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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Case No. 2017AP2289-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDREW ANTON SABO,

Defendant-Appellant.

On Notice of Appeal from a Judgment of Conviction Entered
in Milwaukee County Circuit Court, the Honorable Timothy
Witkowiak, Presiding

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Did the affidavit in support of the search warrant provide probable cause for the court to believe that evidence of a crime would be found at Mr. Sabo's home?

The trial court answered "yes."

2. Is Mr. Sabo entitled to a *Franks-Mann* hearing?

The trial court answered "no."

3. Is Mr. Sabo entitled to the disclosure of the identity of confidential informant in this case?

The trial court answered "no."

POSITION ON ORAL ARGUMENT AND PUBLICATION

Counsel does not request oral argument. Publication is not likely warranted because this case applies well-established law to the facts of the case.

STATEMENT OF THE CASE AND FACTS

Charges

On January 26, 2015, Milwaukee County Court Commissioner Rosa Barillas signed a warrant authorizing police to enter 3718 West Burnham Street. (7:1; App. 137). The sole basis of the warrant was an affidavit from Officer Rodolfo Ayala, a police officer with the Milwaukee Police Department. (8; App. 138-42). The affidavit alleged in pertinent part that:

10. That affiant was contacted by the reliable concerned citizen witness who informed affiant that within the past seven (7) days that the reliable concerned citizen witness was inside of a residence located at **3718 West Burnham Street** . . . when the reliable concerned citizen witness that the reliable concerned citizen witness [sic] observed a firearm. The confidential informant knew the firearm to belong to “Drew”; that the reliable concerned citizen witness further informed affiant that it was the reliable concerned witness belief that “Drew” is a convicted felon and therefore prohibited from the possession of a firearm; The reliable concerned citizen witness described the firearm as a black semi-automatic pistol. The reliable concerned citizen witness also knows for “Drew” to conduct narcotic transactions of cocaine base. The reliable concerned citizen witness observed “Drew” weighing and packaging cocaine base for distribution within the past seven (7) days in the residence at **3718 West Burnham Street**.

(8:1-2, ¶ 10; App. 138-39) (emphasis as supplied in the original).

In regards to follow-up investigation, the affidavit alleged that:

11. That affiant was able to search the data bases kept and maintained by the Milwaukee Police Department regarding individuals who have come in contact with police officers and detectives of the Milwaukee Police Department by means of an arrest, traffic stop, field interview, filing of a report, etc., and was able to obtain the identity of “**Drew**” as being **Andrew A. Sabo, w/m, 09-03-81**; that affiant obtained the last booking photograph of Andrew A. Sabo, w/m, 9-03-81 which was Booking Photograph No. 111030173 which affiant did provide to the reliable concerned citizen witness who did positively identify **Andrew A. Sabo, w/m, 9-03-81** as “Drew” and did further identify **Andrew A. Sabo,**

w/m, 9-03-81 as the individual in possession of the firearm at the residence of **3718 West Burnham Street...**

12. That affiant conducted further investigation on January 26, 2015, by physically proceeding to 3718 West Burnham and conducting surveillance at said location. Affiant while present at this location observed the target of this search warrant, **Andrew A. Sabo, w/m, 09-31-81**, leaning out an upper window of the premises. Officer Ayala took the opportunity to engage **Andrew A. Sabo, w/m, 09-03-81** in conversation at this time. Officer Ayala positively identified the individual he spoke with you [sic] as leaning out of the upper window as being the target herein, **Andrew A. Sabo, w/m, 09-03-81**.

13. That affiant conducted various follow-up investigations into **Andrew A. Sabo, w/m, 09-03-81** that included checking out for any warrants in the NCIC. Affiant received a hit that **Andrew A. Sabo, w/m, 09-03-81** is currently on probation for Possession of a Controlled Substance with Intent to Deliver-Cocaine and Bail Jumping-Felony.

