STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2017AP000603 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

RYAN L. SCHULTZ,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM CONVICTION AND
SENTENCE ENTERED ON
JANUARY 27, 2017, IN THE CIRCUIT COURT
FOR FOND DU LAC COUNTY, BRANCH 2,
THE HON. PETER L. GRIMM, PRESIDING

Respectfully submitted,

RYAN L. SCHULTZ,
Defendant-Appellant

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STATEMENT OF THE ISSUES

I. DID THE SEARCH WARRANT AFFIDAVIT CONTAIN SUFFICIENT FACTS TO ESTABLISH PROBABLE CAUSE?

TRIAL COURT ANSWERED: YES

II. DID THE SEARCH WARRANT AFFIDAVIT LEAVE OUT CRITICAL FACTS WHICH, IF ADDED, WOULD LEAD A MAGISTRATE NOT TO FIND PROBABLE CAUSE?

TRIAL COURT ANSWERED: NO

STATEMENT ON PUBLICATION

Defendant-appellant recognizes that this appeal, as a one-judge appeal, does not qualify under this Court's operating procedures for publication. Hence, publication is not sought.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issue on appeal.

STATEMENT OF THE CASE AND FACTS

This is an appeal from the trial court's denial of defendant's motion to suppress the result and analysis of the blood draw based upon a faulty search warrant affidavit. R.20, 57.

On January 19, 2016, at approximately 3:33 a.m., officers from the Fond du Lac County Sheriff's Department found a vehicle overturned in a ditch. R.29. Deputy Halfmann responded to that call, bypassed the vehicle in the ditch, and continued the short distance to the residence of the registered owner at approximately 3:48 a.m. R.29, 59:6-7. The deputy called out and looked into a small barn-like structure near the house, as a light was on in that structure. R.59:22. There was no answer there, but Sonia Schultz eventually answered the back door of the house when the deputy knocked. R.59:7. Ms. Schultz indicated to the deputy that her husband, Ryan Schultz, "should" have been operating the truck. R.59:8. She did not say she had seen him operate the truck that night. Ms. Schultz said Ryan was at home, and she had been sleeping in a different bedroom than his. R.59:8, 59:27. Ms. Schultz directed the deputy to the bedroom where Schultz was sleeping. R.59:24.

The deputy spoke with Schultz as he lay in bed and observed his face had visible injuries, and it was red. R.59:9-10. The deputy noted the injuries to his face, which were an abrasion to his nose and

some puffiness, were consistent with striking something with his face. R.29:2, 59:29. Schultz said he had not been in a crash and had scratched himself on the nose. R.29:2, 59:10. The deputy noted Schultz had red, glassy eyes, slurred speech, and he emitted a strong odor associated with the consumption of intoxicating beverages. Id. Schultz said he had been drinking Aristocrat brandy at his house. Id. Schultz also told the deputy he had drinks earlier in the afternoon at Lakeshore Mart, and either the bartender or bar owner had given him a ride home. R.59:11. The deputy directed Schultz to get up and get dressed. As he did so, she observed Schultz had an abrasion that appeared fresh on his lower right back area. R.59:29. The deputy did not observe any impressions or marks from a steering wheel or seatbelt. Id.

Deputy Halfmann then spoke with Schultz's daughter, Reily, who said that Schultz arrived home around 2:00 a.m. R.59:13. Schultz had asked for help and had complained about being frostbitten. R.59:14. It was a very cold evening, registering 7 below, according to the deputy. R.59:9. The deputy saw a towel with blood and mud on it in the bathroom. R.59:14. Neither Sonia nor Reily had seen Schultz drink alcohol at home. Id. The deputy never asked Schultz where in the home he had been drinking or where the alcohol was stored. R.59:31.

Schultz denied being injured and, accepting this, the deputy requested that Schultz perform field sobriety tests. Id. During the field sobriety tests, Schultz exhibited signs of impairment due to alcohol. R.59:15-16. Deputy Halfmann then arrested Schultz for operating while intoxicated. R.59:16. Schultz was handcuffed and placed in the back of the squad car. R.29:4. The deputy read the Informing the Accused form and requested that Schultz submit to an evidentiary test. Id. Schultz refused to submit to a test, and the deputy completed paperwork to get a warrant to obtain his blood. Id. The search warrant affidavit and the warrant itself were obtained telephonically, and the recording with the magistrate was subsequently transcribed. R.29:4, 20:7-23.

