE WISCONSIN CONSTITUTION

A. STANDARD OF REVIEW

When reviewing a circuit court's denial of a motion to suppress evidence, courts apply a two-step standard. State v. Martin, 343 Wis. 2d 278, ¶28. Reviewing courts uphold the circuit court's findings of fact unless they are clearly erroneous. Id. Courts then review *de novo* the application of the facts to the constitutional principles. Id.

B. SUMMARY OF ARGUMENT

The Appellant's suppression motion established that he was in custody during his interrogation by law enforcement, and that incriminating statements were taken from him during the course of his custodial interrogation, prior to being given Miranda warnings. As a result, the Appellant's statements regarding his residing in the southwest bedroom, that he did not care ("Does it look like I care?"), and this was the life he chose to live and that he has to face the consequences, should be suppressed, and Appellant should receive a new trial without these illegally obtained statements being admitted into evidence.

C. ARGUMENT

Statements of a defendant may not be used in trial against him if they were not voluntary and violated his right to counsel. See Miranda v. Arizona, 380 U.S. 436 (1966) and State ex rel. Goodchild v. Burke, 27 Wis.2nd 244, 133 N.W.2nd 753 (1965); see also the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 8 of the Wisconsin Constitution.

The Fifth Amendment to the United States Constitution states in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself." Courts have implemented procedural safeguards consistent with the Fifth Amendment. Miranda held that no one should be subjected to custodial interrogation until he or she is

"warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Id.

If someone is subjected to custodial interrogation without these warnings and makes incriminating statements, then those statements constitute a Miranda violation and cannot be used by the prosecution. Id. Custody is a necessary prerequisite to Miranda protections. State v. Armstrong, 223 Wis. 2d 331, 344–45; Montejo v. Louisiana, 556 U.S. 778, 795 (2009) ("If the defendant is not in custody then [Miranda and Edwards] do not apply; nor do they govern other, noninterrogative types of interactions between the defendant and the State.")

The custody determination is made in the totality of the circumstances considering many factors. Martin, id. at ¶35. The factors include "the defendant's freedom to leave; the purpose, place, and length of the interrogation; and the degree of restraint" used by law enforcement. Id. As one factor in the totality of the circumstances, an interview that takes place in a law enforcement facility such as a sheriff's department, a police station, or a jail, may weigh toward the encounter being custodial, but that fact is not dispositive.

When determining the degree of restraint, courts consider factors like "whether the suspect is handcuffed, whether a weapon is drawn, whether a frisk is performed, the manner in which the suspect is restrained, whether the suspect is moved to another location, whether questioning took place in a police vehicle, and the number of officers involved." State v. Morgan, 2002 WI App 124, ¶12, 254 Wis. 2d 602, 648 N.W.2d 23.

A person is in "custody" if under the totality of the circumstances "a reasonable person would not feel free to terminate the interview and leave the scene." Martin, supra, at ¶33. "[A] court must examine all of the circumstances surrounding the interrogation, but the ultimate inquiry is simply whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." Stansbury v. California, 511 U.S. 318, 322 (1994) (per curiam) (citations omitted) (internal quotation marks omitted). Several factors have been considered relevant in the totality of the circumstances such as "the defendant's freedom to leave; the purpose, place, and length of the interrogation; and the degree of restraint." Martin, supra, at ¶35.

As pointed out in trial counsel's motion papers and apparent from the excerpts quoted above, this was a no knock search warrant, forced entry was made with a battering ram, Det. Slomczewski drove there in an armored vehicle known as the Bear Cat, the others announced their presence with a loud speaker, police rushed in with a reasonable inference that weapons were drawn at the time, 11 police officers were in the entry team, 8 more were in the search team not including him, a couple of police department supervisors were there too, Appellant was searched before this interrogation occurred, and was cuffed with hands behind his back for at least 10 minutes before the interrogation took place. The defense established Appellant would not have been free to just walk out of the residence during this interrogation, was not told he was not under arrest before being questioned, no Miranda warnings had been given before the statements at issue were taken, from the time of police entry until their leaving was more than an hour, and Appellant was in fact formally arrested at the end of the search.

