STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2015AP000291-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL TAWAN SMITH,

Defendant-Appellant.

On Appeal from the Denial of a Pretrial Motion to Suppress Evidence and the Judgment of Conviction Entered in the Rock County Circuit Court, the Honorable James P. Daley, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Was the search warrant which indicated that police had the following information: (1) "4 separate pieces of intelligence" from unnamed sources that Mr. Smith was selling drugs at unspecified times over the past year; (2) a statement from a confidential informant that Mr. Smith "was selling marijuana and cocaine from his address;" and (3) a trash pull that produced .21 grams of marijuana stems and roach cigarettes and established that at least two people resided at the residence, sufficient to establish probable cause to arrest Mr. Smith away from his residence before the search warrant was executed?

The trial court answered: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Smith welcomes oral argument if it would be helpful to the court. As this case involves a misdemeanor and will thus be decided by one judge, the decision will not be published. Wis. Stat. §§ 752.31(2)(f), 752.31(3), 809.23(1)(b)4.

STATEMENT OF THE CASE

This is an appeal from a judgment of conviction entered in Rock County, the Honorable James P. Daley, presiding.

The state charged Mr. Smith with four misdemeanor counts: 1) possession of cocaine, contrary to Wis. Stat. § 961.41(3g)(c); 2) possession of THC; contrary to Wis. Stat. § 961.41(3g)(e); 3) carrying a concealed weapon, contrary to Wis. Stat. §§ 941.23(2) and 939.51(3)(a); and 4) possession of drug paraphernalia, contrary to Wis. Stat. § 961.573(1). (1:1-3).

Mr. Smith filed a motion to suppress evidence. (7:1-2). After an evidentiary hearing on January 30, 2014, the trial court denied the motion. (29:22).

On April 15, 2014, Mr. Smith pled no contest to possession of cocaine, possession of THC, and carrying a concealed weapon. (16:1-11; 30:5). Pursuant to a plea agreement, count 4, possession of drug paraphernalia, was dismissed and read-in. (30:5, 9). On September 10, 2014, the trial court accepted the parties' joint recommendation to impose 90 days on each count, concurrent to one another. (33:2, 9; 24:1-2).

Mr. Smith subsequently filed a timely notice of intent to pursue postconviction relief and a timely notice of appeal. (23; 34).

STATEMENT OF FACTS

The facts relevant to this appeal arise from the search of Mr. Smith and his automobile on September 6, 2013. On September 6, police obtained a search warrant for Mr. Smith's residence. (29:3-4). After obtaining the warrant, police conducted surveillance on Mr. Smith's residence, waited for him to leave, and then pulled him over in his car about three-tenths of a mile away from his home. (29:3-12). After informing Mr. Smith that they had a search warrant for his residence, police removed Mr. Smith from his vehicle, and put him in handcuffs. (29:7-8). During the search of Mr. Smith's person and vehicle, police recovered small amounts of marijuana and cocaine, a scale, and a handgun. (29:8). The facts provided in the search warrant and adduced from the suppression hearing are addressed below.

Search Warrant

On September 6, 2013, Officer Patrick Mackey, an investigator with Beloit's Drug and Gang unit, obtained a search warrant for 1223 ½ Bluff Street, Beloit, Wisconsin. (13:1-2). The search warrant authorized a search of the apartment unit located at 1223 ½ Bluff Street. (13:1). It also indicated that it encompassed the "curtilage, outbuildings, storage sheds and any and all vehicles pertaining to the occupants of 1223 ½ Bluff St., and any persons in or on the premises or curtilage..." (13:1). In his affidavit in support of the search warrant, Officer Mackey averred:

> 3. Over the past year, the Beloit Drug and Gang Unit had received 4 separate pieces of intelligence that Daniel Smith was selling prescription pills and marijuana in the City of Beloit. An investigation into this

matter was started by members of the Beloit Drug and Gant Unit.

