STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2016AP1464-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

-vs.-

SAMUEL SILVERSTEIN,
Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION FILED ON JUNE 13, 2016, IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE ELLEN R. BROSTROM, PRESIDING. MILWAUKEE COUNTY CASE NO. 2015CF2778

DEFENDANT-APPELLANT'S REPLY BRIEF

Respectfully submitted:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

ARGUMENT

I. THE SEARCH OF SILVERSTEIN'S HOME WAS UNCONSTITUTIONAL.

Silverstein has consistently argued that the warrant to search his home should never have issued because the supporting affidavit failed to state probable cause because it gave insufficient reasons for crediting Tumblr's hearsay statements. *See* Silverstein's Br. at 10-11.

As a threshold matter, the parties dispute how this Court should classify Tumblr's tip. Silverstein argues that Tumblr's tip is akin to that of an anonymous informant because the true source of its information remains unknown; the State argues that Tumblr acted as a citizen informant. St.'s Br. 8-12. While Tumblr's ultimate classification is not dispositive—either way the warrant in this case should fail—Silverstein replies to the State's citizen-informant argument because of its far-reaching implications.

A. Tumblr is not a citizen informant because, as the State admits, the actual source of the information included in its tip is not known.

The State argues that Tumblr's tip was not from an anonymous informant because Tumblr is an electronic service provider (ESP) and it provided a name and mailing address of the tip's "submitter." St.'s Br. 11. Additionally, the State asserts that ESPs have been found reliable by other jurisdictions, in part because they are required to report abuse to NCMEC. *Id.* at 11-12.

But the problem with the State's argument is that it equates information from a company with hundreds of employees to one coming from a single concerned citizen who happens on possible illegal

activity. Simply putting a name and address of a "submitter" is not enough to make Tumblr's tip any less anonymous. The bare-bones information referred to in the warrant affidavit says nothing about what the named "submitter" did in regard to the suspected child pornography or its sources. Did the "submitter" see that information? If so, how? If not, how was it obtained and transmitted? The affidavit is completely silent regarding this information, and the officer in this case did nothing to find the answers to these simple questions before he asked for the warrant that permitted to him enter Silverstein's home. More must be shown to support a warrant allowing the police to break down the door of a person's home. *See State v. Romero*, 2009 WI 32, ¶ 21, 317 Wis. 2d 12, 765 N.W.2d 756.

In response to the absence of information about the source of Tumblr's tip, the State says that what the "submitter" did or did not do really doesn't matter because Tumblr should be presumed reliable. St.'s Br. 11-12. The State admits that there may have been no person involved in Tumblr's tip, but rather an automated system might have caught the information. *Id.* at 11. The probable cause requirement for a warrant needs more certainty and less anonymity before a presumption of reliability should attach. The State's admission that it does not know the role of the tip's "submitter" confirms the absence of information that should have been presented in the affidavit, and it renders Tumblr's tip more anonymous than that of a citizen informant.

The State argues that an ESP like Tumblr (and whichever employee it was at the company that obtained the information) should be presumed reliable because of its mandatory reporting requirements. (St. Br. 11-12.) But the reporting requirements to which the State points this Court require only reporting, not accurate reports. *See* 18 U.S.C. § 2258A(e). If Tumblr gives a bad tip, it will not face penalties unless it did

so intentionally or maliciously. *See* 18 U.S.C. § 2258B. On the other hand, ESPs must report or face both civil and criminal penalties for not having done so. St. Br. 11. Thus, ESPs are under pressure to overreport: if they fail to report they can be punished; if they mistakenly report they cannot. The incentive to overreport is not counterbalanced by an equal disincentive to reliably report. Thus, the reporting requirement is not alone demonstrative of reliability.

While no Wisconsin case has addressed whether an ESP is presumed reliable, this Court can rely on well-established law to answer that question; no special rule is required. If the source of the tip is unknown, such as where the affidavit supporting a warrant contains no efforts to corroborate that the tip, it should not be presumed reliable. *See State v. Kolk*, 2006 WI App 261, ¶ 12, 298 Wis. 2d 99, 726 N.W.2d 337.