14. That affiant did also check the records of the Wisconsin Circuit Court Access System, also known as CCAP, and ascertained that in Milwaukee County Case No. 2010CF4539 in the matter of the State of Wisconsin versus Andrew A. Sabo, w/m, 09-03-81 filed on 09-16-10, that **SABO** was charged with the felony offense of Bail Jumping, Class H felony, to which **Andrew A. Sabo, w/m, 09-03-81** did enter a guilty plea on 09-14-2011 before the Honorable J.D. Watts; that on this same date the Honorable J.D. Watts informed **SABO** that he, **SABO**, as a convicted felon was not able to possess any weapons; furthermore, affiant asserts that this felony criminal conviction remains of record and un-reversed thereby prohibiting **Andrew A. SABO, w/m, 09-03-81** from the possession or constructive possession of any firearms;

15. That affiant knows from personal observation **3718 West Burnham Street** is the upper unit of a two family, two story duplex dwelling having white siding, white trim, and a gray shingled roof that the numbers “**3718**” are prominently displayed horizontally to the right of the front door, on a pillar, which is on the south side of the dwelling. The primary entry door for **3718 West Burnham Street** is on the south side of the dwelling . . .

(8:2-3, ¶¶ 11-15; App. 139-40) (emphasis applied as in document).¹

The search warrant was executed and officers seized a number of items from the residence including a revolver, a pistol, scales, cocaine, and marijuana plants under a heat lamp. (1:2-3).

The State charged Mr. Sabo with three counts: (1) possession with intent to deliver (cocaine), second and subsequent offense, contrary to Wis. Stat. §§ 961.41(1m)(cm)2 & 961.48(1)(b); (2) possession of a firearm by a felon, repeater, contrary to Wis. Stat. § 941.29(2)(a); and (3) possession of a firearm by a felon, repeater, contrary to Wis. Stat. § 941.29(2)(a). (1:1-2).

Subsequently, an amended information added two counts: (4) manufacture of a controlled substance (THC), use of a dangerous weapon, second and subsequent offense, contrary to Wis. Stat. §§ 961.41(1)(h)2 & 961.48(1)(b); and

¹ According to the suppression motion filed in this case, Officer Ayala was at Mr. Sabo’s apartment at 1:19 p.m. on January 26, 2015. (6:4 n.2). Assistant District Attorney Laura Crivello reviewed and approved the affidavit the same day at 2:00 p.m. and Commissioner Barillas signed the affidavit 21 minutes later. (*Id.*).

(5) keeping a drug house, use of a dangerous weapon, contrary to Wis. Stat. § 961.42(1). (28:2-3).

Suppression Motion and Hearing

Mr. Sabo filed a motion seeking to suppress all of the evidence seized and any derivative evidence. (6:21). Mr. Sabo alleged that the affidavit attached to the search warrant “fail[ed] to establish the veracity, reliability, or credibility of his informant,” and “did not demonstrate that his informant possessed a ‘wealth of detail’ that would have been sufficient to infer that the basis of his informant’s knowledge was ‘sound.’” (6:5-14).

Mr. Sabo further requested a ***Franks-Mann*** hearing asserting that “the allegations made by Ayala’s informant are false—specifically, Sabo denies that his nickname is ‘Drew’ and that an informant was ever in his apartment.” (6:15). Additionally, the motion asserted that the informant “was wrong about important details” and omitted the fact that Mr. Sabo’s apartment was “fastidiously ringed with surveillance cameras.” (6:16).²

² In support of the request for a ***Franks-Mann*** hearing, the motion also asserted that surveillance footage “will reveal that approximately six to seven individuals other than him were in his apartment in the week that Ayala’s informant claims he or she was in Sabo’s apartment” and that “counsel for Sabo anticipates identifying those six to seven individuals by name, along with statements from each of them indicating that they are not Ayala’s informant.” (6:15). This argument is not pursued on appeal.

In addition, Mr. Sabo requested that the court order the State to disclose the identity of its informant. (6:17).³

In a written response, the State argued that the search warrant affidavit provided a substantial basis for a probable cause finding. (12:4-9). The State also argued that the defense failed to make the requisite showing for a *Franks-Mann* hearing. (12:9-14). In regards to the defense's request for the disclosure of the identity of the informant, the State asserted that "[i]f the court determines that the affidavit provided [the commissioner] with a substantial basis upon which to make her probable cause finding, the court should necessarily deny this motion to compel disclosure." (12:14). However, the State indicated that "[i]f the Court is not so satisfied, or if in camera disclosure of the informant's identity will help the Court be satisfied, the State is not opposed." (*Id.*).