4. Over the past 72 hours, your Affiant received information from a reliable confidential informant that Daniel Smith was selling marijuana and cocaine from his address along the 1200 block of Bluff St. in the City of Beloit

5. On Tuesday, 09-03-13, at approximately 2255 hours, your Affiant took part in a trash cover operation at 1223 Bluff St in which a black trash bag with blue ties was recovered from the boulevard area in front of 1223 Bluff St. This trash bag was secured in a locking trash receptacle at Beloit Police Dept.

6. On Wednesday, 9-04-13, at approximately 1545 hours, your affiant searched the contents of this trash bag taken from the boulevard area of 1223 Bluff St. Your affiant located indicia of occupancy for 1223 Bluff St. consisting of an Edgerton Hospital billing statement addressed to Daniel T. Smith, 1223 ½ Bluff St., Beloit, WI and a Dean Health systems billing statement addressed to Sodarisa Jones, 1223 ½ Bluff St. Beloit, WI. Your Affiant located a quantity of marijuana stems and roach cigarettes in this trash.

7. Your Affiant weighed the marijuana stems and roach cigarettes and obtained a total weight of .21 gram. Your Affiant then conducted a Duquenois Levine field test on a sample of one of the marijuana stems and obtained a positive test result for the presence of THC.

8. Your Affiant checked the Wisconsin Department of Transportation Records on Daniel T. Smith M/B DOB 08-01-82 which showed Smith's current address as 1223 ½ Bluff St. Beloit, WI.

(13:4-5).

Suppression Hearing

On December 23, 2013, Mr. Smith's attorney filed a motion to suppress. (7:1-2). The defense argued that pursuant to ***Bailey v. United States***,[1] the search warrant did not allow Officer Mackey to detain and search Mr. Smith after he had left his residence. Further, there was no indication that Mr. Smith committed any traffic violation or any other violation of law that would justify a stop or arrest. (9:1-8).

At the suppression hearing, Officer Mackey was the only witness.[2] (29:1-23). He summarized the evidence in the search warrant affidavit, stating that prior to executing the search warrant, a confidential informant had told him that Mr. Smith was selling marijuana from that address. (29:5-10). Officer Mackey did not provide any testimony regarding his history with the informant, the informant's reliability, or the basis of the informant's knowledge. (29:5-10).

Officer Mackey also testified about the execution of the search warrant. (29:3-14). On the evening of September 6, 2013, Officer Mackey was conducting surveillance at 1223 ½ Bluff Street. (29:3). He planned to wait for Mr. Smith to leave the residence in his vehicle, and then conduct a traffic stop and detain Mr. Smith while the search warrant was executed at the residence. (29:10). At around 10:30 P.M., Mr. Smith left his residence in a maroon Chrysler 300, which was registered in his name. (29:7). After approximately three-tenths of a mile, Officer Mackey pulled

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[1] ***Bailey v. United States***, __ U.S. __, 133 S. Ct. 1031, 185 L.Ed.2d 19 (2013).

[2] The search warrant and his affidavit in support of the search warrant were admitted into evidence through his testimony. (29:4-5).

Mr. Smith over. (29:11-12). Officer Mackey informed Mr. Smith that he had a search warrant for his residence, removed him from the vehicle, and put him in handcuffs. (29:7-8).

Officer Mackey testified, "When we got him out of the vehicle to detain him in handcuffs he uttered that he had a little bit of marijuana in his pocket." (29:8). However in his report Officer Mackey states, "I detained Smith in handcuffs behind his back, safety locking the cuffs. Officer Miller and I then conducted a search of Smith and Smith uttered that he had a little bit of marijuana in his pants pocket."[3] (14:8). Officer Mackey testified that it was normal practice to include all relevant facts in his police report. (29:10). At the time of his arrest, Mr. Smith was not in a position to access his residence, nor could he see his residence. (29:12-13). Officer Mackey proceeded to search the vehicle and found the following items: a clear plastic baggy containing white powder (later identified as cocaine), three marijuana roach cigarettes, a black digital scale, and a Smith & Wesson .40 caliber handgun. (29:8; 1:1-3).

