STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2016AP001289-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARCUS L. PANTOJA,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in Milwaukee County Circuit Court, the Honorable Carolina Stark, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ANDREA TAYLOR CORNWALL
State Bar No. 1001431
Assistant State Public Defender

CHRISTOPHER P. AUGUST
State Bar No. 1087502
Assistant State Public Defender

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
augustc@opd.wi.gov

Attorneys for Defendant-Appellant

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ISSUES PRESENTED

1. Did the search warrant affidavit for 1100 South 1st Street in Milwaukee establish probable cause to search that residence, allegedly occupied by Marcus Pantoja?

   The trial court answered yes.

2. Did the search warrant affidavit establish reasonable suspicion to support authorization of a "no-knock" execution of the search warrant?

   The trial court answered yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication of this case is not requested. While Mr. Pantoja does not request oral argument, he welcomes the opportunity to discuss the case should the Court believe that oral argument would be of assistance to its resolution of the matter.

STATEMENT OF THE CASE

A two-count information charged Mr. Pantoja with both possession of heroin with intent to distribute (>10-50 grams) and possession of a firearm by a felon. (5:1-2). Counsel for Mr. Pantoja filed a motion to suppress, challenging the dispositive search of Mr. Pantoja's alleged residence. (12:1-42). The trial court denied the motion in an oral ruling. (42:8). Mr. Pantoja subsequently pleaded guilty to both charges. (23:1). This appeal followed. (33:1).

STATEMENT OF FACTS

This case arises out of a drug investigation by local law enforcement. (12:33); (App. 113). As part of that investigation, law enforcement made several "controlled buys" using two confidential informants ("CIs"). (12:33); (App. 113). Based on the controlled buys and information supplied by the CIs, law enforcement applied for and obtained two search warrants. (12:31; 12:22); (App. 111). The first, drafted on January 17, 2014, targeted the location where the controlled buys had occurred, 1927 South Winona Lane, Upper Unit, in the City of Milwaukee. (12:22). The second, drafted on January 20, 2014, targeted a residence at 1100 South 1st Street, #3, in Milwaukee, where Marcus Pantoja allegedly resided with his girlfriend and her daughter. (12:31; 12:20); (App. 111). This second search warrant is the subject of this litigation.

Facts Presented in Search Warrant Affidavit

Marcus Pantoja is alleged to have participated in a drug conspiracy with his brother, Miguel Pantoja. (12:33); (App. 113). During the relevant timeframe, Miguel was living at 1927 South Winona Lane, Upper Unit, in the City of Milwaukee, where the drug sales are alleged to have occurred. (12:33); (App. 113). Marcus[1] listed the Winona Lane address as his legal permanent address. (12:40); (App. 120). However, at the time the second warrant application was drafted, the State represented that Marcus was residing at his girlfriend's residence at 1100 South 1st Street, #3. (12:33); (App. 113).

[1] For the sake of clarity, undersigned counsel will break with their usual practice and refer to the Pantoja brothers by their first names when doing so will avoid unnecessary confusion for the reader.

According to the search warrant affidavit for the South 1st Street address drafted January 20, 2014, CI #1 purchased heroin from Miguel at the Winona Lane residence within the preceding 5 days. (12:33); (App. 113).[2] During that sale, Miguel also discussed purchasing a handgun. (12:33); (App. 113). This was the third in a series of controlled buys targeting the Winona Lane residence. (12:33-35); (App. 113-115). CI #1 previously visited the Winona Lane residence at least once, purchasing heroin in October 2013 from an otherwise unidentified man known only as "Christian." (12:34); (App. 114). According to CI #1's hearsay statement, Christian was at that time employed by Marcus Pantoja.[3] (12:34); (App. 114). Police witnessed Marcus standing on the porch leading into the home while that sale took place. (12:34); (App. 114). The affidavit characterizes Marcus as "overseeing" the sale. (12:34); (App. 114). His vehicle, along with a vehicle belonging to a woman identified as his girlfriend, was present at the Winona Lane address. (12:34); (App. 114).