Schultz filed a motion requesting suppression of the blood test result based on the search warrant being issued without sufficient probable cause, or alternatively, because the affidavit omitted facts which would lead to a conclusion there was no probable cause to issue the search warrant. R.20. A hearing was held on that motion on July 12, 2016. R.57. The defense argued there was insufficient probable cause to allow a judge to issue a warrant to obtain his blood. The affidavit in support of search warrant prepared by Deputy Halfmann and read to the on-call judge contained the observations of Deputy Halfmann and Lt. Borgen. R.20:7. The affidavit stated Ryan Schultz

operated or drove a motor vehicle at about 2:00 a.m. Id. The affidavit further listed the following facts:

- one prior conviction for operating while intoxicated
- "vehicle crashed and injuries with driver consistent to him operating vehicle"
- admitted to consuming intoxicants – "drank at gas station bar"
- speech was: incoherent, slurred, slow
- attitude was: confused
- balance was: falling, unsteady, swaying, needing support
- eyes were: bloodshot, glassy
- Field sobriety tests: 6 of 6 clues on the horizontal gaze nystagmus; 6 of 8 clues on the walk and turn; and 3 of 4 clues on the one leg stand.

R.20:7-9.

The deputy read the affidavit to the on-call judge without including additional facts or information. R.20:13-23.

On the issue of whether the affidavit contained enough information to reach the level of probable cause, the Court found that the judge who issued the search warrant did make specific findings of fact, and included "all of the observations that the deputy testified to." R.57:9. The Court further found that "the standard for probable cause is low." Id. In explaining its decision, the Court said,

> I realize it's a close call to make. Defense has strong arguments, but in terms of the low level for probable cause, it is sufficient for the officer's observations to be accepted and have conclusions drawn thereto that the defendant had physical injuries from an accident consistent with him being the driver, and the extra detail, while it wouldn't have hurt, I don't think makes it fatal in this case.

> So the motion would be denied, as I do conclude as a matter of law that the quantum of evidence to support the search warrant has been shown for probable cause, and the motion is, therefore, denied.

R.57:10-11.

The defense then argued the affidavit in support of the search warrant omitted important facts known to the deputy at the time and, had those facts been included in the warrant, there would not have been probable cause to issue the search warrant. R.57:11. On that issue, the Court ruled:

> And after some point officers and judges have to look at the facts. And the self-representations of the defendant in denying facts, those are matters of credibility for the jury and not for me to weight. And I conclude as a matter of law that while the facts in here would have been helpful for Judge English to have a full picture, none of these items as amended would have changed the outcome given that the injuries were consistent with the defendant being in the motor vehicle with a crash, and since he said he wasn't in the crash, it's a safe conclusion that he was the driver as well.
>
> So I find there hasn't been a showing of omission of facts intentionally or facts that are just flat out wrong or done with reckless disregard for the truth or omitted with the reckless disregard for the truth. So under the *Franks* theory of the evidence and the motion thereto, it's denied.

R. 57:21-22.

The Court later heard a suppression motion the defense brought as to whether the deputy had the legal authority to enter Schultz's bedroom and question him or whether the information developed from the investigation from that point should be suppressed. R.59. That motion was also denied. R.59:45-48.

The defendant then pled no contest, reserving his right to appeal the denial of the suppression motions. R.60. Schultz timely filed a Notice of Intent to Pursue Post-Conviction Relief and Notice of Appeal to this Court. R. 37; R. 48.

ARGUMENT

I. THE SEARCH WARRANT AFFIDAVIT DID NOT ESTABLISH PROBABLE CAUSE, AND NO WARRANT SHOULD HAVE ISSUED.

A. Standard of Review

Whether a search is valid is a question of law to be reviewed *de novo* by this Court. ***State v. Guzman***, 166 Wis. 2d 577, 586, 480 N.W.2d 446 (1992). A reviewing court is confined to the record that was before the warrant-issuing magistrate to determine whether there was probable cause to issue the search warrant. ***State v. DeSmidt***, 155 Wis. 2d 119, 132, 454 N.W.2d 780 (1990). The reviewing court has a duty to ensure that the magistrate had a substantial basis to conclude there was probable cause on those facts before the issuing magistrate. ***State v. Jackson***, 313 Wis. 2d 162, 169, 756 N.W.2d 623 (Ct. App. 2008).