Officers placed Mr. Smith in a squad car while the search warrant was executed on his residence. (29:12). After being read his ***Miranda***[4] rights, Mr. Smith stated that the gun, cocaine, and marijuana recovered from his person and vehicle belonged to him. (29:9). Officer Mackey ended his testimony confirming that based on the information contained in his affidavit in support of the search warrant, he believed he had a sufficient basis to arrest Mr. Smith for drug dealing. (29:14).

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[3] Per stipulation of the parties, the police report was entered into the court record. (14:1).

[4] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

Following Officer Mackey's testimony, the state argued that Officer Mackey had neither stopped nor searched Mr. Smith pursuant to the search warrant: "I clearly acknowledge that ***Bailey v. United States*** constricts the ability of police officers to detain individuals for –solely on that basis for purposes of executing a search warrant. But, [defense counsel] I believe has created a straw man argument because the State's not arguing that as a basis." (29:15). Rather, the state contended that Officer Mackey had probable cause to arrest and search the defendant:

> I'm alleging probable cause to arrest and search. I'm also electing that the initial detention was based on a reasonable suspicion. And once the defendant admitted that he had marijuana on his person, even if there wasn't probable cause before that, there was given the defendant's submission and converted a detent—reasonable—a temporary detention to a custodial arrest.

(29:16-17). Defense counsel argued this case was a "clear ***Bailey v. United States*** situation" and that the officer did not have the requisite probable cause to arrest Mr. Smith. (29:17). Defense counsel and the court went through the following exchange, and the court's oral ruling encompassed the latter part of the discussion:

> Defense counsel: I believe the officer testified that the reason for the stop and seizure of the vehicle was the search warrant. It was their plan before—a preconceived plan to stop Mr. Smith once he had left the residence in his vehicle, and that's exactly what happened. I think that the ***Bailey v. United States*** decision is clear in its holding that the ***Summers***[5] rule only applies to the vicinity of the premises to be searched and doesn't apply—

[5] ***Michigan v. Summers,*** 452 U.S. 692 (1981).

> Court: We agree. The search warrant—Once the vehicle left the premises, the search warrant doesn't apply to the vehicle. His argument is that there are—he had probable cause for an arrest at the time he stopped the vehicle. They had probable cause to arrest the defendant based upon what you can read in the probable cause—or at least the affidavit of the search warrant.
>
> Defense counsel: I don't believe that to be the case, your Honor.
>
> Court: Really?
>
> Defense counsel: Because there's no individualized suspicion that at that time that that [sic] crime is afoot. And if you think about it, that that [sic] would allow any person to be seized that there's a search warrant for the residence in which—
>
> Court: No, if there's probable cause for the arrest. This is just an elucidation of probable cause for the arrest. There was a trash pull within 72 hours of the stop and arrest. There is information from confidential informant that this was going on. They pulled the trash. The trash contained indicia of occupancy, together with .21 grams of marijuana material within the—within the garbage bag….the State is saying that there was probable cause for the arrest based upon what information they knew before they stopped him.

(29:17-18).

The trial court denied the motion. (29:22). This appeal follows.

ARGUMENT

I. Four Unspecified "Pieces of Intelligence" from Unnamed Sources, a Confidential Informant's Vague Statement That Mr. Smith was Selling Drugs, and a Trash Pull That Produced .21 Grams of Marijuana Stems and Roach Cigarettes and Established That at Least Two People Resided at the Residence, Did Not Provide Probable Cause to Arrest Mr. Smith.

The trial court and the state both agreed that this was not a ***Bailey*** case.[6] As such, the case resolves under a common Fourth Amendment question: whether the police had probable cause to arrest Mr. Smith. Mr. Smith's detention by the police was not a simple investigatory stop, but an arrest. Because it was an arrest, in order to pass Fourth Amendment muster, it must be supported by probable cause. Probable cause to arrest requires more than a possibility, and more than just a hunch.

