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STATE OF WISCONSIN

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

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2014 AP 2965-CR

TIRON JUSTIN GRANT,

Defendant-Appellant.

ON NOTICE OF APPEAL TO REVIEW A JUDGMENT OF CONVICTION AND THE DENIAL OF A POSTCONVICTION MOTION, ENTERED AND DECIDED IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HONOROBLE DANIEL KONKOL AND J.D.WATTS, PRESIDING, RESPECTIVELY

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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Issues Presented

1. Should Mr. Grant Receive a New Trial?
    a. Due to Insufficiency of the Evidence/Erroneous Ruling of Chain of Custody of Evidence?
    b. Due to a Due Process Violation?
    c. Due to Ineffective Assistance of Counsel?
    d. In the Interests of Justice?

The trial court denied Mr. Grant's motion for a new trial.

2. Did the Trial Court Erroneously Deny Mr. Grant's Postconviction Motion for Early Release Programming Eligibility?

The trial court denied the motion.

Position on Oral Argument and Publication

Neither are requested.

Statement of the Case and Facts

On June 3, 2013, Mr. Grant was charged with one count of possession with intent to deliver cocaine between 1-5 grams as a second or subsequent offense, contrary to Wis. Stats. §§ 961.41(1m)(cm)1r, 961.48(1)(b) and one count of resisting or obstructing an officer, contrary to Wis. Stat. § 946.41(1). (R2). The resisting/obstructing charge was dismissed at initial appearance on defense motion (lack of probable cause). (R48). The complaint was later amended to include more of a factual basis, and the obstructing charge was again dismissed. (R22). The complaint alleged that on May 30, 2013, at approximately 4:48PM, officers observed Mr. Grant flee on foot from a porch where there was a group of people, on 3825 N.36th Street. (R22:2). He did not answer questions, and he jumped a front porch fence, ignoring commands to stop. *Id.* Allegedly, one officer, Officer Ball, observed Mr. Grant remove a "large orange pill bottle from his right front pants pocket" and as he jumped over the fence he threw the pill bottle to the north. *Id.* The officers allegedly recovered the pill bottle with two sandwich baggies inside with corner cut baggies totaling around 2.79 grams of a substance that later tested positive for cocaine. *Id.*

Original counsel Danielle Shelton withdrew due to medical leave, and Attorney Lori Kuehn was appointed. (R48). After the parties briefed the fourth amendment issues, (R11, 12), the defense indicated that it would not be proceeding on the stop/arrest motions previously filed. (R53). On November 11, 2013, Mr. Grant exercised his right to a jury trial. For the state, the following witnesses testified: Milwaukee Police Officer Martez Ball, Milwaukee Police Officer Matthew Bughman, Milwaukee Police Detective James Henner, and Lab Analyst Birjees Kauser. (R56) After the State rested, the defense called Mr. Grant who, after a colloquy with the court, exercised his right to testify. (*Id.* at pp. 95-117). Mr. Grant finished testifying in the morning of November 12, 2013, and after closing arguments, the jury deliberated for two hours before coming back with a guilty verdict. (R59:4-8).

Mr. Grant was sentenced on November 27, 2013 to three years initial confinement and three years extended supervision, and no eligibility for ERP or CIP. (R60:14).

The defense advocated at sentencing for the imposition of the Earned Release (Wisconsin Substance Abuse Treatment Program) or Challenge Incarceration Program. *Id.* at 7-8. The trial court found that:

> You [Mr. Grant] are not eligible for the challenge incarceration program and not eligible for the substance abuse program. I think those are basically better suited to use as resources for someone who has a drug problem, not for somebody that's possessing, intending to deliver and really does not have a drug usage problem.

Id. at 13.