This Court reviews the circuit court's findings of fact under the clearly erroneous standard. ***State v. Padley***, 2014 WI App 65, ¶ 65, 354 Wis. 2d 545, 849 N.W.2d 867. Thus, this Court will generally defer to the lower court's fact and credibility determinations. ***Padley***, 2014 WI App 65 at ¶ 65. However, this Court owes no deference to the lower court's legal conclusions. ***Id.***

B. The Facts in the Affidavit were Insufficient

A search warrant cannot be issued unless a neutral and independent magistrate is presented with sufficient facts to make his own independent determination of probable cause. ***State ex rel. Pflanz v. County Court***, 36 Wis. 2d 550, 556, 253 N.W.2d 559 (1967). The facts supporting probable cause must be found within the four corners of the affidavit. ***State v. Haugen***, 52 Wis. 2d 791, 793, 191 N.W. 2d 12 (1971). The affidavit must answer the question, "how do we know?" This is done when the affidavit answers the five basic questions: what, who, where, when, why as well as the sixth 'W' - who says so. ***State ex rel. Evanow v. Seraphim***, 40 Wis. 2d. 223, 230, 161 N.W. 2d 369 (1968).

The facts supporting probable cause must be found within the information actually presented to the neutral and independent magistrate. Here, the facts presented were only that there was a motor vehicle accident, that Schultz had injuries consistent with being the driver in a motor vehicle accident, that Schultz exhibited signs of alcohol impairment, that he admitted to drinking alcohol, and that he exhibited signs consistent with alcohol impairment.

Because the deputy was requesting a search warrant be issued for Schultz' blood to be taken and examined for evidence that he was operating a motor vehicle while impaired by alcohol, the affidavit

must contain facts to support probable cause to believe Schultz 1) operated a motor vehicle on a public road and 2) was impaired by alcohol at the time of that operation. That is the answer to "what," what crime is charged here. Taking each question that must be answered in turn, it is clear that the facts in the affidavit are insufficient to support probable cause.

In this matter, the "where" is not in dispute as the vehicle was found overturned in the ditch not far from the residence of the registered owner, Sonia Schultz. Additionally, the "who," as in who says so, is easily answered as the affidavit is based upon the deputy's investigation as supplemented by a lieutenant.

However, the other questions are more important here. First, there is the question of "when" - as in, when did the incident happen? While the affidavit indicates the time of the incident was 2:00 a.m., there are no stated facts supporting that averment. The time of the accident itself is unknown, as it was discovered sometime later, after 3:30 a.m. Therefore, the time of operation of the vehicle is unknown. The deputy could have put additional facts in the affidavit to indicate Schultz had returned home at about 2:00 a.m. and, therefore, allowed the magistrate to draw an inference the accident had occurred prior to 2:00 a.m. However, there are no such facts in the affidavit. Consequently, the affidavit has no information in support of the

officer's assertion that the time the incident occurred was 2:00 a.m. Even the information available to the officer, had it been conveyed, would have meant the accident occurred prior to Schultz arriving at home (according to his daughter) at 2:00 a.m.

All the facts necessary to the finding of probable cause must be found within the four corners of the document. ***State ex rel. Evanow v. Seraphim***, 40 Wis. 2d 223, 226 161 N.W. 2d 369 (1968). Here the officer's assertion in the search warrant that the incident occurred at 2:00 a.m. is not supported by any fact, nor does it correctly state the reasonable inferences that could be drawn from the actual facts, had they been presented. Consequently, there is no sufficient showing of when the alleged crime occurred.

Next the question of "why" – why is this particular person being charged? The subject of the affidavit is Ryan Schultz. The further question that must be answered is whether he was the operator of the motor vehicle at the time of the accident. The sole fact given in support of this contention is "vehicle crashed and injuries with driver consistent to him operating a vehicle." However, those injuries are not described in any way – the conclusory statement is made without stating facts such as: what type of accident occurred and how the injuries match the circumstances of the crash. The warrant-issuing judge's determination of probable cause cannot be upheld if the

affidavit provides nothing more than the legal conclusions of the affiant. ***State v. Higginbotham***, 162 Wis. 2d 978, 992, 471 N.W. 2d 24 (1991). There is no analysis of whether those injuries were consistent with a person driving a vehicle as opposed to riding as a passenger in a vehicle that had overturned. Finally, there is nothing within the affidavit as to why this officer believes she has the expertise necessary to conduct an accident reconstruction and determine who was driving a vehicle solely due to abrasions on Schultz' body, especially given the statements as to how the injuries occurred that are inconsistent with them occurring during a car accident.