A second confidential informant ("CI #2") also visited the Winona Lane residence sometime during the two weeks preceding the warrant's drafting. (12:35); (App. 115). On that occasion, the hand-to-hand sale was conducted by "Carlos." (12:35); (App. 115). Miguel was present during the transaction. (12:35); (App. 115). According to CI #2, Miguel was "coordinating" the sale. (12:35); (App. 115). The informant's hearsay statement, contained within the affidavit, states that Carlos works for "Pantoja." (12:35); (App. 115).

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[2] The affidavit does not give actual dates for when the controlled buys are alleged to have occurred.

[3] Note that in the original affidavit for the Winona Lane residence, the same information is included but the reference is generically to "Pantoja."

According to the search warrant affidavit, Marcus Pantoja ran the drug operation in conjunction with his brother Miguel. (12:33); (App. 113). The affidavit also asserted that the South 1st Street location was being used a "stash house" for the drug operation, with drug packaging occurring there. (12:33); (App. 113).

The only information directly relating to the South 1st Street address comes from CI #1. According to his hearsay statement, he transported Marcus from the residence on S. 1st Street to the Winona Lane address within the week preceding the search warrant. (12:35); (App. 115). CI #1 then transported Marcus to an undisclosed location where "they believed" he was making a large-scale heroin purchase. (12:35); (App. 115). CI #1 then transported Marcus back to the S. 1st Street location. (12:35); (App. 115). CI #1 did not go inside the residence, although he believed that Marcus conducted drug-related activities while inside. (12:35); (App. 115). After Marcus left the 1st Street address, CI #1 asserted that he drove him back to the Winona Lane residence. (12:35); (App. 115). CI #1 stated he observed bagged heroin on this return trip. (12:36); (App. 116). In return for his services, CI #1 asserted that Marcus paid him with a quantity of heroin. (12:36); (App. 116).

The affidavit contains other hearsay statements by both confidential informants relating to the relationship between the two residences. (12:36). According to the affidavit, (1) Miguel (2) told CI #1 who (3) told law enforcement that Marcus was living at the S. 1st Street residence in order to avoid a raid or a robbery at the Winona Lane address. (12:36); (App. 116). CI #2 stated that he heard similar remarks in his conversations with the Pantoja brothers. (12:36); (App. 116). CI #2 also claimed that he observed

Marcus transporting heroin in the past, although no further details are provided. (12:36); (App. 116).

The affidavit indicates that the informants correctly identified Marcus' vehicle. (12:36); (App. 116). It places Marcus in that vehicle near the Winona Lane residence. (12:36); (App. 116). The affidavit also presents corroborating evidence that the woman claimed to be Marcus's girlfriend was living at the S. 1st Street address. (12:36); (App. 116). Finally, it contains general assertions that the informants are credible and reliable based on their prior cooperation with law enforcement, including their cooperation in this case. (12:37-38); (App. 117-118).

No-Knock Provision of Warrant

The affidavit includes a "no-knock" request. (12:39); (App. 119). In support of their request, law enforcement made the following averments:

- "[D]rug traffickers are frequently armed with weapons";
- "[C]ontrolled substances are quickly and easily destroyed";
- CI #2 observed an unknown individual at the Winona Lane residence with a weapon "during previous heroin purchases";
- CI #2 observed an unknown individual with a weapon at the Winona Lane residence within the last 30 days;
- Law enforcement was aware of a conversation Miguel had within the last two weeks in which he attempted to purchase a firearm;

- "[A]ffiant believes that both Miguel…and Marcos [sic.]…freely travel between [both locations]; affiant knows that drug dealers will often carry firearms between a stash house and the residence where drugs are being sold."

- Both brothers had prior criminal convictions.

(12:39-40); (App. 119-120).

Trial Court Litigation

Defense counsel filed a motion to suppress, (12:1-42), which argued that the search warrant affidavit failed to establish probable cause with respect to the South 1st Street residence. (12:9-10). The motion also challenged the "no-knock" execution of the search warrant as constitutionally unreasonable. (12:10). The State filed a response brief. (13:1-12).