The cases cited by the State illustrate why the facts of the instant case fall short of qualifying Tumblr's tip as that of a citizen informant. The State cites a New York trial judge's order as authority for the conclusion that ESPs should be viewed without skepticism. St.'s Br. 11. However, that judge did not offer any independent reasoning whatsoever for that conclusion, other than citing to other jurisdictions that had found reliance on internet companies reliable. *People v. Pierre*, 29 N.Y.S.3d 110, slip op. at 4 (N.Y. Sup. Ct. 2016). More telling though is that the judge did not have to consider whether bare-bones information was enough because there was a plethora of evidence that supported treating the informant like a citizen. *Id.* Notably, the warrant in *Pierre* explained how Google came to identify the child pornography as from one its specific accounts, including an explanation of software designed to flag the material that was followed up with a "manual human review." *Id.* at 1-2. Moreover, the warrant included an affidavit from a Google manger. *Id.* at 1-2. Nothing like that is

present in Silverstein's case. *Pierre* is thus favorably distinguishable and actually shows the sort of information that should be necessary to gain the reliability of a citizen informant.

The State similarly cites *James v. State*, 717 S.E. 2d 713 (Ga. Ct. App. 2011), for support that an employee of an ESP is like a citizen. St. Br. 11. But *James* specifically found that, in addition to the employee's contact information, the warrant-issuing magistrate was also informed that the employee had identified herself as an internet security specialist employed by Google and explained the basis of her knowledge. 717 S.E.2d at 716-17. But here, even the State does not know whether the person that NCMEC listed as the "submitter" of Tumblr's tip observed anything, much less what basis of knowledge that "submitter" had. The limited facts in Silverstein's case thus favorably distinguish it from *James* and further demonstrate why Tumblr's tip should not garner the reliability of a citizen's.

Other cases cited by the State did not have to rely as heavily on a presumption of reliability for an ESP as the State does here because the courts in those cases found corroboration of the source of the tip. In *State v. Sisson*, a detective had subpoenaed the ESP for information and did further investigation before the warrant was sought. 883 A. 2d 868, 872-73 (Del. Super Ct. 2005). The affidavit in Silverstein's case explains no similar subpoena or investigation. In *United States v. Cameron*, the district court's order was not specific about the underlying facts, but concluded that the ESP's tip was reliable because the supporting affidavits had "substantial amounts of specificity" and the officers had corroborated the tip through their own investigation, which included the actual uploading of the images through the defendant's internet service provider. 652 F. Supp. 2d 74, 82 (D. Me. 2009). No similar steps occurred in Silverstein's case. In *State v. Woldridge*, the defendant

challenged NCMEC's reliability, not the ESPs reliability, and, in addition, before the officer obtained the warrant she sought and obtained information from the ESP to corroborate the tip. 958 So. 2d 455, 457, 458-59 (Fla. Dist. Ct. App. 2007). Unlike *Woldridge*, police in the instant case had no contact with nor obtained information from Tumblr.

In sum, even the cases to which the State cites to support the Tumblr-as-citizen proposition demonstrate the deficiency in the warrant affidavit in Silverstein's case: police offered insufficient information about Tumblr's tip and its source to show why the tip should be considered as coming from a citizen as opposed to an anonymous informant. This Court should not extend a presumption of reliability to groups of people—companies, agencies, nonprofits, etc.—simply because they are required to report and, when reporting, name a member of the group as indescribably affiliated with the report.

Before the label of "citizen informant" is bestowed to Tumblr's tip in Silverstein's case, more should have been done to ascertain who (or possibly what) was the actual source of the information in it. It is that source—person, computer program, or both—that must be shown to have the credibility of a citizen informant—not just Tumblr, the 400+ employee company. Absent such showing, no presumption of reliability should be assigned. Whereas the facts of Silverstein's case illustrate that the specific informant is still not known to police, the totality of the circumstances do not permit any presumptions of reliability. The content of Tumblr's tip should not be considered as having come from a citizen informant.

But, as mentioned before, whether Tumblr is an anonymous or a citizen informant does not decide this case. Certainly, if Tumblr is an anonymous informant, it is easier to show the affidavit deficient. But, even if this Court concludes that Tumblr is a citizen

informant, Silverstein can still show that the affidavit failed to state probable cause, as explained below.