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[6] Mr. Smith initially argued that the police were not allowed to stop and search his person and vehicle after he had left his residence, pursuant to ***Bailey v. United States***,. ***Bailey v. United States***, --U.S.--, 133 S. Ct. 1031, 185 L.Ed.2d 19 (2013). The United States Supreme Court held in ***Bailey*** that a person's detention incident to a search warrant only applies when the detainee is in the immediate vicinity of the premises to be searched. ***Bailey***, 133 S. Ct. 1031, 1041. Because Officer Mackey pulled Mr. Smith over three-tenths of a mile away from his residence, the trial court correctly held that the search warrant did not authorize the detention of Mr. Smith and the search of his person and vehicle after Mr. Smith had left his residence. (29: 12-13, 17-18). The state also acknowledged that the warrant did not provide a basis for Mr. Smith's detention and search. (29:15). The trial court's holding falls squarely within the rationale of ***Bailey***.

The police lacked the requisite probable cause to arrest Mr. Smith, and therefore, all statements and evidence obtained from his illegal arrest must be suppressed.

When challenging the lawfulness of a search or seizure through a motion to suppress evidence, a question of constitutional fact is presented. ***State v. Sveum***, 2010 WI 92, ¶16, 328 Wis. 2d 369, 787 N.W.2d 317. A reviewing court will uphold a trial court's findings of fact, unless they are clearly erroneous, but it independently reviews whether the facts satisfy the constitutional standard. ***Id***.

The Supreme Court held in ***Bailey,*** if during the execution of a search warrant, "officers elect to defer the detention until the suspect or departing occupant leaves the immediate vicinity [of the premises to be searched], the lawfulness of detention is controlled by other standards, including, of course, a brief stop for questioning based on reasonable suspicion under ***Terry***[7] or an arrest based on probable cause." ***Bailey***, 133 S. Ct. 1031, 1042. Therefore, whether or not Officer Mackey had the authority to arrest Mr. Smith is controlled by a probable cause analysis.

Under both the Fourth Amendment and Article I, § 11 of the Wisconsin Constitution, probable cause must exist to justify an arrest. ***State v. Secrist***, 224 Wis. 2d 201, 209, 589 N.W.2d 387 (1999). Probable cause to arrest demands more than mere suspicion, and more than just a hunch. ***State v. Young***, 2006 WI 98, ¶22, 294 Wis. 2d 1, 717 N.W.2d 729. The information must be sufficient to lead a reasonable officer to believe that the defendant's involvement in a crime is "more than a possibility." ***Secrist***, 224 Wis. 2d 201, 212.

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[7] ***Terry v. Ohio***, 392 U.S. 1 (1968).

A. Mr. Smith was under arrest the moment Officer Mackey conducted the traffic stop.

The trial court did not explicitly rule on whether there was reasonable suspicion to stop Mr. Smith. Instead, it concluded Officer Mackey had probable cause to arrest Mr. Smith. The court's finding of probable cause to arrest in and of itself demonstrates that the facts and circumstances of Mr. Smith's detention was more than a ***Terry*** stop.

When police restraint is so intrusive that it may be indistinguishable from an arrest, probable cause is required. *See* ***Dunaway v. New York***, 442 U.S. 200, 212–16 (1979). Due to the "endless variations in the facts and circumstances," there is no "litmus-paper test for determining when a seizure exceeds the bounds of an investigative stop" and becomes an arrest. ***Florida v. Royer***, 460 U.S. 491, 506 (1983). "[T]he distinction between an arrest and an investigatory stop is not of easy delineation." ***Wendricks v. State***, 72 Wis. 2d 717, 723, 242 N.W.2d 187 (1976). Factual context is critical. ***Id***.