After several adjournments, the Honorable Timothy Witkowiak denied the defense motion. (52; 53; 54; 61; App. 101-21). The court stated:

³ The motion also argued the good faith exception does not apply in this case. (6:18-19). It is Mr. Sabo's continued position that the good faith exception does not apply in this case. However, at the trial court level, the State did not respond to this argument. The State's written response indicated that it "reserves the right to brief the good faith issue more fully in the event that the defendant carries his burden and demonstrates the invalidity of the warrant." (12:2). Given that the State did not brief this issue and the circuit court did not make a decision on this basis, Mr. Sabo does not address the good faith exception in this brief. Instead, Mr. Sabo respectfully requests that if this issue is reached, that this Court remand this case to the circuit court for a decision.

Here what we have is a citizen who reports seeing the defendant – and I think it was loading bullets into a magazine of a gun – also indicates that he saw the defendant working on cocaine. While I don't have any description of the entirety of the premises, the officer then uses that information to confirm some things. First of all, confirms that Drew – and finds out it is Andrew – lives there, finds out there is a felony conviction that this person has, checks the address – is there at the address defined by this person.

The Court will find that the information is deemed credible. I understand that there was no prior information provided by this person – at least not put in the affidavit – but an affidavit doesn't have to contain the entirety of what the confidential informant or concerned citizen would see. The Court will find that there was sufficient information provided with the affidavit to establish probable cause and, therefore, the Court will deny the motion.

And I don't challenge – sometimes warrants aren't processed and done efficiently. In this case it was. Drug type cases, I assume, there has to be some efficiency in order to find the product that the officers are searching for. So the Court will deny the motion.

(61:17-18; App. 116-17).

Subsequently, the court also noted that the presence of surveillance cameras on Mr. Sabo's residence "are a kind of indication that perhaps there is some drug activity occurring" and "it just seems to corroborate statements made by witnesses." (61:19; App. 118).

The court also stated that it "won't entertain the defense motion to set a *Franks-Mann* hearing . . . I don't have enough here to entertain that type of hearing." (61:20; App. 119).

***Renewed Motion for Franks-Mann Hearing and to Disclose
the Identity of the State's Informant***

Subsequently, after an additional adjournment, the defense renewed its motion for a ***Franks-Mann*** hearing and for the State to disclose the identity of informant. (55; 16). In support, the motion alleged that a man with pending homicide and kidnapping charges, Albert Martinez, came to trial counsel's office and stated that he called 911 and "lied" about Mr. Sabo having "guns and drugs" in his residence. (16:2-3). The motion argued that: "[w]hen all of this information is considered, the only possible conclusions to be drawn are that (1) Ayala's informant was not Martinez; (2) Ayala's informant does not exist; or (3) Ayala falsified facts within his affidavit in an effort to create probable cause by bootstrapping Martinez's vague and false tip about contraband within Sabo's apartment." (16:4).

At the hearing on the renewed motion, the defense argued that "[t]his could all be solved . . . with a five-minute conversation back in the court's chambers with Officer Ayala or with the State. Here's our informant, here's where we got the information. Done. Case over. That's all I've been asking for this entire time." (56:12; App. 133).

In response, the State argued at the hearing that the defense did not provide a substantial preliminary showing for a ***Franks-Mann*** motion hearing. (56:3; App. 124). Additionally, in regards to the in-camera disclosure request, the State argued that there was no reason to find that the informant was "non-reliable." (*Id.*).

The Honorable Timothy Witkowiak denied the renewed motion, finding that the defense did not present "a substantial preliminary showing." (56:13; App. 134). During the hearing, the court noted that "this person was so

incredible at the time he makes that [911] phone call, but he was much more credible at the time he comes into your office about what happened” and “my concern is obviously the tape isn’t there. That would make it crystal clear as far as what occurred.” (56:8-9; App. 129-30). In addition, during the hearing, the court also stated that:

What [the defense is] giving me is a statement now made by somebody who’s accused of murdering and burning somebody down in Texas. What I’ve got is an affidavit from an officer that establishes probable cause.

I can’t, at this point, find that the defense has given me enough to show what it needs to show to conduct that Franks-Mann hearing; therefore, the court will deny the motion.

(56:13; App. 134).

Plea and Sentencing

Mr. Sabo subsequently pled guilty to three counts: (1) possession with intent to deliver (cocaine), second and subsequent offense; (2) possession of a firearm by a felon, repeater; and (3) possession of a firearm by a felon, repeater. (1; 38:1; 65:2-3). In exchange, the State agreed to recommend 8 to 10 years of initial confinement and 5 years of extended supervision. (29:2; 65:3). The State to agreed withdraw the amended information with two additional counts. (28; 65:2).

