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COURT OF APPEALS
DISTRICT II

03-31-2017

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,)
)
 Plaintiff-Respondent,)
)
 -vs-)
)
)
 GUY S. HILLARY,)
)
)
 Defendant-Appellant.)

Appeal No. 2016 AP 1538-CR

DEFENDANT-APPELLANT’S REPLY BRIEF

Appeal of the denial of the Motion to Suppress and Judgment of Conviction entered

Walworth County Circuit Court Case No. 15 CF 167

The Honorable David M. Reddy Presiding

Respectfully Submitted:

ANEEQ AHMAD, ATTORNEY AT LAW

By: _____

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ARGUMENT

First, the State erroneously argues that the same level of probable cause for a search warrant does not apply to a subpoena. (State's Response Brief, p. 7-9). The State claims that the probable cause standard for a subpoena is substantially lower than that for a search warrant, without any authority in regards to subpoenas. The State reasons that because the probable cause threshold is substantially lower, the anonymous tip, although lacking any indicia of reliability, was nevertheless sufficient to support probable cause for the subpoena to be issued.

However, the State overlooks one critical aspect of a probable cause analysis here. This case involves probable cause based on anonymous tips. The requisite level of probable cause in any analysis of an anonymous tip entails constitutional principles, which requires an indicia of reliability. *See Illinois v. Gates*, 462 U.S. 213 (1983); *State v. Rutzinski*, 241 Wis. 2d 729 (2001). Even if this Court finds that the level of probable cause required for a subpoena is lower than that for the issuance of a search warrant, an indicia of reliability is nevertheless required under constitutional principles and precedent. The constitutional requirements for an anonymous tip apply, regardless of the stage in the proceedings - whether it is in the embryonic stages of the proceedings, or earlier, at the initial point of a criminal investigation. The Fourth Amendment's protections apply uniformly when it comes to anonymous tips.

Therefore, this Court should decide whether the anonymous tip was sufficient to establish probable cause for the issuance of the subpoena. This requires this Court to determine if there was any indicia of reliability of the tip. The tip was not reliable, as

there was no corroboration or history of the tipster providing true and accurate information in the past.

Second, the State concedes that any information that was not presented within the four corners of the warrant affidavit is irrelevant, and upon review, should be disregarded by this reviewing Court. (State's Response Brief, p. 12). The defendant-appellant therefore refers the Court to paragraph (f) of his opening brief. (Defendant-Appellant's Brief, p. 18-19). The trial court erred in taking into account any of the testimony from the officer at the motion hearing regarding the availability online of basic electrical usage information of the defendant. Both parties agree on this issue.

Third, the State concedes that without the electrical usage records, the search warrant affidavit would have lacked probable cause. (State's Response Brief, p. 14). The anonymous tips are not only weak, as the State concedes, but fail to establish any indicia of reliability. Because the electrical usage information was derived from an invalid subpoena, in violation of Wis. Stat. § 968.135, which was both a statutory violation and a Fourth Amendment violation (lack of indicia of reliability), the electrical usage information should be excised from the search warrant affidavit, under *State v. Popp*, 352 Wis. 2d 696 (2014) and *State v. Sveum*, 328 Wis. 2d 369 (2010). Because the search warrant affidavit cannot support a probable cause finding with such excisions, the evidence should be suppressed.

Fourth, even if the electrical usage information is not excised from the affidavit, the search warrant nevertheless lacked probable cause to issue, as the anonymous tips lacked indicia of reliability. Electrical usage information, standing

alone, cannot support a probable cause finding. *See State v. Loranger*, 250 Wis. 2d 198 (2002).

CONCLUSION

The evidence in this case must be suppressed, in summary, because, all of the defendant's electrical usage information should be excised from consideration due to an invalid subpoena. Even if this Court does not excise such information, the warrant affidavit still lacks probable cause because the anonymous tips from July 2014 and November 2012 both lack indicia of reliability or veracity, as there was no corroboration of such details. Because electrical usage records alone do not establish probable cause, the warrant must be quashed and the resulting evidence must be suppressed.

For the foregoing reasons, the Defendant-Appellant respectfully requests this Court to vacate his conviction, reverse the trial court's denial of his motion to suppress, and remand the matter for further proceedings, or other relief as deemed appropriate by this Court.

Dated this ____ day of March, 2017.

Respectfully Submitted:
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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this reply brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is proportional serif font. The text is 12 point type and the length of the brief is 824 words.

Dated this ____ day of March, 2017.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this reply brief, which complies with the requirements of s. 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 ___ day of March, 2017.

Respectfully submitted,

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CERTIFICATE OF DELIVERY AND PROOF OF SERVICE

I hereby certify that this brief was served upon the opposing party **David H. Perlman, Office of the Attorney General, P.O. Box 7857, Madison, WI, 53707-7857**, by mail on March 30, ____, 2017.

Dated this ____ day of March, 2017.

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