On December 4, 2014, the trial court held a non-evidentiary hearing and denied the motion in an oral ruling. (42:1,8); (App. 104, 106). With respect to probable cause, the court concluded that the reviewing commissioner "had a substantial basis, based on the affidavit for concluding that probable cause existed to issue the warrant." (42:9); (App. 106). The court cited the information contained in the affidavits provided by two confidential informants, "reportedly based upon first hand observation or conduct of one or both of the informants." (42:10); (App. 107). The court also noted that CI #1 had given information "against their penal interests." (42:10); (App. 107). There were also "specific details" in the statements derived from the CIs. (42:11); (App. 107). These three things—"basis of knowledge, statement against penal interests, amount of detail"—were all relevant and persuasive factors in the

court's "credibility" analysis. (42:12); (App. 107). As to reliability, the circuit court noted that some aspects of the CIs' story had been verified by law enforcement, including Marcus's presence at the Winona Lane address, and that his girlfriend resided at the South 1st Street residence. (42:13); (App. 107). The court also noted the recency of some of the information contained in the affidavit. (42:14); (App. 108).

As to the challenge to the no-knock execution, the circuit court ruled that:

> "[T]here were a number of pieces of information that I find both allowed officers but also [the reviewing commissioner] not only to reasonably suspect that there would be a gun present at the address and that someone would be likely to arm themselves and put officer safety in danger. And actually, enough that they could conclude not only that it is reasonably suspected but that it would be probable or fairly probable that that would happen."

(42:15); (App. 108). That analysis focused on the averments dealing with firearms at the Winona Lane residence as well as an older firearm charge for Mr. Pantoja's girlfriend. (42:15-16); (App. 108).

This appeal followed.[4] (33:1).

[4] "An order denying a motion to suppress evidence or a motion challenging the admissibility of a statement of a defendant may be reviewed upon appeal from a final judgment or order notwithstanding the fact that the judgment or order was entered upon a plea of guilty or no contest to the information or criminal complaint." WIS. STAT. § 971.31(10).

SUMMARY OF ARGUMENT

Mr. Pantoja renews his challenge to the second search warrant's authorization and execution in this Court. First, Mr. Pantoja argues that the affidavit fails to establish probable cause with respect to the place searched—the South 1st Street location. Second, Mr. Pantoja argues that the affidavit fails to establish that the no-knock execution of the warrant was reasonable under the circumstances.

ARGUMENT

I. The Affidavit in Support of the Search Warrant for Marcus Pantoja's Home Was Insufficient to Establish Probable Cause.

A. Legal standard.

Both the state and federal constitutions forbid the issuance of search warrants absent probable cause. U.S. CONST. AMEND. IV & XIV; WIS. CONST. Art. I, § 11. The two provisions offer "essentially identical" protections. *See* ***State v. Ward***, 2000 WI 3, ¶55, 231 Wis.2d 723, 604 N.W.2d 517.

The test that this Court uses in assessing the sufficiency of the search warrant below is outlined in ***State v. Higginbotham***, 162 Wis. 2d 978, 989, 421 N.W. 2d 24 (1991):

> A search warrant may issue only on a finding of probable cause by a neutral and detached magistrate. We accord great deference to the warrant-issuing judge's determination of probable cause and that determination will stand unless the defendant establishes that the facts are clearly insufficient to support a finding of probable cause.

> In reviewing whether there was probable cause for the issuance of a search warrant, we are confined to the record that was before the warrant-issuing judge …. The duty of the reviewing court is to ensure that the magistrate had a substantial basis for concluding that the probable cause existed.

Ultimately, this Court must ask "whether objectively viewed, the record before the warrant-issuing judge provided 'sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that they will be found in the place to be searched.'" ***Ward***, 2000 WI 3, ¶27 (citations omitted); *see also* ***Illinois v. Gates***, 462 U.S. 213, 238 (1983).