At sentencing, the Honorable Timothy Witkowiak imposed a total prison sentence of 8 years (4 years initial confinement and 4 years extended supervision). (38:1; 66:21-22).

Additional relevant facts will be referenced below.

ARGUMENT

I. The affidavit in support of the search warrant failed to provide probable cause for the court to believe that evidence of a crime would be found at Mr. Sabo's home.

A. Legal principles.

The Fourth Amendment of the United States Constitution and Article I, section 11 of the Wisconsin Constitution provide that no warrant shall issue "but upon probable cause." In determining whether probable cause exists, courts must use "the totality-of-the-circumstances analysis that traditionally has informed probable-cause determinations." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). The Court in *Gates* described the analysis as follows:

The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Id.

Accordingly, the magistrate may consider only the facts set forth in the affidavit supporting the warrant application. *State v. Ward*, 2000 WI 3, ¶ 26, 231 Wis. 2d 723, 604 N.W.2d 517. The determination "must be based upon what a reasonable magistrate can infer from the information presented by the police." *Id.* "On review it must appear that the magistrate was apprised of 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 objects sought will be found in the place to be searched.” *State v. Starke*, 81 Wis. 2d 399, 408, 260 N.W.2d 739 (1978).

A reviewing court is confined to the record established before the magistrate at the time the warrant was issued. *Id.* Although the magistrate’s determination must be accorded “great deference,” the duty of the reviewing court is to ensure that the magistrate had a substantial basis for concluding that probable cause existed. *Ward*, 231 Wis. 2d 723, ¶ 21; *Gates*, 462 U.S. at 238-39.

Magistrates cannot merely ratify the bare conclusions of others. “In order to ensure that such an abdication of the magistrate’s duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued.” *Gates*, 462 U.S. at 239.

While this Court must employ a deferential standard in reviewing the issuing magistrate’s determination of probable cause, it owes no deference to the circuit court’s decision upholding the warrant’s validity. *See State v. Johnson*, 231 Wis. 2d 58, 67, 604 N.W.2d 902 (Ct. App. 1999).

As discussed below, in this case, this Court should conclude that the affidavit in support of the search warrant failed to provide probable cause.

B. The affidavit does not establish the informant’s basis of knowledge.

To demonstrate an informant’s basis of 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.” *State v. Romero*, 2009 WI

32, ¶ 22, 317 Wis. 2d 12, 765 N.W.2d 756. This can be shown by “an explanation of how the declarant came by his or her information” or indirectly, if, for example, the declarant provides a wealth of detail. *Id.*

In this case, the affidavit fails to describe any characteristics of the informant that would make the informant knowledgeable about illegal narcotics. The affidavit states that the informant “observed ‘Drew’ weighing and packing cocaine for distribution . . .” and “knows ‘Drew’ to conduct narcotic transactions of cocaine base.” (8:2-3, ¶ 10; App. 139-40).

The affidavit does not state how the informant knows the substance that “Drew” was weighing and packaging was actually cocaine. The affidavit does not state that the informant previously used cocaine, that Mr. Sabo admitted he was weighing and packaging cocaine, that Mr. Sabo’s actions were somehow unique to cocaine, that the informant bought cocaine and brought it to the police for testing, or that the informant used some of the observed substance and experienced cocaine-like effects. Thus, the affidavit contains no information that would lead the issuing commissioner to conclude that the substance the informant observed was in fact cocaine.

Additionally, the affidavit does not state how the informant “knows ‘Drew’ to conduct narcotic transactions of cocaine base.” Did the informant see him sell or buy cocaine? Did the informant sell or buy cocaine from him?

Moreover, the informant did not provide a “wealth of detail” that would lead an issuing magistrate to conclude that Officer Ayala’s informant had a basis for his allegations that cocaine and a firearm would be found at Mr. Sabo’s apartment. The affidavit does not contain any information

regarding the layout of “Drew’s” apartment, the furnishing in the apartment, how the informant knew “Drew,” how he gained entrance into Drew’s apartment (was it to buy or sell drugs?), or why he believed “Drew” was a felon. Did the informant look Mr. Sabo up on CCAP, hear that he was a convicted felon from the street, or was he convicted with Mr. Sabo as a co-defendant? The informant does not provide any information as to how or for how long he or she knew Mr. Sabo, when or how they met, his or her relationship to Mr. Sabo, or how he or she came to know Mr. Sabo as “Drew.”

