STATE OF WISCONSIN

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

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 The Circuit Court for Milwaukee County, The Honorable Carolina Stark, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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I. The State's Arguments Regarding the Commissioner's Probable Cause Determination Are Unpersuasive and Have Been Fully Anticipated and Addressed In the Opening Brief.

A. There is an insufficient nexus between the place where the drug trafficking occurred – 1927 South Winona Lane—and Mr. Pantoja's residence, 1100 South 1st Street.

In support of its argument that there is a nexus between Mr. Pantoja's home and the drug activity at the separate and distinct Winona Lane residence, the State begins with a lengthy description of the activities that occurred at 1927 South Winona Lane. (State's Br. at 6-7). The majority of the State's "evidence" underlying probable cause all comes from, and is related to, that address. As was argued at length in the opening brief, this is where the drug sales happened. This is where firearms were witnessed. This is where Miguel and Carlos were allegedly observed participating in a drug enterprise. It is the only place that law enforcement, via their CIs, has ever entered. Mr. Pantoja has therefore conceded that, if the Court concludes that the informants in this matter were credible and reliable witnesses, then there was likely probable cause to search 1927 Winona Lane for evidence of drug trafficking. (See Opening Br. at 10).

However, as Mr. Pantoja also pointed out in the opening brief, the alleged drug sales at 1927 South Winona Lane do not, and categorically cannot, provide independent probable cause with respect to the South 1st Street address. Just because police believe that an individual committed a

crime—or is even engaged in ongoing criminal behavior, as in the case of a drug dealer—does not automatically entitle police to search that individual's home. This is well-established Wisconsin law. *See* ***State v. Ward***, 2000 WI 3, ¶36, 231 Wis.2d 723, 604 N.W.2d 517; ***State v. Higginbotham***, 162 Wis.2d 978, 995, 471 N.W.2d 24 (1991).

The State cites a laundry list of facts and circumstances that allegedly connect Mr. Pantoja's residence with the location where drug sales occurred. (State's Br. at 6-7). Looking closer, however, all the State has really done is allege that Mr. Pantoja is a drug dealer—information which does not tell the reviewing magistrate anything about the place to be searched. Presence at a sale, employment of a lackey, and participation in a conspiracy *may* furnish cause to suspect a *person* of wrongdoing. But before a search warrant may be issued they need to connect that wrongdoing to a specific *place*. The State fails to do so here.

For example, the State alleges that "personal observations" of law enforcement provide some quantum of probable cause. (State's Br. at 8). However, the "observation" cited is the mere fact that Mr. Pantoja was seen driving a car law enforcement believed was linked to drug trafficking. (State's Br. 8). While that fact may entitle law enforcement to search the *vehicle* in question, it is hard to see why evidence about yet another distinct place—this time a mobile vehicle—provides probable cause with respect to a fixed and distinct address. The same goes for the statements Mr. Pantoja made to an informant about moving into the South 1st Street residence with his then-girlfriend. (State's Br. at 9). This establishes his residence but does not necessarily entitle a magistrate to infer that he moved into the home *with* the drugs seen at 1927 Winona Lane.

B. The remaining pieces of evidence supporting probable cause are derived from unreliable hearsay declarants.

Lacking more concrete evidence, the State ultimately falls back on the statements of its CIs. However, there are several problems. First and foremost, many of the assertions are conclusory and lack essential detail. As was argued at length in the opening brief, merely conclusory allegations—even superficially strong allegations of drugs being present in a home—will not provide probable cause:

- ***United States v. Koerth***, 312 F.3d 862, 867 (7th Cir. 2002) (Affidavit "presented the magistrate judge with little more than mere conclusions and assertions of wrongdoing on the part of the defendant, without an adequate factual foundation, based on the testimony of a previously unknown informant.");

- ***United States v. Peck***, 317 F.3d 754, 756 (7th Cir. 2003**)** **(**"Although Doe claimed she personally observed drugs in Peck's house less than two days before the search warrant was executed and she appeared before the issuing judge, these elements are not enough to overcome the minimal amount of detail given in Doe's affidavit.");

- ***United States v. Mykytiuk***, 402 F.3d 773, 776 (7th Cir. 2005) ("Although Soltau provided first-hand information against his penal interest, there was no evidence that he was a reliable witness or that he had provided accurate information in the past, and he provided only one detail to support the accuracy of his statements regarding Mykytiuk's methamphetamine production—that Mykytiuk stored his materials in two five-gallon buckets. This was a thin reed on which to

rest the probable cause determination, and we are disinclined to second-guess both the district court's and the government's assessment of this point.");

- *Cf.* ***State v. Stank***, 2005 WI App 236, 288 Wis.2d 414, 708 N.W.2d 43 (CI purchased from defendant on weekly basis, every time CI visited home he would see the same group of drug buyers, had been to the home 500 times, defendant personally showed CI firearm and CI was able to tell where drugs were hidden).