Trial counsel filed a notice of intent to pursue postconviction relief on November 27, 2013. R35. On September 29, 2014, the defense timely filed a postconviction motion for a new trial and, in the alternative, for early release programming. R40. After being briefed by the parties, the

postconviction motion was denied without a hearing by the trial court on December 12, 2014. R44 (Appd. at 114-116). The trial court indicated that (1) Detective Henner was qualified as an intent to deliver expert and had the trial counsel brought a motion to exclude his testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1973), it would have been denied. *Id.* at 2. (Appd. at 115). The trial court also found that "the evidence was sufficient to establish that the chain of custody for the drugs was not tampered with or amiss," mentioning nothing about the absence of the pill bottle allegedly recovered from the scene. *Id.* at 3 (Appd. at 116). Finally, the trial court determined that Mr. Grant may be statutorily eligible for early release programming, but found that the sentencing court properly exercised its discretion in determining that Mr. Grant had a drug delivery problem and not a drug addiction. *Id.* Therefore, the postconviction court declined to alter the sentencing court's denial of early release. *Id.*

Notice of Appeal was timely filed on December 22, 2014. R46

Argument

I. Mr. Grant Should Receive a New Trial

a. Mr. Grant Should Receive a New Trial Due to Insufficiency of the Evidence Because of Inadequate Chain of Custody of Evidence

The Wisconsin Supreme Court has held that where a defendant moves for a dismissal or a directed verdict at the close of the state's case, and when the motion is denied, that, "the introduction of evidence by the defendant, if the entire evidence is sufficient to sustain a conviction, waives the

motion to direct." *State v. Kelley*, 107 Wis. 2d 540, 545, 319 N.W. 2d 869 (1982). In these cases, the reviewing court must examine all the evidence in determining whether it is sufficient to sustain the conviction. *Id.*

To sustain a conviction for possession with intent to deliver cocaine, under Wis. Stats. § 961.41(1m)(cm)1r, there must be sufficient evidence to prove that Mr. Grant (1) possessed a substance, (2) that substance was cocaine, (3) Mr. Grant knew the substance was cocaine, and (4) he intended to deliver the cocaine. The State must also prove that the cocaine was between 1-5 grams of weight. Appellate review is deferential to the jury verdict, and the verdict will not be reversed "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient…that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis.2d 493, 501, 451 N.W.2d 752 (1990).

In Mr. Grant's case, Officer Brian Maciewjewski testified that he was patrolling on a bicycle on May 30, 2013 and he saw a group of guys standing around the front porch of 3825 N. 36th Street in Milwaukee. (R55:57-58). He testified that Mr. Grant ran up the walkway of the house onto the steps of the porch and began to walk northbound across the front porch. *Id.* at 60. Officer Maciewjewski indicated that he asked the subject if he lived there, the subject never responded back and after being asked what his intentions were standing in the street, the subject jumped over the front porch and then went westbound along 3829 N. 36th Street and then to the back alley where Officer Martez Ball gave foot pursuit. *Id.* at 61. This subject, later identified as Grant, dropped a black phone as he jumped over the front porch. *Id.* at 62. The defense on cross examination established that Officer Maciewjewski never saw Mr. Grant discard a pill bottle or any drugs, that he never saw

any drugs on Mr. Grant and that the discarded black phone had nothing on it that was indicative of drug dealing. *Id.* at 63.

Officer Martez Ball testified next. (R56). He was with Officer Maciejewski when Maciejewski asked the subject if he lived at the residence. *Id.* at 4. He testified that the subject jumped over railing into yard next to house (north of house). *Id.* Officer Martez yelled for him to "stop, police." *Id.* The subject jumped the fence going into the rear. *Id.* at 6. Officer Ball testified that he followed the subject from behind, and the subject removed a pill bottle from right pocket front. *Id.* As the subject was running, he tried to jump a fence. *Id.* Both feet of this subject were on top of the fence. *Id.* Officer Ball testified that he grabbed the subject's ankles, and with his right hand, the subject threw a pill bottle. *Id.* Officer Ball testified that the bottle landed 10-15 feet away. *Id.* at 7. At this point, per Officer Ball, the subject toppled over the fence and was taken into custody by additional officers. *Id.* at 7. Some exhibits were introduced into trial by the state to establish the positioning of Mr. Grant and the officers. *Id.* at 7-16. Officer Ball testified that when he grabbed Mr. Grant's feet he saw a pill bottle in the right hand. *Id.* at 17. It wasn't until Officer Ball grabbed Mr. Grant that Grant actually threw the pill bottle. *Id.* Apparently, there were four officers that went to the back of the house to go after Mr. Grant. *Id.* at 20. Officer Ball confirmed that this was a troubled area—multiple arrests for drugs and weapons. *Id.* at 25.