In the State’s written response, it noted that the affidavit states:

8. The affiant believes that the disclosure of the reliable concerned citizen witness’s identity would place the concerned citizen in danger and would create a great deal of tension in the relationship between the target of the warrant and the concerned citizen. This concerned citizen indicated that the concerned citizen stepped forward out of fear that the target would become engaged in violence utilizing the firearm observed by the concerned citizen.

(12:8; *see* 8:2, ¶ 8; App. 139). Based on this paragraph, the State asserts that this means that a “relationship exists” between the informant and Mr. Sabo. Additionally, because the affidavit indicates that “revealing the informant’s identity would ‘create a great deal of tension in the relationship’ [this] gives rise to reasonable inferences, e.g., that the relationship is one of trust.” (12:8).

First, regardless of whether a target of a warrant and an informant know each other or are complete strangers, it seems that disclosure would mostly likely always result in “a great deal of tension in the relationship” arising between the target of warrant and the informant.

Second, assuming for the sake of argument, but not conceding, that a relationship does exist between Mr. Sabo and the informant, inferring that the relationship is “one of trust,” is a stretch. The affidavit does not state anything about trust. And, as indicated above, “tension” will likely arise regardless of the type of relationship.

Lastly, the affidavit contains no specific information about the gun the informant observed. There was no information about the caliber of the gun, where the gun was handled, such as the kitchen or the bedroom, whether the gun was cased, uncased, or holstered, or even whether the gun was large or small. A “black semi-automatic pistol” could be guessed or made up by anyone.

Therefore, the informant did not demonstrate a “wealth of detail” that would have been sufficient to permit an inference that the basis of the declarant’s knowledge is sound. *See State v. Popp*, 2014 WI App 100, ¶ 31, 357 Wis. 2d 696, 855 N.W.2d 471.

C. The affidavit does not establish the informant’s veracity.

1. The affidavit does not establish that the informant is credible.

One way to demonstrate a declarant’s veracity, is to bring facts “to the warrant-issuing officer’s attention to enable the officer to evaluate . . . the credibility of the declarant.” *Romero*, 2009 WI 32, ¶ 21. A declarant’s credibility is commonly established on the basis of the declarant’s past performance of supplying information to law enforcement. *Id.*

Here, the affidavit contains no information about the informant's past performance. The affidavit does not claim that Officer Ayala (or any other officer) knew the informant, used the informant in the past, or that the informant has a history of providing reliable information. There is no indication, for example, that the informant has given information that has led to successfully executed search warrants, traffic stops, or other searches. Nor is there any indication that the informant has given information that resulted in the recovery of contraband, prosecutions, or even arrests. As a result, the informant appears to be an unproven, first-time informant.

Moreover, the type of informant is unknown. Throughout the affidavit, the informant is characterized inconsistently as a "confidential informant,"⁴ a "reliable concerned citizen witness,"⁵ and "a reliable registered confidential informant."⁶ As a result, the affidavit does not explicitly establish the "type" of informant.

⁴ On the first page of the affidavit, the caption preceding paragraph four refers to the informant as "the confidential informant." (8:1; App. 138 (capitalization removed)). "Confidential informant" then appears three more times throughout the affidavit—twice in paragraph six and once in paragraph ten. (See 8:2-3, ¶¶ 6, 10; App. 139-40).

⁵ The informant is referred to as "a reliable concerned citizen witness" twenty three times throughout the affidavit. (8:2-3, ¶ 6 (once), ¶ 7 (four times), ¶ 8 (five times), ¶ 9 (four times), ¶ 10 (eight times), ¶ 11 (once); App. 139-40).

⁶ The informant is referred to as "a reliable registered confidential informant" once in paragraph four of the affidavit. (See 8:1, ¶ 4; App. 138).

Lastly, the informant did not make any statements against interest which might establish his credibility. “When a declarant makes statements against his penal interest that are closely related to the criminal activity being investigated, under circumstances providing the declarant with no apparent motive to speak dishonestly, such statements may be taken as establishing the declarant’s credibility and thus his veracity.” *Romero*, 2009 WI 32, ¶ 36. Here, the informant did not say, for example, that he bought cocaine from, sold cocaine to, or even used cocaine with “Drew.”