It is well-settled that a court may rely on the hearsay statements of confidential informants in determining whether probable cause exists. *See* ***Sanders v. State***, 69 Wis.2d 242, 258, 230 N.W.2d 845, 854 (1975). However, the confidential informant's "veracity" and "basis of knowledge" are relevant and important considerations in assessing whether their allegations establish probable cause. ***Gates***, 462 U.S. at 238; ***State v. Romero***, 2009 WI 32, ¶20, 317 Wis.2d 12, 765 N.W.2d 756.

B. The affidavit fails to establish a "nexus" between the activities on Winona Lane and 1100 S. 1st Street.

Probable cause must be specific to the place searched. ***Gates***, 462 U.S. at 238; ***Ward***, 2000 WI 3, ¶27. "Probable cause to believe that a person has committed a crime does not automatically give the police probable cause to search his house for evidence of that crime." ***State v. Marquardt***, 2005 WI 157, ¶81, 286 Wis. 2d 204, 705 N.W.2d 878 (quoting ***Higginbotham***, 162 Wis. 2d at 995).

In this case, the bulk of the search warrant affidavit for the South 1st Street address where police alleged Marcus Pantoja was residing is concerned with particularized allegations of drug trafficking that was occurring at an entirely distinct location—the Winona Lane residence primarily occupied by Miguel Pantoja. (12:33); (App. 113). The Winona Lane address was the only place where actual drug activity was directly observed and where the controlled heroin buys occurred. It is also the only residence into which either informant had ever been admitted inside and actually observed or participated in drug sales. On at least one occasion, the primary resident of that home—Miguel Pantoja—was present and "coordinating" the hand-to-hand sale of heroin. (12:35); (App. 115). A reviewing authority could fairly conclude, based on those asserted facts, that probable cause existed that the Winona Lane address was a place where "street level sales take place." (12:33); (App. 113). Based on the information contained in the search warrant affidavits, both informants had been at the Winona Lane address multiple times and had participated in illegal activities there.

Notably, however, according to the affidavits, Marcus Pantoja was not present at the Winona Lane residence for two out of the three controlled buys. (12:33-36); (App. 113-117). Marcus Pantoja is never described as actively participating in the hand-to-hand sale of drugs. On the contrary, the three drug transactions described in the affidavit all involve other drug sellers—two of whom are otherwise entirely unknown individuals with no apparent connection to the South 1st Street residence ("Christian" and "Carlos"). (12:33-36); (App. 113-117). Additionally, the search warrant affidavits lack any indication that Marcus Pantoja's brother, Miguel, was ever seen at, or had any connection to, the South 1st Street

address at which the second search warrant affidavit alleged Marcus lived.

While the affidavit alleges that Marcus Pantoja was present at the Winona Lane address during one of the controlled buys, he was apparently seen by law enforcement on the porch rather than inside the house where the transaction occurred. (12:34); (App. 114). Thus, Marcus Pantoja's connection to the Winona Lane address appears minimal at best. There is no allegation in the search warrant affidavit that he had any direct interaction with either drugs or money during the controlled buy transactions at Winona Lane.

Thus far, the evidence is therefore suggestive but far from constitutionally probative. Even assuming, arguendo, that these otherwise weak facts and circumstances suggest Marcus is a drug dealer, that inference alone does not provide probable cause to search the separate residence at the South 1st Street address, where it was alleged he was residing with his girlfriend. Generalized allegations of criminality cannot supply the particularized probable cause required by the state and federal constitution with respect to that specific place. *See* ***Ward***, 2000 WI 3, ¶36 ("In finding that the affidavit supplied sufficient facts from which to draw an inference of probable cause to search, we are not suggesting that when there is sufficient evidence to identify an individual as a drug dealer […] that there is sufficient evidence to search the suspect's home.").

The requirement of a nexus between the place searched and the allegations of wrongdoing is critical. For example, in ***State v. Sloan***, this Court found an insufficient nexus between the defendant's residence and alleged drug manufacturing. ***State v. Sloan***, 2007 WI App 146, 303 Wis.2d

438, 736 N.W.2d 189. The Court found a lack of evidence that the defendant had been recently engaged in "any criminal activity at the residence to be searched […]." ***Id***., ¶31. In the Court's view, "there must be some factual connection between the items that are evidence of the suspected criminal activity and the place to be searched." ***Id***.