Officer Matthew Bughman testified next that he observed a pill bottle being thrown from 15-25 feet away. *Id.* at 28. He stated that he recovered the pill bottle, placed it in his pocket until things got sorted out, examined it and noted two clear plastic sandwich bags containing a total of 23 corner cuts of suspected crack cocaine. *Id.* at 30. They called for a conveyance and Officer Bughman testified that he conveyed the suspected cocaine back to District 7 where he subjected it

to a field test. *Id.* at 31. He recalled the weight as approximately 2.79 grams total. *Id.* at 32. After the field test, Officer Bughman testified, he sealed the substance into a paper fold which was placed into another paper envelope and sealed with evidence tape. *Id.* at 33. Then, he filled out an inventory form with specifics of the circumstances of the substance being obtained, which was introduced as Exh. 5, MPD inventory form 13016408, 0131500106. *Id.* at 34.

On cross examination, defense counsel established that the orange-colored prescription pill bottle was not introduced into evidence. *Id.* at 41. At no point in the trial was a pill bottle introduced into evidence. (R55, R56). Additionally, Officer Bughman noted that he had written none of his observations down in a police report. (R56:43-45). He wrote nothing detailing his observations of having (1) seen an object thrown, (2) having found a pill bottle, (3) having examined it, (4) having transported it to the police department, (5) having analyzed it, in a police report. *Id.* Defense counsel asked him: "you never wrote that [that Bughman saw Mr. Grant throw a pill bottle] down anywhere, correct?" *Id.* at 44. Officer Bughman responded that he had told the other officers and he believed that they put it in their report. *Id.* However, Officer Bughman was then not able to identify where in the reports his observations were noted, and he confirmed on the stand, "it's not in there." *Id.*

Lab analyst Birjees Kauser testified for the State that she received a manila envelope with a police inventory number on it (0131500106 and 13016408) as well as a lab number on it. *Id.* at 67. After weighing and testing the substance involved, she indicated that the substance tested positive for a total of 1.1209 grams of cocaine base. *Id.* at 76. She stated that a portion of the drugs is consumed during testing and that the cocaine base can lose weight over time depending on "how the process and how the packaging is done." *Id.* Cocaine powder

is dissolved in water and a base like baking soda is added to it and then heated. *Id.* at 77. She testified that:

> What happens is…the cocaine settles at the bottom of the container as an oil. The water is drained out and the oil is scratched and it's brought down to room temperature. Then it becomes solidified, and that---so the water that is drained out, it depends on how much or when or at what point the packaging was done in the paper packet. So it was—if it was dried up properly, it may still retain some solvent that is the water that I mentioned, and when it is repackaged in paper packet, the paper absorbs moisture, so there is one way that the differences in weight can be observed over the period of time.

Id.

Ms. Kauser, on cross examination, discussed a comparative study that she had done, "out of curiosity" and apparently on her own time. *Id.* at 78. She said she was "curious" to know the weight loss of cocaine base from the time it was retrieved from the state agency to the time she tested it. *Id.* She stated that there was "quite a bit of weight loss that went on for at least two days." *Id.* She indicated that she could not pinpoint any study that would account for the weight loss, or, for instance, the 66% weight loss that was exhibited in this case. *Id.* at 79. She said simply because of the nature of the substance, it can lose weight. *Id.* She testified, "just imagine if you're taking something out of water and you have not dried it properly and it has been packaged say at one point in plastic baggies then it has been put in a paper packet, the paper is going to absorb moisture. We all know that. That's a common observance." *Id.*

However, Ms. Kauser did not testify to a stain on the papers or to any observations she made of a loss of water weight in this case. She did not testify that this cocaine was not cooked properly or when it was packaged. She could not have possibly known when the substance was cooked and at what

point it was put in a baggie or on a paper fold in relation to its having been cooked. In fact, Officer Bughman, who had allegedly recovered the cocaine from the scene, testified that the chunky laundry detergent-like substance in the pill bottle **"did not appear to be wet."** *Id.* at 32. Additionally, Ms. Kauser testified that no pill bottle was ever given to her. *Id.* at 83.