Therefore, in this case, the affidavit does not establish that the informant is credible as it appears that the informant is an unproven, first-time informer. Additionally, the informant did not make any statements against his penal interest.

2. The police did not meaningfully corroborate the informant’s story.

Another way to demonstrate a declarant’s veracity, is to bring facts “to the warrant-issuing officer’s attention to enable the officer to evaluate . . . the reliability of the particular information furnished.” *Romero*, 2009 WI 32, ¶ 21. If an informant’s credibility cannot be established, “the facts may still permit the warrant-issuing officer to infer that the defendant has supplied reliable information on a particular occasion.” *Id.* The reliability of the information may be shown by corroboration of details because if “a declarant is shown to be right about some things, it may be inferred that he is probably right about other facts alleged.” *Id.*

However, corroboration of a few non-suspicious and easily predictable events should not suffice. *See generally, U.S. v. Leake*, 998 F.2d 1359 (6th Cir. 1993) (finding insufficient corroboration of anonymous tip where the

officers only corroborated the description of the house and the address); *U.S. v. Mendonsa*, 989 F.2d 366 (9th Cir. 1993) (stating that “[t]he fact that a suspect lives at a particular location or drives a particular car does not provide any indication of criminal activity”).

Here, Officer Ayala only corroborated the “innocent details” of Mr. Sabo’s life—that he lived at an apartment on West Burnham Street, that he is a felon, and Mr. Sabo’s appearance. Officer Ayala did not confirm that Mr. Sabo goes by “Drew.” Nor did Officer Ayala conduct meaningful surveillance on Mr. Sabo’s apartment. For example, Officer Ayala did not observe Mr. Sabo’s apartment to determine whether there was drug activity occurring or attempt to send the informant back to the apartment to purchase a gun or drugs.

Thus, because the informant in this case was only correct about a few innocuous and publicly-available details, there was no basis for the warrant-issuing-commissioner to conclude that the informant was “probably right about other facts alleged.” *Romero*, 2009 WI 32, ¶ 21.

In sum, the affidavit attached to the search warrant failed to establish the informant’s basis of knowledge or veracity. Thus, insufficient probable cause existed to justify the issuance of the search warrant, and any evidence obtained must be suppressed.

II. This Court should remand for a *Franks-Mann* hearing.

A. Legal principles.

Consistent with the United States Supreme Court decision in *Franks v. Delaware*, 438 U.S. 154 (1978), the

Wisconsin Supreme Court has determined that whenever a 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 that the allegedly false statement is necessary to the finding of probable cause,” the defendant is entitled to a hearing (known as a *Franks-Mann* hearing). *State v. Anderson*, 138 Wis. 2d 451, 462, 406 N.W.2d 398 (1987).

In order to make a substantial preliminary showing:

[t]here must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons.

State v. Mann, 123 Wis. 2d 375, 388, 367 N.W.2d 209 (1985) (quotation omitted). The allegedly false statement can also involve an omitted fact that is “undisputed” and “critical to an impartial judge’s fair determination of probable cause.” *Id.* at 388-89.

If the defendant has made the necessary preliminary showing, the defendant is entitled to a hearing unless the judge concludes that the affidavit is sufficient to support probable cause even without the questionable statements. *Anderson*, 138 Wis. 2d at 464.

A circuit court’s denial of a defendant’s motion for a *Franks-Mann* hearing is subject to de novo review. See *State v. Manuel*, 213 Wis. 2d 308, 315, 570 N.W.2d 601 (Ct. App. 1997).

B. Mr. Sabo is entitled to a *Franks-Mann* hearing.

1. Mr. Sabo made the necessary preliminary showing for a *Franks-Mann* hearing in his initial suppression motion.

In this case, Mr. Sabo made the necessary preliminary showing for a *Franks-Mann* hearing for in his initial suppression motion.

First, the motion asserted that “the allegations made by Ayala’s Informant are false.” (6:15). The motion stated that Mr. Sabo denies that his nickname is “Drew” and that “an Informant was ever in his apartment.” (*Id.*). The motion also stated that “[a]s an offer of proof, Sabo asserts that he has never been known on the street, by his family, his friends, or otherwise, as ‘Drew.’” (*Id.*). His nickname is “Butch.” (*Id.*).

Second, the motion asserted that the “informant was wrong about important details.” (6:16). The motion explained that the informant stated that Mr. Sabo had a “black semi-automatic pistol.” (8:3, ¶ 10; App. 140). However, Mr. Sabo’s house contained a pistol that was “black *and* silver—not just black.” (6:16; 10:1) (emphasis added).