B. The warrant affidavit was clearly insufficient to support the probable cause finding

The State's response to Silverstein's argument that the warrant should not have issued ranges far afield from his actual claim. *See* St.'s Brief at 13-14, 17-18. As Silverstein has consistently argued, this case is about whether the warrant affidavit included sufficient facts to establish probable cause. Nonetheless, the State at one point mischaracterizes his claim as one of intentional or reckless falseness under *Franks v. Delaware*, 438 U.S. 154, 171 (1978), and later a staleness claim. *See* St.'s Brief at 13-14, 17-18. In each instance, the State argues that Silverstein cannot succeed because he cannot satisfy the relevant standard. Were this a *Franks* case or a staleness case, the State would probably be right. But, it is not.

This is a case about a game of telephone that ended in a warrant to kick down Silverstein's door. His challenge to that warrant asks whether the totality of the facts in the supporting affidavit establish a basis on which to credit as reliable Tumblr's hearsay statements. After all, no police officer spoke to or had any contact with the person at Tumblr that started the game of telephone. In fact, no one presently knows who that person was.

The relevant question is whether Silverstein can show that the facts in the affidavit were clearly insufficient to support a probable cause finding. *State v. Higginbotham*, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991). When deciding whether probable cause existed for the issuance of a search warrant, a reviewing court is "confined to the record that was before the warrant-issuing commissioner." *Romero*, 2009 WI 32, ¶ 18, n.11. Post hoc bolstering of a warrant affidavit with omitted facts that should otherwise have been

included at the start cannot salve the constitutionality of a search based on a deficient affidavit. *See id*. But that is precisely what the State's argument to this Court does: it adds facts to Detective Bichler's affidavit that were never before the magistrate.

For example, over two pages the State details information about NCMEC, its operation, and the manner by which it forwards tips from ESPs to law enforcement. St.'s Br. at 9-10. Additionally, the State explains the statutory scheme requiring ESPs like Tumblr to transmit known child pornography violations to NCMEC, as well as the existence of statutory penalties for not doing so. *Id.* Later, when speaking directly about Tumblr's reliability, the State avers that "(a) an ESP collects identifying information and (b) information posted in a public forum is assessable to anyone, including the forum's moderator." *Id.* at 15. It then notes that, "[w]hile the affidavit did not specify as much, all of the information that Tumblr reported [to NCMEC] was information that it collects." *Id.*

None of the State's new information about NCMEC or Tumblr was in the affidavit. Even if that information was known to the magistrate who reviewed the affidavit, the State cannot now rely upon it as support for the warrant because "[t]he subjective experiences of the magistrate are not part of the probable cause determination." *State v. Ward*, 2000 WI 3, ¶ 26, 231 Wis. 2d 723, 604 N.W.2d 517. Only those facts set forth within the four corners of the affidavit can contribute to the probable cause analysis. *Id.* And it cannot be said that the intricacies of NCMEC or Tumblr's operation are common knowledge; not even the circuit court judge who denied Silverstein's motion was familiar with those things. (R.31:11-13, 15-16; A-Ap. 15-17, 19-20.)

A simple reading of the facts set forth in the affidavit leaves unknown how it is that Tumblr found

the child pornography where it claimed to have found it. As even the State admits, no one presently knows whether it was, in fact, a person or some autonomous computer agent that found and reported the child pornography. If it was a person, no one knows who that person was, or even if several people were involved. If it was a computer agent, no one knows its functionality, limits, or scope of operation; no one even knows who the person was that coded that program. The affidavit and its attachments certainly do not answer any of those questions, and Tumblr's tip is thus unreliable.

Without supporting facts, the State attempts to discard the absence of half of the NCMEC report as a copying error stating that "there is no reason to conclude that law enforcement did not have the full reports." St.'s Br. at 13. However, it is not relevant what law enforcement had back at the office; this Court must assess the information presented to the magistrate at the time of the application. The State does not dispute that the attached NCMEC report contained only the even numbered pages or that Silverstein is correctly asserts that relevant evidence claimed to be in the attached report is missing. The admitted omission of half the NCMEC report is clear reason to conclude that the reviewing magistrate did not have the full reports. As Silverstein more fully detailed in his first brief, information that the affidavit alleged to be in the NCMEC reports is not actually in the attached reports by virtue of the omitted pages, & that omission renders further unreliable Tumblr's tip.