Even if he was the operator of the vehicle, the question of why Schultz is charged is not answered unless there are sufficient facts to show he was impaired at the time of the operation. The accident happened at an unknown time. The affidavit states that the incident occurred at 2:00 a.m. but, again, there are no facts which back up that assertion. Even if it is presumed that the incident happened at 2:00 a.m., the only other fact regarding drinking is that Schultz admitted to consuming alcohol earlier in the afternoon at a gas station bar. The affidavit does not include any time of consumption or amount of alcohol consumed. The search warrant was signed at 4:58 a.m., indicating a lengthy period of time between the alleged incident, police contact, and conclusion of the investigation. The fact that the

incident occurred at 2:00 a.m., and the defendant admitted to drinking an unknown amount of alcohol at an unknown time prior to that before being found intoxicated at his home hours later, is not sufficient to establish probable cause to believe he was impaired by alcohol at the time he operated the vehicle even if the affidavit established he was actually the operator.

A neutral and detached magistrate looking at the facts in the affidavit, does not have enough information to determine whether the officer has correctly concluded that there is a probability that Schultz was the person operating the motor vehicle. The probable cause determination must be made based upon what a reasonable magistrate can infer from the information presented by the police. ***State v. Ward***, 2000 WI 3, ¶ 26, 231 Wis. 2d 723, 736, 604 N.W. 2d 517. The magistrate must be presented with facts sufficient to form their own conclusion based upon consideration of the known facts and common-sense probabilities. ***Id.*** at ¶33 citing ***State v. Bernth***, 246 N.W. 2d 600 (Neb. 1976). Here the facts presented were not sufficient for the magistrate to form a such a conclusion.

The information provided does not allow for a reasonable inference because there are insufficient facts for a neutral and detached magistrate to independently evaluate whether the injuries referenced are consistent with an accident. Nor is there enough to

determine whether the injuries are consistent with a person being an operator of a motor vehicle, as opposed to a passenger in a motor vehicle. Consequently, a reasonable magistrate is left without sufficient facts to support the contention that Schultz was probably guilty of a crime in this matter.

A neutral and detached magistrate, reviewing the facts presented in this affidavit is left without the ability to reasonably evaluate and determine that all of the 'W's' have been answered. The magistrate must have the ability to reasonably determine what the crime is, when and where the offense was alleged to have happened, why it is believed the defendant committed the offense, and who said he committed the offense. ***State ex rel. Evanow v. Seraphim***, 40 Wis. 2d 223, 230, 161 N.W. 2d 369 (1968). The probable cause determination must be based upon what a reasonable magistrate can infer from the information presented by the deputy. ***State v. Ward***, 2000 WI 3, ¶ 26, 231 Wis. 2d 723, 604 N.W.2d 517.

A reviewing court must consider whether the record before the magistrate, when objectively viewed, provided sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime. ***Id.*** 2000 WI 3, ¶27, citing ***State v. Kerr***, 181 Wis. 2d 372, 378, 511 N.W. 2d 586 (1994). Because those facts were not provided in the affidavit in this matter, no warrant

should have been issued. The warrant was missing facts that would reasonably link the crash that occurred to the type of injuries Schultz had. These facts would have shown he was possibly driving at the time of the accident. The facts given to the magistrate were missing the time of consumption of alcohol, the amount of alcohol consumed prior to the time of the crash, and the amount of time that passed before observed alcohol impairment. Furthermore, in the absence of any facts establishing any admission that Schultz operated or that anyone saw him operate, no probable cause as to operation can be presumed from the mere conclusory statement that he had injuries consistent with operation. More facts are necessary to excite a reasonable belief that Schultz committed a crime. The evidence obtained from the search must, therefore, be suppressed.

II. THE MAGISTRATE WOULD NOT HAVE ISSUED THE SEARCH WARRANT HAD THE POLICE NOT OMITTED MATERIAL FACTS FROM THE AFFIDAVIT.

Deputy Halfmann's numerous material omissions from the warrant concealed the real circumstances of the accident and Schultz's arrest. Had it not been for these omissions, the warrant would not have been issued. The United States Supreme Court in ***Franks v. Delaware,*** 438 U.S. 154 (1978) said:

> [W]e hold that, where the defendant makes a substantial preliminary showing that a false statement knowingly and

> intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Franks v. Delaware, 438 U.S. 154, 155-156 (1978).