Third, the motion asserted that the informant “omitted details that an actual informant who had actually been to Sabo’s apartment would have readily passed along to the police, like the fact that Sabo’s apartment was fastidiously ringed with surveillance cameras.” (6:16; 9:1-2).

As the motion concluded, “[w]hen all this information is considered, the only possible conclusions to be drawn are that either Ayala’s informant does not exist or Ayala’s informant completely made up a tale about being in Sabo’s apartment.” (6:16-17).

If the informant does not exist, the officer intentionally included false information in his affidavit knowing it was false. Alternatively, if the informant exists, but made up a story, the officer included the story with reckless disregard for its falsity because, as discussed in Part I, the officer failed to conduct a sufficient investigation to verify any meaningful details. And, if the informant's statements are stricken, insufficient probable cause existed for the search warrant.

Therefore, Mr. Sabo's motion makes a substantial preliminary showing entitling him to a ***Franks-Mann*** hearing.

2. Mr. Sabo's renewed motion for a ***Franks-Mann*** hearing, standing alone or coupled with his initial motion, made the necessary preliminary showing for a hearing.

Mr. Sabo's renewed motion also made the necessary preliminary showing for a ***Franks-Mann*** hearing. Mr. Sabo's renewed motion alleged:

As an offer of proof, Sabo asserts that:

On August 21, 2015, Albert R. Martinez, Jr. (DOB:2/21/86), came to the offices of Kohler & Hart, S.C. at 735 N. Water Street, Suite 1212, Milwaukee, WI to discuss his knowledge about the search warrant executed at Andrew Sabo's apartment on January 27, 2015. In the presence of Attorney Daniel H. Sanders and Paralegal Beth Van Engen, Martinez stated he is the uncle to Melissa Buck, the girlfriend of Andrew Sabo. Buck's mother is Martinez' sister. Martinez knows Sabo uses the nickname of "Butch".

Martinez stated that sometime in mid-January 2015, Martinez and Sabo got into an argument at 732A S. 31st

Street, Milwaukee, WI. 732A S. 31st Street in the residence of Martinez' father, Albert R. Martinez, Sr. The argument escalated into a physical altercation between Martinez and Sabo and Sabo hit Martinez in the face.

Approximately 30-40 minutes after the fight and after Sabo left the residence, Martinez called 911 and spoke to a female MPD dispatcher. Martinez called from (414) 316-8735, a Boost Mobile cell phone that was not working at the time due to an unpaid bill, but nevertheless had 911 calling capability.

Martinez told the dispatcher that there were guns and drugs in "Andrew Sabo's" residence. Martinez did not give an address. He said the residence was in the area of S. 38th St. and W. Burnham Avenue. Martinez wished to stay anonymous. He did not give his name, address, or telephone number despite repeated requests by the dispatcher. The dispatcher asked if Martinez saw the drugs and guns inside the house and Martinez said yes.

The dispatcher asked Martinez 4-5 times if he had been in the house and Martinez said yes. Martinez did not describe the drugs or the guns to the dispatcher. Martinez only gave the name "Andrew Sabo". He did not give the nicknames "Butch" or "Drew". Martinez could hear the dispatcher typing in the background.

The 911 call lasted approximately 90 seconds. At one point, Martinez was put on hold for 15-20 seconds. When the dispatcher returned to the line, she asked if Martinez was sure on the house location and Martinez said yes. Martinez only talked to the female dispatcher. He never talked to another officer or detective. He never met with the police in person about Andrew Sabo. No one from the police department ever called him back.

In the presence of Attorney Sanders and Ms. Van Engen, Martinez said he lied to the dispatcher about Andrew

Sabo. Martinez called the police to get back at Sabo for the fight. Martinez never saw drugs and guns inside Sabo's residence. Martinez was never even inside Sabo's residence and doesn't know the address of the residence.

Martinez said he came forward because he lied and felt bad for his niece, Melissa Buck. At the time Martinez made the 911 call, he had active warrants for his arrest in Waukesha County for theft offenses.