At the close of the State's case, the defense made a motion to dismiss/for directed verdict due to the absence of a pill bottle, the distinction between the weight of the cocaine the lab analyst tested, which weighed out at just over 1 g, (whereas the police said the weight was just over 2.79) the absence of documentation of Officer Bughman's corroboration of having seen a pill bottle thrown and under what circumstances, no indication of drug dealing in the case such as: surveillance, undercover buys, scales, firearms, search warrants. *Id.* at 84. The State countered that the lab analyst didn't rule out the possibility of a 66% drop in the amount of weight, that Officer Ball had indicated that he had seen the pill bottle thrown as well, and that there was intent to deliver based on the packaging and weight of the substance found. *Id.* at 87-89. The trial court ultimately responded that:

> the indication was that the defendant threw the pill bottle that contained the substance. The state is not required to bring in the pill bottle. It's something that's simply can be argued with regard to weight, but it is not fatal as to a required element. The state has to prove the substance was cocaine. I believe the lab analyst has sufficiently proved that the substance was cocaine… and the act of the defendant throwing the substance under the circumstances I think can lead a jury to believe he knew it was a controlled substance. State put on evidence that .12 would be one use and a user would have 1-3 uses, but the evidence here is that the defendant had at least 1.1 grams and possibly up to 2.79. well beyond the 1—3 usages.

Id. at 89-90.

The contested issues in this trial were whether Mr. Grant (1) possessed a substance and (2) whether that substance, if possessed, was indicative of intent to deliver. In contesting the second issue, Mr. Grant was not, throughout the trial, conceding that he actually possessed a substance. The police claimed that they saw an object being thrown. The object, an orange pill bottle, was recovered, allegedly with corner cut baggies inside of it. This pill bottle was never introduced into evidence, and the weight of the drugs as allegedly weighed right after recovery was significantly different than the weight as tested by the lab analyst five months later. There needs to be a solid chain of custody to prove that the drugs found on scene were, in fact, the drugs tested by Lab Analyst Kauser. It is necessary to establish a chain of custody of an exhibit being introduced into evidence because "[t]he standard for the admission of exhibits into evidence is that there must be a showing that the physical exhibit being offered is in substantially the same condition as when the crime was committed." *State v. McCoy,* 2007 WI App 15, ¶¶17-18, 298 Wis. 2d 523, 531, 728 N.W.2d 54, 58 (internal quotes and citation omitted). The standard in reviewing whether the State presented sufficient proof to establish a chain of custody is discretionary. *State v. Simmons,* 57 Wis.2d. 285, 295-96, 203 N.W.2d 887 (1973). The law with respect to chain of custody issues requires "proof sufficient to render it improbable that the original item has been exchanged, contaminated, or tampered with." *McCoy,* 2007 WI App 15 at ¶9, citing *B.A.C. v. T.L.G.*, 135 Wis. 2d 280, 290 (Wis. App. 1986). "The requirements of authentication or identification as a condition precedent to admissibility are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent

claims." *Id.*, citing *United States v. Moore*, 425 F.3d 1061, 1071 (7th Cir. 2005). While a "perfect chain of custody is not required," *McCoy,* 2007 WI App 15 at ¶9, the trial court may admit or exclude evidence within its discretion. *State v. Hereford*, 195 Wis.2d 1054, 1065, 537 N.W.2d 62, 66 (Wis.App.1995). It is also true that gaps in chain of custody go to the weight of the evidence rather than its admissibility. *McCoy,* 2007 WI App 15 at ¶9.

Yet, it is unreasonable for the court to have admitted the cocaine evidence given these circumstances:

(1) There was a significant corroborating piece of evidence missing: the orange pill bottle. R56:41.

(2) The officer who allegedly retrieved the pill bottle did not write a police report detailing the circumstances of its retrieval and the subsequent steps taken to ensure chain of custody. *Id.* at 43-45.

(3) The weight of the cocaine from its having been tested by Officer Bughman to its having been tested by Lab Analyst Kauser was different by a reduction of 66%. *Id.* at 79.