United States v. Carpenter, 360 F.3d 591 (6th Cir. 2004) is also persuasive. In that case, law enforcement observed the cultivation of marijuana in an open field near the suspect's home. ***Id***. at 594. There was a road between the field and the home. ***Id.*** However, these facts—standing alone—were insufficient to provide probable cause to search the residence. ***Id.*** Law enforcement needed more concrete observations, notwithstanding the suggestiveness of the bare facts. ***Id.***

Here, the bulk of the allegations in the search warrant for the South 1st Street address center on activity at Winona Lane, with minimal information provided regarding any activity at the South 1st Street address, alleged to be Mr. Pantoja's residence.[5] Assertions that Mr. Pantoja had unsavory associations or that he had overseen a drug sale at the Winona Street address —even an allegation that he had others working for him as part of a drug enterprise—cannot supply probable cause to search the South 1st Street address. The information provided fails to establish the required "nexus" between these allegations and that address. Nothing in the affidavit would enable a reasonable magistrate to take that leap.

[5] There is also an allegation that his vehicle was involved in drug activities, however, the State plainly cannot argue that this vehicle was ever present inside the apartment searched.

C. The only evidence tying the South 1st Street residence to criminal activity comes from incredible, unreliable hearsay declarants who lack a sufficient basis of knowledge.

To that end, law enforcement does not solely rely on the activity at Winona Lane in its affidavit. The affidavit includes several pieces of information supporting a claimed linkage between the two addresses. However, that link is only provided by the hearsay statements of CI #1 and CI #2. Their statements lack indicia that could lead a reviewing magistrate to reasonably conclude that they had either a sufficient basis of knowledge or that they were otherwise credible and reliable. ***Romero***, 2009 WI 32, ¶20.

1. Basis of knowledge.

"To demonstrate the basis of a declarant's knowledge, facts must be revealed to the warrant-issuing officer to permit the officer to reach a judgment whether the declarant had a basis for his or her allegations that evidence of a crime would be found at a certain place." ***Id.***, ¶22. Merely conclusory allegations will not suffice. ***United States v. Koerth***, 312 F.3d 862, 867 (7th Cir. 2002).

In this case, several of the allegations about the South 1st Street residence are just that—non-specific conclusory allegations, unsupported with any level of factual detail. A simple allegation that the home is a "stash house," without any further descriptive details is insufficient for probable cause as this fails to explain how or in what manner the confidential informants acquired information to support this assertion.

Moreover, there is no evidence that either informant ever entered the South 1st Street home where the packaging and storing of drugs allegedly occurred. This lack of first-hand detail is particularly problematic. Consider ***State v. Stank***, 2005 WI App 236, 288 Wis.2d 414, 708 N.W.2d 43: In that case, the informant provided more than just a simple allegation that the defendant had a drug operation in their home. ***Stank***, 2005 WI App 236, ¶6. Rather, the CI was able to describe the nature of the compartments where illegal drugs would be secreted with a high level of suggestive detail ("a freezer bound shut with bungie [sic] cords") based on hundreds of prior visits. ***Id***.

In this case, the informant claimed to witness drugs in Marcus Pantoja's possession while in his vehicle. (12:35-36). Setting aside the fact that the informant's information still fails to place evidence of illegal actions inside the residence itself, the assertion is also problematic inasmuch as it lacks needed detail. A bare assertion that an informant has observed contraband will not meet the probable cause standard. *See* ***Koerth***, 312 F.3d at 867; ***United States v. Peck***, 317 F.3d 754, 756 (7th Cir. 2003) ("Doe failed to give specific details about the drugs in Peck's house such as where the drugs were hidden, the total amount of drugs Peck possessed, or the frequency with which Peck sold drugs. The only details Doe gave were that she had been in the house and was shown drugs."); *See also* ***United States v. Mykytiuk***, 402 F.3d 773, 776 (7th Cir. 2005) (where otherwise untested informant "provided only one detail to support the accuracy of his statements" probable cause was lacking).