Subsequent case law has extended the *Franks* ruling to specifically cover material omissions by an affiant. The Wisconsin Supreme Court has clarified the standard: "The ***Mann*** court held that an omitted fact must be undisputed, capable of single meanings and critical to a probable cause determination in order to be viewed as the reckless disregard for the truth required by ***Franks***." ***State v. Gordon*** 159 Wis. 2d 335, 464 N.W.2d 91 (Ct. App. 1990) (citations omitted), *citing* ***State v. Mann***, 123 Wis. 2d 375, 388, 367 N.W.2d 209 (1985).

"A warrant affidavit must set forth particular facts and circumstances underlying the existence of probable cause, so as to allow the magistrate to make an independent evaluation of the matter." ***Franks v. Delaware***, 438 U.S. 154, 165 (1978) (Blackmun, J.). Consequently, the affidavit must recite underlying circumstances from which the magistrate can independently determine there is probable cause. ***Id***. When there is a critical omission from the complaint where inclusion is necessary for an impartial magistrate to

fairly determine probable cause, that is not significantly different than a false statement made knowingly and intentionally or with reckless disregard for the truth. ***Mann***, 123 Wis. 2d 375 at 385-86. With a search warrant, if the critical facts omitted would have led to a neutral and detached magistrate finding there was not probable cause to issue the warrant, then the evidence must be suppressed. The reviewing court gives deference to the magistrate's determination that an affidavit establishes probable cause but independently reviews whether an affidavit establishes probable cause to issue a search warrant after a circuit court has made ***Franks/Mann*** excisions. ***State v. Marquardt***, 2005 WI 157, ¶ 23, 286 Wis. 2d 204, 705 N.W. 2d 878, ***State v. Herrmann***, 233 Wis. 2d 135, 143, 608 N.W. 2d 406 (Ct. App. 2000). In this case, the lower court held that even with the information alleged to have been omitted, the magistrate could have found probable cause. That holding is, therefore, independently reviewed.

Deputy Halfmann failed to include so much pertinent information in her affidavit in support of the search warrant in this case that it at least constitutes a reckless disregard for the truth.

- 1) the deputy observed the accident when she drove by but she failed to mention that the nature of the crash was that a truck was upside down in the ditch. R.59:22.

- 2) she failed to mention Schultz was not in the truck or near the truck but instead was first contacted laying in his bed with his eyes closed. R.59:9.
- 3) she failed to include the fact that Schultz denied having been in a crash. R.59:10.
- 4) Schultz also denied driving his truck that night. Id.
- 5) the deputy includes in the affidavit that Schultz admitted to drinking at a gas station bar but does not include the information that he said he had a couple of drinks there earlier in the afternoon. R.59:11. Given that contact was made after 3:30 a.m., that would have been about half a day before police contact.
- 6) although she includes the admission to drinking at the bar, she does not include that he stated he had been drinking brandy at home. R.59:10.
- 7) the deputy did not include the description of Schultz's injuries which were a scrape near his nose, reddened face, and scratches on his lower back. R.59:9,59:29 She did not include his explanation that he had merely scratched his nose.
- 8) the deputy does not include that the injuries are consistent with many other causes and does not link them

specifically with a rollover crash, either with or without a seatbelt. R.59:29.

- 9) the deputy does not include her observations that there was no mark on Schultz consistent with either hitting his chest on the steering wheel or consistent with a mark from a seatbelt. R.59:29.

The deputy omitted all of these crucial facts that should have been shared with the issuing magistrate because the magistrate must be given the facts necessary to reach an independent conclusion. ***State v. Mann***, 123 Wis. 2d at 5. Had the magistrate been informed of what the actual injuries were and the type of accident, it would have called into question whether those injuries (a scratch by the nose, reddened face, and scratches on his back) were consistent with a rollover accident. Had the magistrate been informed that Schultz was not contacted at the scene of the accident, but much later when he was at home and in bed, it would have called into question the inferences that he was driving at the time of the accident and that he was impaired at an earlier point in the evening. Had the magistrate been informed that Schultz admitted to drinking at a bar about twelve hours before but admitted to drinking brandy at home more recently R.59:10, it would have called into question whether signs of impairment by alcohol lead to reason to believe he was impaired at the time of driving.