(4) The reduction in weight was testified to in an expert opinion unsupported by professional studies. *Id.* at 78.

In its response to the postconviction motion, the State claimed that the missing evidence was irrelevant to the chain of custody because Officer Bughman testified about how he recovered, tested and inventoried the suspected cocaine, and because at trial "Officer Bughman was still able to say that this was the cocaine that he recovered." (R42:4-5). This argument only highlights the chain of custody problems in this case. The cocaine itself has no distinguishing characteristics that would allow Officer Bughman to differentiate it from any other cocaine (or for that matter any off white powdery substance) as opposed to the one allegedly discarded by Mr. Grant. It is

particularly puzzling how Officer Bughman could make such an assertion considering that the substance in question apparently reduced by more than half in weight since the time he would have last seen it. A pill bottle on the other hand would have presented evidence that could be recognized and distinguished. Considering that in this case the State presented absolutely no other evidence that would suggest drug use or drug dealing by Mr. Grant, it is especially troubling to allow the jury to rely on police testimony regarding a pill bottle it allegedly recovered but was never able to produce. Additionally, not every plastic pill bottle would be able to fit inside of it two plastic sandwich bags with multiple corner cuts of cocaine. Failure to present the bottle had deprived Mr. Grant of the opportunity to challenge that assertion as well.

In its order denying the postconviction motion, the trial court did not specifically address any of the defense's chain of custody arguments such as the missing evidence, missing information in the police reports or the lack of quantifiable scientific explanation with respect to the alleged weight reduction of the cocaine, concluding without further analysis or discussion that "[t]he evidence was sufficient to establish that the chain of custody for the drugs was not tampered with or amiss." (R44:3).

Due to these inadequacies, Mr. Grant moves this court for a new trial as a substantial piece of information, the chain of custody of the alleged drugs found on scene, was not properly documented, both before and during trial, and, therefore, under the court's discretion, it should not have admitted the cocaine evidence in this case.

b. Mr. Grant Should Receive a New Trial Because of a Due Process Violation When Officer Bughman Did Not Inventory the Pill Bottle

Mr. Grant asserts that his due process rights were violated when Officer Bughman stated that the pill bottle did not appear to be dirty or weathered. R56:29-30. Mr. Grant was not allowed to contest this claim in court by showing the jury the actual item. *Id*. Having the actual pill bottle in court could have provided some exculpatory evidence in contrast to Bughman's testimony. Specifically, when the police fail to preserve evidence, the defendant's due process rights can be violated in one of two ways. *State v. Greenwold*, 189 Wis. 2d 59, 67, 525 N.W.2d 294 (Wis. App. 1994). The first is when police fail to preserve evidence "that might be expected to play a significant role in the suspect's defense." *California v. Trombetta*, 467 U.S. 479, 488 (1984). To satisfy this standard, the evidence must both: (1) possess an exculpatory value that was apparent to those who had custody of the evidence before the evidence was destroyed and (2) be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. *State v. Oinas*, 125 Wis. 2d 487, 490, 373 N.W.2d 463 (Wis. App. 1985) The second way involves bad faith, and Mr. Grant has no evidence of that, and it is his burden of proving as such, and therefore that claim is not advanced.

Mr. Grant asserts that this case falls under the first instance: that the pill bottle was apparently exculpatory to Officer Bughman and he failed to inventory it. First, as mentioned *supra*, some pill bottles may to too small to have two sandwich bags inside of it. This depends on the size of the sandwich bags and the size of the bottle. Additionally, the pill bottle would have been apparently exculpatory if it was old,

weather-beaten, covered in dirt, and full of scratches or mud, because the officers were claiming that it was thrown that instant. Officer Bughman said that it wasn't (R56:29-30), but Mr. Grant had no opportunity to contest that. Additionally, Officer Bughman said that there was no label on the pill bottle. R56:30. However, Mr. Grant never had the opportunity to actually see the pill bottle to contradict that claim and to see whether or not a person's name would be on the bottle and thus an implication of another possessor/owner. The information as to whether the pill bottle was (a) too small to hold the alleged drugs, (b) much more weathered than described or (c) labeled, is information that Mr. Grant could not have received any other way but looking directly at an inventoried pill bottle.