In this case, the informants never even crossed the threshold of the alleged "stash house." Accordingly, they have zero basis of knowledge for the claims that the South 1st Street residence was a stash house where drug packaging occurred. Even if CI #1's story about the transport of heroin is believed, *see infra*, this barebones allegation is still lacking in detail and therefore constitutionally insufficient.

2. Veracity—credibility and reliability of informants.

As to the veracity of both informants, "facts must be brought to the warrant-issuing officer's attention to enable the officer to evaluate either the credibility of the declarant or the reliability of the particular information furnished." ***Romero***, 2009 WI 32, ¶21. Mr. Pantoja concedes that the affidavit does contain some information about both informants' prior "track record." However, the affidavit fails to disclose a single instance in which *new* information provided by either CI was ever corroborated. Mr. Pantoja avers that this is a distinction that matters.

According to the affidavit, it would appear that their cooperation has been limited to either participating in controlled buys or giving merely confirmatory information to law enforcement. A heroin user's cooperation with a monitored controlled buy—a situation that tests the CI's nerve, rather than their resourcefulness—tells a reviewing court little about their ability to reliably and credibly forage for accurate and useful street-level intelligence. The same can be said for their ability to confirm what is already known in law enforcement files.[6]

[6] The issue is one of novel, testable intelligence versus already known information. In other words, a confidential informant who steps forward to give reliable information capable of reopening a cold case

Finally, it is worth noting that there is simply no corroboration of any of the evidence at issue here. Corroboration matters. ***Romero***, 2009 WI 32, ¶21. While law enforcement was able to corroborate generic details—Mr. Pantoja's vehicle, for example—this does nothing to corroborate the larger allegations and is therefore of low value in the probable cause analysis. *See* ***State v. Linde***, No. 2014AP2445-CR, ¶10, unpublished slip op. (Wis. Ct. App. August 2, 2016) (asserting that corroboration of "basic information" "readily available" in public sources has "minimal value.").

Here, law enforcement lacked probable cause to conduct the search of the South 1st Street location. While there were sufficient details and observations about actual drug activities at Winona Lane, there was insufficient evidence to connect those activities with the South 1st Street location. The only such evidence comes from hearsay declarants and is totally lacking in important details, patently incredible, or otherwise unreliable. Accordingly, the court erred in issuing the warrant and the defense motion should have been granted.

II. The Affidavit Fails to Present Sufficient Evidence Giving Rise to a Reasonable Suspicion that a No-Knock Execution of the Search Warrant was Necessary.

A. Legal standard.

The state and federal constitutions both prohibit "unreasonable" searches and seizures. U.S. CONST. AMEND. IV & XIV, Wis. Const. Art. I, § 11. "One requirement of a

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homicide should be distinguished from one who can merely "confirm" that Lee Harvey Oswald killed J.F.K.

reasonable search is that police officers executing a search warrant follow the rule of announcement." ***State v. Eason***, 2001 WI 98, ¶17, 245 Wis.2d 206, 629 N.W.2d 625 (citing ***Wilson v. Arkansas***, 514 U.S. 927 (1995)). The constitutionally derived rule of announcement may be disregarded only under specific circumstances:

> In order to dispense with the rule of announcement, "the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence."

Eason, 2001 WI 98, ¶18 (citing ***Richards v. Wisconsin***, 520 U.S. 385, 394 (1997)). This is a "commonsense nontechnical" test. ***Id.***, ¶19 (quoting ***Ornelas v. United States***, 517 U.S. 690, 695 (1996)).

Because the only evidence in the record comes from the search warrant application, this Court's review of the no-knock execution is limited to those facts appearing in the warrant affidavit. ***Eason***, 2001 WI 98, ¶11.

B. The allegations in the affidavit do not establish reasonable suspicion to support a no-knock entry at the South 1st Street residence.