It is hard to imagine a more frightening experience than that which confronted Appellant and his young son, and even harder to imagine Appellant not feeling restraint on his freedom of movement of the degree associated with a formal arrest, given the involvement of 22 police officers and supervisors surrounding him who had just battered in his front door after using a loudspeaker to announce themselves, searched him, cuffed him behind his back, and who never notified him he was not under arrest. Under a totality of all the circumstances, he was in custody when interrogated by Det. Slomczewski prior to being Mirandized.

"[I]nterrogation'" is not limited to "express questioning," but also refers to "any words or actions on the part of the police … that the police should know are reasonably likely to elicit an incriminating response." Rhode Island v. Innis, 446 U.S. 291, 301 (1980). An "incriminating response'" is "any response_whether inculupatory or exculpatory_that the prosecution may seek to introduce at trial." Id. at 301 n.5 (emphasis omitted).

Det. Slomczewski's "conversation" with Appellant after the cuffs were removed was designed to elicit incriminating responses; the context of this discussion is described in detail above, as 22 members of the Milwaukee Police Department were in the process of executing a drug search warrant at the time, and it cannot credibly be doubted that Det. Slomczewski hoped for incriminating statements which would prove useful in any prosecutions which may arise from this search.

In short, Appellant was in custody and was being interrogated at the time these statements were obtained, all without benefit of Miranda. For the reasons stated above,

these statements should be suppressed and the case remanded for retrial without them.

2. THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION TO DISCLOSE THE IDENTITY AND STATEMENT OF A CONFIDENTIAL INFORMANT, IN VIOLATION OF SEC. 905.10 STATS. AND APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS UNDER THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 1 OF THE WISCONSIN CONSTITUTION

A. STANDARD OF REVIEW

In reviewing a circuit court's decision following an *in camera* hearing or submission of affidavits under Wis. Stat. § 905.10, the scope of review is whether the trial court properly exercised its discretion. See State v. Outlaw, 108 Wis. 2d 112, 128-29, 321 N.W.2d 145 (1982); State v. Norfleet, 2002 WI App 140, ¶9, 254 Wis. 2d 569, 647 N.W.2d 341; State v. Larsen, 141 Wis. 2d 412, 419, 415 N.W.2d 535 (Ct. App. 1987).

This court is also called upon to interpret Wis. Stat. § 905.10 to determine what standards are appropriate for the determination whether an informant's identity must be disclosed. Such a question of statutory interpretation presents a question of law that this court reviews *de novo*, "benefiting from the analys(is) of the circuit court..." State v. Head, 2002 WI 99, ¶41, 255 Wis. 2d 194, 648 N.W.2d 413 (citing State v. Busch, 217 Wis. 2d 429, 441, 576 N.W.2d 904 (1998)).

When a defendant's constitutional right to a fair trial is implicated, it raises a question of law which this court reviews *de novo*. See State v. Green, 2002 WI 68, ¶20, 253 Wis. 2d 356, 369, 646 N.W.2d 298; see also State v. Littrup, 164 Wis. 2d 120, 126, 473 N.W.2d 164 (Ct. App. 1991) (stating "[S]ince this appeal deals with the

constitutional questions of whether [the defendant's] rights to due process . . . were protected, the appeal presents questions of law. Appellate courts review questions of law de novo without deference to the trial court") (citations omitted).

B. SUMMARY OF ARGUMENT

The Appellant's theory of the defense was that he was unaware cocaine was in the bedroom and that the found cocaine was not his but could belong to someone else in the residence.

Informant testimony that he observed Miguel possessing and selling cocaine in this house would create doubt that Appellant was the one who possessed and sold the cocaine found during the search, and at trial the informant might have testified the room he believes to Miguel's was in fact where the cocaine was found; this would create doubt for a jury that Appellant possessed the cocaine for which he was convicted.

C. ARGUMENT

In ruling on this suppression motion, the trial court noted the sealed memorandum reviewed *in camera* included evidence about Appellant's activities as well as Miguel's, and so determined it would not be appropriate on balancing defense and state interests to disclose the identity of the confidential informant, and denied this motion.

Section 905.10(3)(b) provides:

"Testimony on merits. If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case . . . and the federal government or a state or subdivision thereof invokes the privilege, the judge shall give

the federal government or a state or subdivision thereof an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits but the judge may direct that testimony be taken if the judge finds that the matter cannot be resolved satisfactorily upon affidavit. If the judge finds that there is a reasonable probability that the informer can give the testimony, and the federal government or a state or subdivision thereof elects not to disclose the informer's identity, the judge on motion of the defendant in a criminal case shall dismiss the charges to which the testimony would relate, and the judge may do so on the judge's own motion. . . . Evidence submitted to the judge shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the federal government, state or subdivision thereof. All counsel and parties shall be permitted to be present at every stage of proceedings under this subdivision except a showing in camera at which no counsel or party shall be permitted to be present."