c. Mr. Grant Should Receive a New Trial Because Mr. Grant Received Ineffective Assistance of Counsel When His Attorney Failed to Challenge the State's Intent to Deliver Expert Qualifications under *Daubert*

The United States Supreme Court established a two prong test for ineffective assistance of counsel. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984). First, the defendant must show that counsel's performance was deficient and that counsel's errors were prejudicial. *Id.* Counsel's choices are deficient if they are mistakes, rather than the part of a reasoned, deliberate defense strategy. *State v. Moffett*, 147 Wis.2d 343, 353, 433 N.W.2d 572, 576 (1989). Subsequently, prejudice will be shown if the defendant shows that "there is a reasonable probability that, but for counsel's errors, the result

of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland* at 694, 104 S.Ct. at 2068. The deficiency must be so serious as to deprive the defendant of a fair trial whose result is reliable. *Id.*

Detective James Henner was called by the State to testify in its case in chief. (R56:48-63). Det. Henner was not at all involved in the arrest of Mr. Grant or the gathering of evidence in this case. *Id.* at 48. Det. Henner was used by the State based on his proffered expertise in drug cases in order to explain to the jury that the amount of drugs found in Mr. Grant's case would be considered intent to deliver. *Id.* at 52. Specifically, the state wanted to establish foundation that Det. Henner had the requisite knowledge and credibility "to give an opinion on whether or not this particular—particular crack cocaine was held for the intent to distribute or for personal use." *Id.* at 55. Det. Henner ultimately gave an expert opinion that .1 grams of crack cocaine is personal use (id. at 57) and that 3/4 gram could probably go either way (personal use or intent to deliever) depending on the packaging but that 1.12 grams and 2.79 (as in Mr. Grant's case) was intent to deliver. *Id.* at 59. Det. Henner also gave an opinion that packaging the crack up into corner cuts is also indicative of intent to deliver. *Id.* at 60. It is clear here that Det. Henner was called by the state as an expert, based on his "specialized knowledge or training."

Under Wisconsin's adoption of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1973), there are three requirements for the admission of expert testimony as evidence. See also: Fed.R.Evid. 702. First, the expert witness must be "qualified" to discuss the subject matter. *Id.* at 593. The expert must have special expertise by education, training or experience. *Id.* at Second, the subject matter must be "qualified" for admission, meaning that the principles and methodology must be **reliable** to be considered

by the trier of fact. *Id.* Third, the expert witness must have properly applied the "qualified" subject matter methodology to the facts in this case. *Id.* Generally speaking, when a challenge is brought, the trial court must analyze the expert testimony to determine if there is a basis in either technical or street science. *Boyd v. City and Cnty of S.F.*, 576 F.3d 938 (9th Cir. 2009). The trial counsel should only let in expert testimony if it is both relevant and reliable. *United States v. Vesey*, 338 F.3d 913, 916 (8th Cir. 2003). Many factors bear into this inquiry including: (a) whether the theory or technique can and has been tested; (b) whether the theory or technique has been subjected to peer review and publication; (c) the known or potential rate of error for the technique; and (d) the theory or technique's general degree of acceptance in the relevant scientific community. *Daubert* at 593–94.

Mr. Grant asserts that trial counsel should have brought a *Daubert* motion to challenge the admissibility of Det. Henner's expert testimony as to the drugs in this case being considered "intent to deliver" because the Det. Henner's qualifications and the "science" on which it was based was not reliable. In *U.S. v. Robertson,* 387 F.3d 702 (2004), the court found that an officer who was a 10 year veteran of the St. Louis P.D., had a two week training course by the DEA and conducted daily intelligence on the local narcotics trade as well as having arrested over 50 individuals in a two year period for drug/gun offenses and testified in court over fifty times resulted in reliable testimony. *Id.* at 704-705. In this case, foundation was established that Det. Henner had work experience of seven years as a detective, the preceding six years as a police officer. *Id.* at 48-50. He testified that he had some experience in intelligence division investigating gang crimes and was currently on an FBI task force aimed at drug detection. *Id.* He testified that he knew about search warrants and confidential informants (neither of which were involved in

this case.) *Id.* at 50-55. Det. Henner did elaborate that out of his 200 search warrant executions, about half resulted in the location of drugs, and he enlightened the jury as to what is found in such places, called "flop houses." *Id.* at 56-57. Det. Henner said that typically at a flop house you can find drug paraphernalia, scale, small baggies, and that based on his experience with the execution of search warrants and confidential informants crack cocaine is generally packaged in corner cuts or in the corner of a baggie and tied off. *Id.* at 57.