Thus, merely conclusory allegations that Mr. Pantoja was a drug dealer, that the South 1st Street location was a stash house, or that this is where packaging occurred are constitutionally insufficient without more contextual information that would allow the reviewing magistrate to more fully evaluate a given statement's weight in the probable cause analysis.

The State makes a partial concession that "some of the informant's assertions were conclusory because those assertions, standing on their own, did not demonstrate how the informants knew that information." (State's Br. at 11). It nevertheless avers that these allegations are sufficient because of minimal police corroboration. (State's Br. at 11). However, by their account the police were at most able to corroborate that Mr. Pantoja resided at the South 1st Street location, that he was adjacent to a hand-to-hand sale at the Winona Lane residence, and that nearly five years earlier he had been arrested on drug charges. (State's Br. at 11). While it might support a weak inference of criminality on Mr. Pantoja's part, the State's asserted "corroboration" of insubstantial detail fails to establish that the South 1st Street residence probably contained drugs.

The State also fails to address the serious problems present in CI #1's account of transporting heroin with Mr. Pantoja that were raised in the opening brief. (Opening Br. at 14). Even if that story is accepted as true, the State is *still* incapable of placing either its informants or any drugs *within* the home. At best, it reflects that the car was involved in the alleged criminal scheme. That, without more, cannot provide probable cause with respect to the home.

Finally, the State also asserts that the statements of the CIs should be relied on due to the CIs' prior reliability. (State's Br. at 11). However, the State ignores Mr. Pantoja's argument that there is no verifiable evidence that either informant had ever provided genuinely new, instead of merely confirmatory, evidence to law enforcement. (Opening Br. at 15). Moreover, evidence that these individuals had followed instructions and successfully purchased drugs from suspected dealers does not automatically mean that they will be able to reliably convey secret information about the inner workings of a larger drug conspiracy.

The State's arguments with respect to probable cause are ultimately unpersuasive. Accordingly, this Court should rely on those arguments and authorities discussed in Mr. Pantoja's submissions to find that the search warrant's issuance was unsupported by probable cause and therefore unlawful and unconstitutional.

II. The Erroneous Approval of the No-knock Warrant Renders the Resulting Search Unreasonable and Therefore Unconstitutional and Should Merit Suppression of Any Evidence Obtained.

A. Suppression is a remedy in this case.[1]

Here, law enforcement sought and received a search warrant with a "no-knock" provision in it. This is therefore not a case where law enforcement obtained an otherwise valid search warrant and then, due to some perceived exigency, made an instant (and retrospectively erroneous) decision to disregard the constitutionally required rule of announcement.

Hudson v. Michigan addresses this second scenario but says nothing about the first. In that case, law enforcement sought and obtained a warrant to search the defendant's home for evidence of drug-related wrongdoing. ***Hudson v. Michigan,*** 547 U.S. 586, 588 (2006). The defendant did not challenge the warrant's validity, only the warrant's execution. ***Id***. The Supreme Court declined to apply the exclusionary rule in such a circumstance, given its view of the no-knock execution as an essentially technical violation. ***Id***. at 592. In its view, the underlying warrant was valid and the State should therefore not be punished for failing to abide by the knock and announce rule, which it believed imposed an arbitrary and imprecise constitutional limitation. ***Id***. at 595.

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[1] Undersigned counsel points out that this argument was never made in the briefs filed in the circuit court or at the motion hearing. This Court may therefore choose to disregard the State's argument under a waiver theory. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443, 287 N.W.2d 140 (1980).

In ***State v. Brady***, the Wisconsin Court of Appeals confronted a fact pattern similar to that which was presented in ***Hudson***. In that case, law enforcement obtained a valid search warrant to investigate possible firearms violations. ***State v. Brady***, 2007 WI App 33, ¶2, 298 Wis.2d 782, 729 N.W.2d 792. That warrant, however, did not contain a "no-knock provision." ***Id***. Police ultimately opted to execute the warrant without knocking or announcing their presence. ***Id***. ¶4. On appeal, the defendant challenged no-knock execution, asserting that it rendered the search invalid and should result in suppression of evidence. ***Id***. ¶7.