The test for whether a person has been arrested "is whether a reasonable person in the defendant's position would have considered himself or herself to be 'in custody,' given the degree of restraint under the circumstances." ***State v. Marten-Hoye***, 2008 WI App 19, ¶14, 307 Wis. 2d 671, 746 N.W.2d 498. (citations omitted). Under this objective test, the circumstances of the situation including what has been communicated by the police officers, either by their words or actions, are controlling. ***Id***. Thus, the question is whether a reasonable person in Mr. Smith's position would have considered himself "in custody." Here, a reasonable person in Mr. Smith's position would have believed he was

"in custody" when Officer Mackey stopped him and immediately put him in handcuffs.

This was not just an investigative ***Terry*** stop. After pulling Mr. Smith over, Officer Mackey informed him that he had a search warrant for his residence and "got him out of the vehicle." (29:8). He immediately put Mr. Smith in handcuffs. (29:8; 14:8). Officer Mackey's report states:

> I made contact with the driver identified from his WI driver's license as Daniel T. Smith, DOB 8/1/82. Smith was the only occupant in the vehicle. Sgt. Tilley and Officer Miller arrived on the scene to assist me. I informed Daniel Smith that I had a signed Search Warrant for the address of 1223 ½ Bluff St.
>
> I detained Smith in handcuffs behind his back, safety locking the cuffs. Officer Miller and I then conducted a search of Smith and Smith uttered that he had a little bit of marijuana in his pants pocket.

(14:8).

A reasonable person in Mr. Smith's situation would have felt "in custody" from the moment he was removed from the vehicle. Mr. Smith was in a moving vehicle at the time of the seizure. Three officers approached him while he was in his car, and two officers patted him down while he was put in handcuffs. (14:8). Objectively, Mr. Smith was arrested. In addition, while an officer's subjective intent is not determinative as to whether or not a person is under arrest, it is clear that Officer Mackey intended to arrest Mr. Smith. *See* ***State v. Sykes***, 2005 WI 48, ¶33, 279 Wis. 2d 742, 695 N.W.2d 277 (29:14).

B. Officer Mackey did not have the quantum of evidence necessary to establish that Mr. Smith probably committed a crime.

An arrest is unreasonable absent probable cause. ***Secrist***, 224 Wis. 2d at 212. The trial court ultimately held that the facts known to Officer Mackey at the time of the execution of the search warrant, which established probable cause to search Mr. Smith's residence, also established probable cause to arrest Mr. Smith. While the affidavit in support of the search warrant may have supplied the requisite probable cause to search, it does not necessarily follow that it also provided probable cause to arrest Mr. Smith. In determining probable cause to arrest or probable cause to search, generally, "the same *quantum* of evidence is required;" however, the relevant inquiries differ:

> [W]hile the two determinations are measured by similar objective standards, the two determinations require different inquiries. Under an analysis of probable cause to search, the relevant inquiry is whether evidence of a crime will be found. *Under an analysis of probable cause to arrest, the inquiry is whether the person to be arrested has committed a crime.*

Secrist, 224 Wis. 2d at 209 (citations omitted; emphasis added). Here, Officer Mackey did not have the quantum of evidence necessary to support the relevant inquiry, that is, whether Mr. Smith had committed a crime.

To determine whether the officer had probable cause to support his belief that Mr. Smith had committed a crime, the trial court must consider "the information available to the officer." ***State v. Kutz***, 2003 WI App 205, ¶12, 267 Wis. 2d 531, 671 N.W.2d 660. "Probable cause for arrest exists when the totality of the circumstances within the

arresting officer's knowledge would lead a reasonable police officer to believe that the defendant probably committed a crime." ***Id.***, ¶11. The information must be sufficient to lead a reasonable officer to believe that the defendant's involvement in a crime is "more than a possibility"; however, it does not need to reach to the level of proof beyond a reasonable doubt. ***Secrist***, 224 Wis. 2d at 212. The burden is on the state to prove probable cause to arrest. ***State v. Lange***, 2009 WI 49, ¶19, 317 Wis. 2d 383, 766 N.W.2d 551.