Ultimately, the State concedes that the affidavit was lacking key information and attempts to provide that information now. *See* St.'s Br. at 15. Those attempts clearly demonstrate the deficiencies in the affidavit and the information that should have been provided to show probable cause. To remedy those deficiencies, the State now presents new evidence that goes above and beyond what the magistrate could have

used in making common sense inferences. Because the affidavit was clearly insufficient at the time the magistrate reviewed the application, no warrant should have issued, and this Court should reverse the circuit court's contrary conclusion.[1]

II. SILVERSTEIN SHOULD NOT HAVE BEEN SUBJECT TO A MANDATORY MINIMUM SENTENCE.

Silverstein alternatively argues that imposing a mandatory minimum on him is barred by the constitutional due process requirement of definiteness, also known as the "fair warning doctrine." *See United States v. Lanier*, 520 U.S. 259, 265-66 (1997). The Supreme Court has held that the doctrine of unconstitutional vagueness applies "not only to statutes defining the elements of crimes, but also to statutes fixing sentences." *Johnson v. United States*, ___ U.S. ___, 135 S. Ct. 2551, 2557 (2015).

The varying interpretations of the statute by other courts reveals an arbitrariness in its enforcement, which is the main evil sought to be eliminated by the fair warning and vagueness doctrines. *See State v. Pittman*, 174 Wis. 2d 255, 276, 496 N.W.2d 74 (1993). In *Johnson*, the Supreme Court

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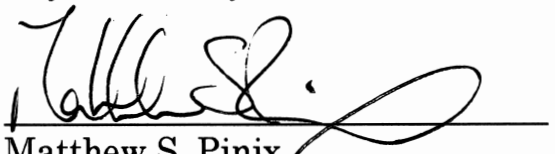
[1] The State, in a footnote, makes an inadequate and untimely plea that this Court remand the matter for a hearing on good faith without citing any authority for its proposed remand. St.'s Br. at 19 n.6. The State has forfeited its undeveloped claim for good faith relief. *State v. Gove*, 148 Wis. 2d 936, 941, 437 N.W.2d 218 (1989) (claim waived if not timely raised below), *see also State v. Pettit,* 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court need not address inadequately developed arguments). "As a general rule, issues not raised in the circuit court will not be considered for the first time on appeal." *State v. Dowdy*, 2012 WI 12, ¶ 5, 338 Wis. 2d 565, 808 N.W.2d 691. "The reason for this general rule is to give trial courts the opportunity to correct errors, thus avoiding appeals." *State v. Van Camp*, 213 Wis. 2d 131, 144, 569 N.W.2d 577, 584 (1997). The forfeiture rule applies both to the appellant and to the respondent. *Id.* By failing to assert good faith below, the State forfeited it. *See id.*

recognized that varying conclusions about a sentencing statute's meaning across multiple courts is a sign of unconstitutional vagueness. *Id.* at 2560. In his first brief, Silverstein detailed how courts around the state that had differently interpreted and applied Wis. Stat. § 939.617(2). This disparity in enforcement shows that the statute is vague enough that those required to "enforce and apply the law" must create their own arbitrary standards in doing so, an indication the statute is unconstitutionally vague as applied to Silverstein. *State v. Princess Cinema of Milwaukee, Inc.*, 96 Wis. 2d 646, 657, 292 N.W.2d 807 (1980).

CONCLUSION

For all those reasons, and those set forth more fully in his first brief, Silverstein asks this Court to reverse the circuit court's order denying his motion to suppress. Alternatively, he asks this Court to conclude that the mandatory minimum could not be constitutionally applied and reverse for resentencing.

Dated this 6th day of January, 2017.



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CERTIFICATION

I certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced using a 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, maximum of 60 characters per full line of body text. The length of this brief is 3,000 words, as counted by the commercially available word processor Microsoft Word.

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

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of 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 6th day of January, 2017.

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CERTIFICATION OF FILING BY MAIL

I hereby certify, pursuant to Rule 809.80(4)(a), Rules of Appellate Procedure, that this Appellant's Brief and Appendix will be deposited in the United States mail for delivery to the Clerk of the Court of Appeals, Post Office Box 1688, Madison, Wisconsin, 53701-1688, by first-class mail, or other class of mail that is at least as expeditious, on January 6, 2017. I further certify that the brief will be correctly addressed and postage pre-paid. Three copies will be served by the same method on Tiffany M. Winter, AAG, Wisconsin Department of Justice, Post Office Box 7857, Madison, Wisconsin 53707-7857.

Dated this 6th day of January, 2017.

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