The Court did not inflexibly apply a flat, categorical rule that suppression was not available in such an instance. ***Id***. ¶12. Rather, the Court held that suppression may be available if the defendant could prove that a constitutionally cognizable interest protected by the knock and announce rule was infringed by the State. ***Id***. ¶12. It carefully considered evidence relating to three specific interests derived from ***Hudson***: "the safety of the officers and residents, the integrity of personal property, and residents' dignity." ***Id***. ¶16. Ultimately, "[n]one of these protected interests, as they relate to Brady personally, was violated in this case." ***Id***. Only then did the Court conclude that "despite what might be considered a technical violation of the knock-and-announce rule, there is no justification for applying the exclusionary rule *in this case* because the constitutionally protected interests remain intact." ***Id.*** (emphasis added).

Thus, when faced with a technical violation of the knock and announce rule—the split second decision made by officers on the ground acting without advance permission to disregard a constitutional mandate—the Court appeared to leave open the possibility that exclusion might be warranted

in a given case, depending on the specific facts and circumstances.

Moreover, ***State v. Grantham***, No. 2010AP2693-CR, unpublished slip op. (Wis. Ct. App. Dec. 13, 2011), suggests a defendant retains the ability to challenge, via a motion to suppress, the magistrate's preemptive decision to authorize a "no-knock" warrant. ***Grantham***, No. 2010AP2693-CR, ¶¶12&14. That case, unlike ***Hudson*** and ***Brady,*** does not attack the "technical" execution of the warrant as determined by the officer in the field. Rather, it straightforwardly challenges the exercise of judicial authority by the reviewing magistrate. And, also unlike ***Hudson*** and ***Brady***, the defendant in ***Grantham*** did not concede that the underlying warrant purporting to establish probable cause was otherwise valid.

These distinctions matter and are pertinent to this case. Because Mr. Pantoja has consistently objected to the warrant's authorization, as opposed to its execution, his case is therefore clearly distinguishable. Pursuant to ***Grantham***'s persuasive authority, this Court can, and should, address Mr. Pantoja's preserved suppression motion challenging the pre-approval of the no-knock warrant. This Court should not adopt the unduly restrictive reading of the cases urged by the State (noting that one such case, ***State v. Felix*** 2012 WI 36, 339 Wis. 2d 670, 811 N.W.2d 775, does not even address the question presented). Instead, it should independently review the commissioner's decision to issue a no-knock search warrant as outlined in the opening brief. If it concludes that the reviewing magistrate was incorrect to issue a "no-knock" warrant, suppression of the resulting evidence should result.

B. There was no reasonable suspicion to believe that a no-knock warrant was necessary.

The State's first piece of evidence allegedly supporting reasonable suspicion—Investigator Baranek's training and experience, coupled with his general knowledge about the habits of drug dealers—cannot provide constitutionally sufficient reasonable suspicion. This is well-established in ***State v. Eason***, 2001 WI 98, ¶25, 245 Wis.2d 206, 629 N.W.2d 625 (Holding that "training and experience alone is not sufficient to establish reasonable suspicion."). The only other pieces of evidence offered by the State to support a finding of reasonable suspicion relate to Miguel Pantoja, Marcus' brother. (State's Br. at 16-17). There is no evidence that Miguel Pantoja was ever inside the South 1st Street home, that he had a key, or that it was otherwise reasonable to believe he would be inside when officers executed the warrant at that location. The State does not otherwise concretely respond to the medley of issues pointed out in the opening brief, including the lack of a suggestive criminal record, the danger of relying on boilerplate references to drug dealing, an overall lack of detail, and a general overindulgence on law enforcement speculation. (Opening Br. at 19-20).

The State's arguments are unpersuasive. Accordingly, this Court should rely on the arguments and authorities in the opening brief to rule in Mr. Pantoja's favor.

III. Good Faith Does Not Apply.

Should this Court conclude that the warrant was wrongfully issued for any of the reasons articulated in the opening brief, Mr. Pantoja should prevail. The lower court made no finding as to good faith. Although the State bears the burden of proving its existence, Mr. Pantoja has preemptively

asserted that the State cannot satisfy its burden here. (Opening Br. at 20-22). Mr. Pantoja believes that the evidence in the record is sufficient for this Court to make a determination as to the existence of good faith. It is unclear whether a "good faith hearing" is required under ***State v. Marquardt***, 2001 WI App 219,¶22, 247 Wis. 2d 765, 635 N.W.2d 188 or whether the remand in that case was only warranted in light of the then-"new" law of ***Eason***. To the extent that this Court disagrees and determines that more fact-finding is required, however, a remand is appropriate.

Dated this 5th day of December, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,460 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 5th day of December, 2016.

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