Unfortunately, this case did not involve a confidential informant, flop house, surveillance, scales, firearm, search warrant, or money, which Det. Henner admitted on cross examination. *Id.* at 62. In this case, a pill bottle was found in the same general vicinity of Mr. Grant, and the officers claimed that they saw him throw it. Det. Henner never testified as to how many drug arrests he had made in contexts such as this or how many drug arrests he had made in general. He never testified as to how many times he had testified in a drug trial or was called as an expert. He never testified that he had gone to any trainings on drug packaging and distribution. He never explained how his theories on what constitutes an amount and packaging consistent with intent to deliver were peer reviewed or tested. He never testified how he had formulated his opinions.

It is Mr. Grant's position that it was deficient not to challenge Det. Henner's expertise under *Daubert* as an expert on "intent to deliver" and that his testimony was not reliable, and that this deficiency prejudiced Mr. Grant because the jury was compelled to hear from an official source that the amount and packaging of drugs under those circumstances was consistent with intent to deliver.

d. Mr. Grant Should Receive a New Trial in the Interests of Justice

The court may exercise its discretion to reverse Mr. Grant's conviction if it concludes that either (1) the real controversy has not been tried or (2) that it is probable that justice has miscarried. Wis. Stats. § 752.35. To prove that the real controversy has not been tried, Mr. Grant must show that the jury was precluded from considering "important testimony that bore on an important issue" or that certain evidence improperly received "clouded a crucial issue" in the case. *State v. Darcy N.K.*, 218 Wis. 2d 640, 581 N.W.2d 567 (Wis. App. 1998), citing *State v. Hicks*, 202 Wis. 2d 150, 160, 549 N.W.2d 435, 439-40 (1996). In arguing a miscarriage of justice, Mr. Grant must show that "there is, 'a substantial degree of probability that a new trial would produce a different result." *Id.* (citations omitted.)

In this case, the cocaine in the case should not have been admitted because there was not a strong enough chain of custody to establish that it was the same drugs that was found on scene in an alleged orange pill bottle. The admission of those drugs clouded the issue of whether or not the officer actually found drugs on the scene, because the pill bottle was never found and inventoried.

II. The Trial Court Erroneously Denied Mr. Grant's Motion for Early Release Programming Eligibility

Sections 973.01(3g) and (3m) of the Wisconsin statutes instruct a court to decide "as part of the exercise of its sentencing discretion" "whether the person is eligible or ineligible to participate" in either the Wisconsin Substance Abuse Program under §302.05(3) or the Challenge

Incarceration Program under §302.045. Wis. Stat. § 302.045 provides that:

> **(1) Program.** The department shall provide a challenge incarceration program for inmates selected to participate under sub. (2). The program shall provide participants with manual labor, personal development counseling, substance abuse treatment and education, military drill and ceremony, counseling, and strenuous physical exercise, for participants who have not attained the age of 30 as of the date on which they begin participating in the program, or age-appropriate strenuous physical exercise, for all other participants, in preparation for release on parole or extended supervision. The department shall design the program to include not fewer than 50 participants at a time and so that a participant may complete the program in not more than 180 days. The department may restrict participant privileges as necessary to maintain discipline.
>
> **(2) Program eligibility.** Except as provided in sub. (4), the department may place any inmate in the challenge incarceration program if the inmate meets all of the following criteria:
>
> (a) The inmate volunteers to participate in the program.
>
> (b) The inmate has not attained the age of 40 as of the date the inmate will begin participating in the program.
>
> (c) The inmate is incarcerated regarding a violation other than a crime specified in ch. 940 or s. 948.02, 948.025, 948.03, 948.05, 948.051, 948.055, 948.06, 948.07, 948.075, 948.08, 948.085, or 948.095.
>
> (cm) If the inmate is serving a bifurcated sentence imposed under s. 973.01, the sentencing court decided under s. 973.01 (3m) that the inmate is eligible for the challenge incarceration program.
>
> **(d) The department determines, during assessment and evaluation, that the inmate has a substance abuse problem.**
>
> (e) The department determines that the inmate has no psychological, physical or medical limitations that would preclude participation in the program.