The sum total of information available to Officer Mackey at the time of Mr. Smith's arrest was: (1) four "pieces of intelligence" from unnamed sources that Mr. Smith was selling marijuana and prescription pills within the last year; (2) a confidential informant said Mr. Smith was selling marijuana from the 1200 block of Bluff Street; and (3) a trash pull established at least two people lived at 1223 ½ Bluff Street, as well as produced a small quantity of marijuana stems and roach cigarettes. (13:4-5; 29:5-10). The record is void of any information concerning the "four pieces of intelligence," and there is no information regarding the basis of the confidential informant's knowledge, reliability, nor evidence of Officer Mackey's history with the informant. The trash pull demonstrated that at least two people resided at the residence, and therefore does not establish that *Mr. Smith* probably committed a crime. The amount of information possessed by Officer Mackey at the time of his arrest of Mr. Smith does not equate to probable cause to arrest.

1. The record lacks any information about the confidential informant's reliability and basis of knowledge.

Hearsay information that is "shown to be reliable and emanating from a credible source" may provide probable

cause to arrest. ***State v. McAttee***, 2001 WI App 262, ¶9, 248 Wis. 2d 865, 637 N.W.2d 774 (citation omitted). Therefore, information from a confidential informant may supply the requisite probable cause if police know the informant and "from their own direct knowledge know the informant to be reliable." ***Id***. (citation omitted). Like any probable cause determination, whether information from a confidential informant is sufficient to establish probable cause to arrest depends on the totality of the circumstances, including the informant's "veracity, reliability, and basis of knowledge." ***Id***. (citation omitted).

Officer Mackey referred to the confidential informant in one paragraph of his affidavit in support of his search warrant:

> 4. Over the past 72 hours, your Affiant received information from a reliable confidential informant that Daniel Smith was selling marijuana and cocaine from his address along the 1200 block of Bluff St. in the City of Beloit.

(13:4).

At the suppression hearing, Officer Mackey testified that a confidential informant had informed him "that a Daniel Smith was selling marijuana from that address." (29:5). The one paragraph in the affidavit and Officer Mackey's one sentence at the hearing contains the totality of the information in the record about the confidential informant.

When police have relied on information from an informant, the court balances two factors to determine whether officers acted reasonably in reliance on that information. ***State v. Miller***, 2012 WI 61, ¶31, 341 Wis. 2d 307, 324-25, 815 N.W.2d 349. The first is the quality of the information, which depends upon the reliability

of the source, and the second is the quantity or content of the information. ***Id.***

The first factor, the reliability of the confidential informant, depends in part on whether he or she has previously provided truthful information. ***State v. Kolk***, 2006 WI App 261, ¶12, 298 Wis. 2d 99, 726 N.W.2d 337. Officer Mackey did not provide any details on his previous interactions with the informant or whether he had any previous interactions with the informant. His affidavit and his testimony at the suppression hearing merely provide a conclusory statement that the informant is reliable. (29:5; 13:4). Officer Mackey did not elaborate on what information the confidential informant had provided in the past, or how it was deemed reliable. (29:5-10). A mere statement that an informant is reliable does nothing to establish an informant's reliability.

The second factor, the quantity or the content of the information, is also inadequate. The informant's statement provides virtually no information with which to assess the content. Officer Mackey's testimony and affidavit state that he was informed that a Daniel Smith was selling drugs from the 1200 block of Bluff Street. (29:5; 13:4). It is unclear whether the informant is claiming that he purchased marijuana and cocaine from Mr. Smith himself, or if he merely heard from someone else that Mr. Smith was selling from his residence. *See* ***Kolk***, 2006 WI App 261, ¶15 (the court concluded that the informant had little reliability because the record contained "absolutely no suggestion of how the informant knew about the legal or illegal activities ascribed to [defendant]."). Here, the record is void as to how the informant knew about Mr. Smith's alleged involvement in criminal activity.