In this case, the affidavit fails to satisfy the legal standard. Here, the bulk of the evidence again concerns the Winona Lane residence. For example, the affidavit discloses that two armed individuals were observed by CI #2 at the Winona Lane residence. (12:39); (App 119). However, no connection between these unknown individuals and the South 1st Street location is presented. Similarly, evidence that Miguel Pantoja referenced a desire to purchase a gun at the Winona Lane residence fails to provide a basis to believe

there will be a gun present in the South 1st Street location. The warrant never establishes a connection between Miguel Pantoja and that residence. There is no allegation that he had ever been present at that location.

Boilerplate references to drug dealing cannot independently provide reasonable suspicion to support a no-knock warrant. *See* ***Eason***, 2001 WI 98, ¶24. The same can be said for generalized statements stemming from the officer's "training and experience." ***Id.*** ¶25. Moreover, while a criminal record may be used in the reasonable suspicion calculus, Marcus Pantoja's criminal record is not sufficiently suggestive. The affidavit discloses that Marcus Pantoja "is a Felony Offender with prior arrests for Possession of a Schedule I or II Narcotic (2011), Possession of Marijuana (2010), Possession of a Schedule I or II Narcotic (2010), and Battery (2009)." (12:40); (App. 120).

The record discloses no prior firearm offenses. *Cf.* ***United States v. Dumes***, 313 F.3d 372, 381 (7th Cir. 2002). More importantly, the only "violent" history is a prior arrest for battery. Battery, however, is broadly defined in Wisconsin law and covers a wide-range of minimal bodily intrusions. For example, throwing urine on another is a battery under Wisconsin law. ***State v. Higgs***, 230 Wis.2d 1, 16, 601 N.W.2d 653 (Ct. App. 1999). Thus, there is no way to evaluate whether Mr. Pantoja's dated arrest for battery is sufficiently suggestive to furnish a constitutionally reasonable suspicion that danger would result were law enforcement forced to announce themselves before entering.

With respect to Mr. Pantoja's prior drug arrests, relevant details are again lacking. The affidavit also does not state whether any of these arrests—including the battery arrest—led to conviction. The Wisconsin Supreme Court has

expressed skepticism when arrests, as opposed to convictions, are the basis for a no-knock request. ***Eason***, 2001 WI 98, ¶21. In ***Eason***, the Court explained that an aggravated assault arrest's lack of significance in the reasonable suspicion rubric was problematic:

> Moreover, it was just that — an arrest, not a conviction. We do not require an affidavit to eliminate all innocent explanations. *See* ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990) (suspicious behavior that might have an innocent explanation may still provide the basis for reasonable suspicion to justify an investigative stop). However, we agree with the court of appeals that "it is equally reasonable to assume that the reason no conviction was uncovered by the officer drafting the affidavit was that Bentley may have been released as the `wrong man.'" ***Eason***, 2000 WI App 73, ¶ 8.

Eason, 2001 WI 98, ¶21.

Ms. Rosario, who is the primary tenant, also has a history. (12:36); (App. 116). It is equally lacking in probative force. She was arrested for a drug offense in 2013 and a concealed carry violation in 2005. (12:36); (App. 116). At the time the affidavit was drafted, she had a warrant for operating after suspension. (12:37); (App. 117). While the drug-related arrest was more recent, the gun arrest was close to ten years old at the time the warrant was issued. (12:36); (App. 116). The information was simply too stale to support reasonable suspicion that there would be a weapon in the home some ten years later. *Cf.* ***United States v. Singer***, 943 F.2d 758, 763 (7th Cir. 1991) (Finding that a six-month old allegation that the defendant possessed a weapon would support reasonable suspicion: "Although six months is an extended period of time, we do not believe it is so long that it cannot be used to establish special circumstances justifying a no-knock entry.").

Moreover, there is no evidence any of her arrests led to conviction. (12:36-37); (App. 116-117).

Other than law enforcement speculation, there was no actual information in the affidavit linking Mr. Pantoja to a firearm or to violent tendencies that would support a no-knock warrant. *Cf.* ***State v. Sammon***, No. 2011AP682–CR, unpublished slip op. (Wis. Ct. App. July 25, 2012) (Evidence that defendant used drugs tending to promote violent tendencies, possessed multiple weapons in home and wife told police she was concerned for her children supported no-knock execution).