To date, the sealed contents of the *in camera* review have not been made available to trial or appellate counsel. Here, the trial court did not find that there was no reasonable probability the informant could give testimony helpful to the defense, but rather only that the sealed evidence discussed unspecified conduct of Appellant which would on balance make disclosure "inappropriate".

According to the Wisconsin supreme court in State v. Vanmanivong, 2003 WI 41 at sec. 32, "the following procedures should be used by Wisconsin circuit courts when determining whether an informant's identity should be disclosed. Once a defendant has

made an initial showing that there is a reasonable probability that an informant may be able to give testimony necessary to the fair determination of the issue of guilt or innocence, the state has the opportunity to show, *in camera*, facts relevant to determining whether or not the informant can, in fact, provide such testimony. If, and only if, the court determines that an informer's testimony is necessary to the defense in that it could create a reasonable doubt of the defendant's guilt in jurors' minds, must the privilege give way. Outlaw, 108 Wis. 2d at 141-42 (Callow, J., concurring)"

Apparently, the trial court here weighed the evidence and determined that the evidence revealed by the informant would hurt as well as help the Appellant, and that therefore Appellant could not have it when, in fact, the evidence was necessary to the Appellant's defense (ie- Miguel and not Appellant was the possessor of the cocaine on which his judgment of conviction is based).

A defendant must show that an informer's testimony is necessary to the defense before a court may require disclosure. See Outlaw, 108 Wis. 2d at 139 (Callow, J., concurring). "Necessary" in this context means that the evidence must support an asserted defense to the degree that the evidence could create reasonable doubt. See id. at 141-42. To the extent that the informant's evidence showed Miguel was the likely possessor of the cocaine, it supports Appellant's defense that he neither knew of nor possessed this cocaine to the degree that such informant evidence could create reasonable doubt, so that denial of the request was error.

The analysis does not end there. Rather, reviewing courts move to an examination for harmless error. In State v. Harvey, 2002 WI 93, 254 Wis. 2d 442, 647

N.W.2d 189, the Wisconsin supreme court adopted the United States Supreme Court's decision in Neder v. United States, 527 U.S. 1 (1999), which reaffirmed the harmless error test stated in Chapman v. California, 386 U.S. 18 (1967). In Neder, the Supreme Court confirmed the Chapman standards: "That test, we said, is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Neder, 527 U.S. at 15 (quoting Chapman, 386 U.S. at 24).

As can be seen from the trial transcript excerpts above, a valiant effort was put forth by trial counsel to defend Appellant even without the prayed-for informant evidence being made available to him for presentation to this jury, and in particular the questions sent to the judge from the jury during its deliberations show how the jury struggled with the defense theory of the case. The informer's testimony was necessary to the defense in that it could have created a reasonable doubt of the defendant's guilt in jurors' minds, so that the privilege should have given way and the motion should have been granted.

The evidence was reasonably necessary to a fair determination of Appellant's guilt or innocence, and so Appellant should have been allowed to present such evidence from the informant at trial. It is immaterial whether in hindsight an argument can be made that evidence of Appellant's own conduct could have convinced a jury of his guilt, when in fact the informant's evidence of Miguel's conduct may have convinced a jury of reasonable doubt as to Appellant's guilt.

Appellant had a due process right to fully present his defense by having the informant's testimony and evidence reviewed by a jury to decide if it, not a judge, found reasonable doubt, or that the defense was established, and the trial court's denial of his

motion to disclose the informant violated that important constitutional right. The judgment of conviction should be reversed, and the case remanded with directions for a new trial at which Appellant may use the informant and his evidence to present his defense.

3. THE TRIAL COURT ERRED IN IMPOSING A MORE SEVERE SENTENCE ON APPELLANT FOR EXERCISING HIS RIGHT TO TAKE HIS CASE TO TRIAL, IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS UNDER THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 1 OF THE WISCONSIN CONSTITUTION, AND UNITED STATES V. JACKSON, 390 U.S. 570, 581 (1968)

A. STANDARD OF REVIEW

Whether a defendant's due process rights were violated is a question of law appellate courts review *de novo*. State v. Munford, 2010 WI App 168, ¶27, 330 Wis. 2d 575, 794 N.W.2d 264, ¶20.