Because there is no testimony regarding the confidential informant's reliability, apart from the informant's description as "reliable," there is no way to assure that the hearsay information he provided came "from a credible source." ***State v. McAttee***, 2001 WI App 262, ¶9. Furthermore, the information provided lacks content—it is unclear how the informant knows Mr. Smith and what his interactions with Mr. Smith were. In short, the quality and quantity of the information provided from the criminal informant are lacking. The confidential informant's information cannot rise to the level of probable cause to arrest.[8]

2. The trash pull, in which indicia of residency demonstrated that two people resided in the apartment, does not amount to probable cause to arrest Mr. Smith.

Because the confidential informant's reliability cannot be established, the only other evidence known to Officer Mackey at the time of Mr. Smith's arrest was the evidence recovered from the trash pull. The trash pull from 1223 ½ Bluff Street revealed a small amount of marijuana

[8] The search warrant affidavit also references "4 separate pieces of intelligence that Daniel Smith was selling prescription pills and marijuana in the City of Beloit." (13:4). Officer Mackey did not testify about this information at the suppression hearing. This statement also fails to establish probable cause to arrest. Again, there is no indication where this information came from, if it came from confidential informants or from anonymous tipsters, how the person/persons came to acquire this knowledge, or when exactly over the past year the information was provided. This information fails for the same reasons previously stated in this section—namely, there is no way to assure that the hearsay information provided came "from a credible source." ***State v. McAttee***, 2001 WI App 262, ¶9.

and billing statements for both Mr. Smith and Ms. Sodarisa Jones, with 1223 ½ Bluff Street listed as the billing address. (29:5; 13:4). Probable cause to arrest demands "more than a possibility." ***Secrist***, 224 Wis. 2d 201, 212. The miniscule amount of marijuana recovered and the fact that the evidence indicated that at least two people resided at the residence does not establish that *Mr. Smith* probably committed a crime.

In sum, the quantum of evidence that may have provided the requisite probable cause to search Mr. Smith's residence in no way was sufficient to arrest Mr. Smith. Again, the relevant inquiry is whether Mr. Smith had committed a crime. The search warrant may have provided probable cause to support the inquiry as to whether evidence of a crime would be at a particular location. However, as demonstrated from the above analysis, the totality of the evidence would not lead a reasonable police officer to believe that Mr. Smith had "probably committed a crime." Thus, Mr. Smith's arrest is invalid.

When an arrest is invalid, a search incidental to that arrest is also invalid. If the court concludes that the arrest and subsequent search was illegal, as argued above, the court must suppress the evidence directly found as a result of the search. ***Mapp v. Ohio***, 367 U.S. 643 (1961). Fourth Amendment protections thus mandate suppression of Mr. Smith's statements and the items recovered from his person and vehicle.[9]

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[9] Further, even where a defendant produces contraband in response to unlawful police action, the contraband is the fruit of the illegality and must be suppressed. See, e.g., State v. Hart, 2001 WI App 283, ¶¶2, 24, 249 Wis. 2d 329, 639 N.W.2d 213 overruled in part by State v. Sykes, 2005 WI 48, 279 Wis. 2d 42, 695 N.W.2d 277 (marijuana pipe thrown by defendant during illegal pat down suppressed). Here,

CONCLUSION

For the reasons stated in this brief, Mr. Smith respectfully requests that this court vacate his judgment of conviction and remand to the trial court with directions that all evidence derived from his unlawful arrest be suppressed.

Dated this 18th day of June, 2015.

Respectfully submitted,

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Mr. Smith stated he had marijuana in response to his illegal arrest; because his arrest was illegal, the marijuana found on his person is the fruit of illegality and must be suppressed.

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 4,694 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 18th day of June, 2015.

Signed:

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CERTIFICATION AS TO APPENDIX

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

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

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using 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.

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