The trial court stated that "while the facts in here would have been helpful for Judge English to have a full picture, none of these items as amended would have changed the outcome given that the injuries were consistent with the defendant being in the motor vehicle with a crash." R.57:22. However, the trial court did not explain how the 'injuries' even as described were consistent with a rollover accident. Nor did the trial court explain why it was not reckless disregard for the truth when deputy Halfmann included Schultz' admission to drinking at the bar but excluded his admission to drinking at home.

Most egregiously, nowhere in the affidavit is the magistrate apprised of the circumstances of how and where Schultz was found in relation to the time and place of the accident. If the accident theoretically occurred at 2:00 a.m. or before, the police went to the Schultz residence at about 3:48 a.m., and Schultz was found in his bed, that was important information for a neutral and detached magistrate to have when evaluating whether there was probable cause to issue a warrant.

The deputy omitted important and necessary information from the affidavit. When, as here, an affidavit is the only evidence presented to a magistrate in support of a search warrant, the validity of the warrant rests solely on the strength of the affidavit. ***United***

States v. Peck, 317 F. 3d 754, 755-56, (7th Cir. 2003). While the trial court ruled the affidavit would still have reached the level required even had all the information been included, that holding is subject to independent review by this Court. A neutral and detached magistrate could not find sufficient facts for probable cause when all of the omitted facts are included.

When issuing the warrant, the magistrate summarized the information provided in the affidavit – the time of driving at 2:00 a.m., refusal for a blood test[1], one prior drunk driving conviction, an accident was involved, the officer's observations including an admission of drinking, Schultz was incoherent, confused, issues with balance, eyes bloodshot and glassy, and an odor of intoxicants. R.20:20-21. From this recitation, it is clear that the magistrate was not apprised of the fact that Schultz was not found at the accident scene and that the "injuries" he had on his person were not consistent with a significant rollover accident. The magistrate was not apprised that Schultz gave an alternative explanation for the scratch to his nose. Further, the magistrate was not apprised that the admission to drinking was "earlier in the afternoon" – almost 12 hours before the alleged driving and that Schultz stated he had been drinking at home after that.

[1] The deputy's report indicates she requested Schultz submit to a breath test. R.29:4.

As it relates to issues of bloodshot, glassy eyes, incoherence and balance issues, the magistrate was not informed or aware that Schultz was pulled from his bed hours after the accident could have occurred, had he been driving. Finally, and perhaps most importantly, the magistrate was not informed that Schultz denied driving and, therefore, was unable to draw any conclusions or make any findings as to whether there was probable cause to believe Schultz was operating the vehicle.

An affidavit for a warrant must set out particular facts and circumstances going to the existence of probable cause to allow the magistrate to make an independent evaluation of the matter. ***Franks***, 438 U.S. at 165. In reviewing a warrant to determine whether it states probable cause, the reviewing court is limited to the record before the warrant-issuing magistrate. ***State v. Higginbotham***, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991). There must be a sufficient factual showing that a reasonable person would believe that the object sought by the warrant is linked with the commission of the crime and will be found in the place to be searched. ***DeSmidt***, 155 Wis.2d 119, 131-32, 454 N.W.2d 780 (1990), quoting ***State v. Starke***, 81 Wis. 2d 399, 408, 260 N.W.2d 739 (1978). The duty of the reviewing court is to ensure that the magistrate had a substantial basis to conclude that probable cause existed. ***DeSmidt***, 155 Wis. 2d at 133, 454 N.W.2d 780 (1990).

The magistrate was unaware of the real circumstances of the accident and the arrest of Schultz. When the omitted facts are included, the burden cannot be met here because there was not a substantial basis to conclude there was probable cause to issue the warrant. Therefore, the Fourth Amendment was violated, and the results of the search must be suppressed. ***Mapp v. Ohio***, 367 U.S. 643, 670, 81 S. Ct. 1684 (1961), quoting ***Wolf v. Colorado***, 338 U.S. 25, 42, 69 S. Ct. 1359 (1949).

CONCLUSION

Schultz would not have entered a plea to the charge in circuit court except for the trial court's incorrect ruling. For the reasons stated above, the judgment of the trial court should be reversed, and this action be remanded to that court, with directions that the court grant Schultz's motion to suppress.

Dated at Madison, Wisconsin, August 31, 2017.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

Proportional serif font: Min. printing resolution of 200 dots per inch, 13-point body text, 11-point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 5880 words.

I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated: August 31, 2017.

Signed,

_____

SARAH M. SCHMEISER
State Bar No. 1037381

CERTIFICATION

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 notion that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: August 31, 2017.

Signed,

_____

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