Wis. Stat. § 302.045 (emphasis added)

In the case at hand, the trial court came to the conclusion, without testing or substantive interviewing, that Mr. Grant did not have a drug problem and that he was simply a drug dealer. The State did not take a position on Challenge Incarceration or Earned Release at sentencing. R60:2-6. The defense noted that Mr. Grant was statutorily eligible and as to drug use, considering that there was a prior drug case in the past so that could be indication of drug use, but also that he was clean throughout his pretrial supervision. *Id.* at 7-8. Ultimately, the defense extracted that Mr. Grant did not use drugs, but whether this was only during supervision or in entirety of his life remained to be seen. Mr. Grant espouses that he meets the criteria of all ERP and CIP statutory requirements. As to the use of drugs, the CIP statute indicates that "the department determines, during assessment and evaluation, that the inmate has a substance abuse problem." Wis. Stat. § 302.045(2)(d). Mr. Grant urges this trial court to reconsider his eligibility for both early release programs, but CIP in specific, because once the court makes the first level of eligibility, it is up to the DOC to determine whether Mr. Grant meets the criteria.

Although prison is an effective way of protecting the public, it is a temporary solution, and it does not focus on Mr. Grant's rehabilitative potential. Mr. Grant needs to construct options for himself in his life that will provide educational and economic support without resorting to drug dealing. Avoiding succumbing to a potential drug addiction is essential for his well-being and success, and especially essential for those times in which work is slow and hard to come by. Mr. Grant needs positive reinforcement.

In order for Mr. Grant to reenter society successfully, he will need the skills, such as those developed in the Wisconsin Substance Abuse Program, such as drug education, behavior modification, decision making skills and counseling. The trial court had multiple sentencing objectives when sentencing Mr.

Grant. Of course, punishment was a component, but Mr. Grant is and will continue to serve a prison sentence until he is accepted by a release program, and then he will be on extended supervision even after finishing the earned release programs. The other sentencing objectives, of rehabilitation (risk reduction) and behavioral control, can be addressed through this specific programming.

In conclusion, Mr. Grant asks the Court to find him eligible for CIP and Wisconsin Substance Abuse Program because he is a potential candidate for these programs, and he would like to make the best use of his sentence to address his future reintegration into the community.

Conclusion

This Court therefore should reverse the decision of the trial court denying Mr. Grant a new trial based on insufficient evidence, due process violation, ineffective assistance of counsel or in the interests of justice, or in the alternative, grant Mr. Grant eligibility for the early release programming.

Dated at Milwaukee, Wisconsin this 6th day of March, 2015.

Respectfully submitted,

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APPENDIX

INDEX TO APPENDIX

STATE OF WISCONSIN

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

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. 2014 AP 2965-CR

TIRON JUSTIN GRANT,

Defendant-Appellant.

Certification of Appendix

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with 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 issue raised, including oral or written rulings or decisions showing the trial 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 person, 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:_____,
MAAYAN SILVER
Attorney for Defendant-Appellant

CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 6, 208 words.

Signed:_____,
MAAYAN SILVER
Attorney for Defendant-Appellant-Petitioner

CERTIFICATION OF ELECTRONIC FILING

Pursuant to Rule 809.19(12)(f), I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix. The text of the electronic copy of the brief is identical in content and format to the text of the paper copy of the brief. 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:_____,
MAAYAN SILVER
Attorney for Defendant-Appellant-Petitioner

CERTIFICATION OF MAILING

I certify that this brief and appendix was deposited in the United States mail for delivery to the Clerk of the Wisconsin Court of Appeals by express mail on March 6, 2015. I further certify that the brief was correctly addressed and postage was pre-paid.

Date: _____

Signature: _____