It is a well-settled principle of law that a circuit court exercises discretion at sentencing. McCleary v. State, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). On appeal, review is limited to determining if discretion was erroneously exercised. See id. at 278. When discretion is exercised on the basis of clearly irrelevant or improper factors, there is an erroneous exercise of discretion. Id.

B. SUMMARY OF ARGUMENT

The trial court erroneously exercised its discretion and impermissibly chilled Appellant's exercise of his state and federal constitutional rights to a jury trial by giving a more harsh sentence to Appellant on the basis of the clearly irrelevant and impermissible

factors that he exercised his constitutional Due Process rights to a jury trial and motion practice.

C. ARGUMENT

At sentencing, the trial court stated Appellant went to trial and motions alleging these were not his crimes, so that it was not sure if Appellant was really accepting responsibility. The court said he did not penalize Appellant for taking his case to trial, but that his going to trial and filing motions was the opposite of accepting responsibility, a jury found him guilty, and that this all concerned the court; as a result, the court said he was not sure Appellant really accepted responsibility.

In short, the court clearly was troubled by Appellant's exercise of his constitutional rights to take this case to motions and trial, interpreted that exercise of constitutional rights as being inconsistent with Appellant accepting responsibility, and made clear this failure to accept responsibility impacted the sentence handed down, notwithstanding the court's words that he did not penalize Appellant for taking the case to trial.

This fundamental principle – that there should not be a "trial penalty" for exercising one's constitutional rights - was recognized by the United States Supreme Court in United States v. Jackson, 390 U.S. 570, 581 (1968). In Jackson, the Supreme Court concluded that the Federal Kidnapping Act, which allowed imposition of the death penalty to a defendant who exercised his right to a jury trial, was unconstitutional.

Penalizing a criminal defendant for going to trial operated "to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the

Sixth Amendment right to demand a jury trial." Jackson, at 581. The Jackson Court held that the inevitable effect of such a "trial penalty" unacceptably discourages assertion of these Fifth Amendment and Sixth Amendment rights. Id. Imposition of a "trial penalty" the Jackson Court held, is "patently unconstitutional". Id., at 581-82.

Enhancing punishment to a defendant for exercising his constitutional rights to plead not guilty, to defend himself, to testify or not, and to present a defense at a jury trial, which are rights guaranteed him under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and the correlative provisions in the Wisconsin Constitution, whether done by legislative enactment or a harsher sentence imposed by a judge, improperly chills the assertion of constitutional rights by penalizing those who choose to exercise them.

It is clear that there has been an erroneous exercise of discretion at sentencing by the trial court, who used the improper factors of Appellant exercising his right to a jury trial and utilization of motion practice in handing down a more severe sentence. This is precisely the "trial penalty" banned by Jackson, supra, and should result in a new sentencing hearing.

CONCLUSION

The trial court committed error in denying defense motions to suppress evidence, to identify the confidential informant, and in punishing Appellant at sentencing for going to trial, so that the judgment of conviction should be vacated and the case remanded with directions to hold a new trial with the challenged evidence suppressed and the informant's evidence available for use by the Appellant at trial, and alternatively for

resentencing without sanction for the exercise of his constitutional rights.

Dated at Wauwatosa, Wisconsin, this 24th day of January, 2015.

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CERTIFICATION

I certify that this Appellant's Brief conforms to the rules contained in s.809.19(8)(b) and (c) for a brief produced using the following font: proportional space font. The length of this Brief is 7135 words and 26 pages.

Dated January 24, 2015.

RICHARD L. ZAFFIRO
Attorney for Defendant-Appellant
State Bar No. 1005614

APPENDIX CERTIFICATION

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 s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) 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 first names and last initials 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.

Signed: _____
Atty. Richard L. Zaffiro

APPENDIX TABLE OF CONTENTS

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT 1

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs. App. No. 2014 AP 2855 CR

ERIBERTO VALADEZ,

Defendant-Appellant.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12) STATS.

I hereby certify that:

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

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

3. 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.

Signed

Signature