The facts and circumstances presented in the affidavit fail to establish a reasonable suspicion that a no-knock entry was reasonable here. No further evidence was presented about special circumstances that might have existed at the time of entry. Accordingly, this Court should reverse the trial court ruling denying the defense motion.

III. Good-Faith Does Not Excuse the Actions of Law Enforcement.

Assuming that this Court agrees that the search of the residence was unlawful under either theory, the Court must then address the applicability of the good-faith exception. *See* ***Eason***, 2001 WI 98, ¶27; ***United States v. Leon***, 468 U.S. 897, 918-20 (1984). Under federal law, the State must prove that the "police relied in good faith on the judge's decision to accept the affidavit and issue the warrant." ***Koerth***, 312 F.3d at 868. Good faith is lacking when either:

1. The reviewing authority "wholly abandoned his judicial role or otherwise failed in his duty to perform his neutral and detached function and not

serve merely as a rubber stamp for the police." ***Id***. (citing ***Leon***, 468 U.S. at 923) (quotations omitted).

2. "[T]he officer submitted an affidavit so lacking in indicia of probable cause as to render official belief in it is existence entirely unreasonable." ***Id***. (citing ***Leon***, 468 U.S. at 923 (quotations omitted).

In this case, the facts and circumstances satisfy both criteria. Here, the reviewing authority "rubber-stamped" an affidavit that contains scant reference to the South 1st Street residence. The search warrant is deficient on its face and either the magistrate, or the officer who relied on it, should have been aware of its flaws. Because they chose to act anyway, the exclusionary sanction should apply.

In addition, Wisconsin law provides an additional layer of protection in its good-faith analysis. For the good faith exception to apply under Wisconsin law, the State must satisfactorily prove that:

1. Officers conducted a significant investigation before obtaining the warrant;

2. The warrant was reviewed by a knowledgeable police officer or government attorney;

3. A reasonably well-trained police officer would not know the search was illegal.

State v. Scull, 2015 WI 22, ¶38, 361 Wis.2d 288, 862 N.W.2d 562.

Here, the State cannot satisfy its burden with respect to the first prong. While law enforcement conducted an investigation of drug activity at the Winona Lane address, they failed to undertake the investigation that mattered for the purposes of this search warrant: an investigation of the 1100 South 1st Street location. Law enforcement can place Mr. Pantoja at the residence but cannot even definitively establish that he resided there (as opposed to merely visiting his girlfriend). Law enforcement alleges that Mr. Pantoja was ferrying drugs between the two residences on a regular basis, yet failed to conduct surveillance in order to confirm this suspicion. While law enforcement conducted a concerted investigation of the Winona Lane residence, there is no evidence that they ever similarly investigated the South 1st Street location.

These are fatal failings. Because the State cannot satisfy prong one of the analysis, good faith does not apply and the evidence should be suppressed.

CONCLUSION

The defense motion should have been granted. There was no probable cause to search the South 1st Street location and no reasonable suspicion that a no-knock entry to that residence was necessary on the facts presented. Because the search warrant affidavit was insufficient as to the South 1st Street address, good faith does not apply and the evidence should be suppressed.

Dated this 21st day of September, 2016.

Respectfully submitted,

CHRISTOPHER P. AUGUST
Assistant State Public Defender
State Bar No. 1087502

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
august@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 5,492 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 21st day of September, 2016.

Signed:

Christopher P. August
Assistant State Public Defender
State Bar No. 1087502

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 220-5520
augustc@opd.wi.gov
Attorney for Defendant-Appellant

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; 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.

Dated this 21st day of September, 2016.

Signed:

Christopher P. August
Assistant State Public Defender
State Bar No. 1087502

Office of State Public Defender
P.O. Box 7862
Madison, WI 53707-7862
(414) 227-4805
august@opd.wi.gov
Attorney for Defendant-Respondent

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