On or about August 21, 2015, Martinez moved to Fort Worth, Texas. In October 2015, Martinez was arrested in connection with the homicide of a Tarrant County, Texas woman, whose body was allegedly was found burning late September 28, 2015 in far east Fort Worth, Texas. It is believed that Martinez has since been charged with murder and kidnapping and remains in the Tarrant County jail. See [http://www. Star-telegram.com/news/local/community/fortworth/article41052591](http://www.Star-telegram.com/news/local/community/fortworth/article41052591).⁷

Several open records requests were made to MPD regarding the 911 calls. The specific wording was as follows: "Any 911 recording and/or narrative made between January 11 and January 26, 2015, between the hours of 12 pm and 3 pm, referencing an alleged incident involving "Andrew Sabo" and/or residents at a residence in the vicinity of S. 38th Street and W. Burnham in District 2 and/or involving drugs and guns inside said residence."

On October 15, 2015, MPD responded to the request it was unable to locate any records containing the name "Andrew Sabo" during the time frame specified, and

⁷ Since then, Mr. Martinez has been sentenced to life in prison for capital murder. See <http://www.star-telegram.com/news/local/community/fort-worth/article194241774.html>; <https://offender.tdcj.texas.gov/OffenderSearch/offenderDetail.action?sid=05830467>

lacking an exact address or addresses are unable to conduct an address search.⁸

Important aspects of Martinez's statement to defense counsel's Paralegal are corroborated by Sabo's interrogation. During Sabo's interrogation, he informed a Detective that the firearm found in his home was purchased and the surveillance cameras installed outside his home were purchased because Martinez had repeatedly threatened Sabo with a knife.

(16:2-3).

When this information is considered, there are three possible conclusions: (1) the informant was not Martinez; (2) the informant does not exist; or (3) the officer took Martinez's tip and falsified facts to create probable cause.

As Mr. Sabo's motion concluded, "the timing and nature of Martinez's vague and ultimately false tip to police strongly suggests that his information was used by the police to obtain a search warrant . . . making the first possible conclusion highly unlikely." (16:4).

If the second possible conclusion is true (the informant does not exist), then the officer included the information in his affidavit knowing it was false.

Likewise, if the third possible conclusion is true (that the officer falsified facts based on Martinez's tip to create probable cause), then the affidavit was made with a reckless disregard for the truth because, as discussed in Part I, the officer failed to conduct a sufficient investigation to verify any meaningful details.

⁸ According to the State, if a 911 call ever existed, it was likely purged by the time of the open records request, as 911 audio only has a retention period of 120 days. (56:10; App. 131).

If the information relating to the informant is stricken, probable cause does not exist for a search warrant.

Therefore, Mr. Sabo's renewed request for a *Franks-Mann* hearing, standing alone or coupled with his initial request, makes a substantial preliminary showing and this Court should remand for a hearing.

III. This Court should remand this case to the circuit court to disclose the identity of the informant.

The State has a privilege to refuse to disclose the identity of a person "who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer . . ." Wis. Stat. § 905.10(1).

However, information derived from a confidential informant in support of a search warrant may be challenged. Wis. Stat. § 905.10(3)(c) provides a mechanism by which the state's privilege may be breached if to do so is necessary to determine the validity of the warrant. *See State v. Mordica*, 168 Wis. 2d 593, 610, 484 N.W.2d 352 (Ct. App. 1992).

If a defendant challenges the search warrant, a court must determine whether the informant was "reasonably believed to be reliable or credible." *See* Wis. Stat. § 905.10(3)(c); *State v. Fischer*, 147 Wis. 2d 694, 703, 433 N.W.2d 647 (Ct. App. 1988). If the evidence of the record is insufficient to support a finding of reasonable reliance, the judge may require that the informant's identity be disclosed. Wis. Stat. § 905.10(3)(c).

Circuit courts are vested with discretion when it comes to determining whether to grant a disclosure motion under Wis. Stat. § 905.10. *Id.* at 703.

Here, the circuit court erroneously exercised its discretion in refusing conduct an in camera review of the informant's identity.⁹ Mr. Sabo's motion met all of the necessary elements under Wis. Stat. § 905.10(3)(c) to obtain an in camera review of the identity of the informant. Wis. Stat. § 905.10(3)(c) provides:

If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible, the judge may require the identity of the informer to be disclosed.

First, Mr. Sabo's motion sufficiently alleged that an informant was relied upon to establish the legality of the means by evidence was obtained (a search warrant). (6:17; 16:4-5).

Second, Mr. Sabo's motion specifically alleged that the informant was not reliable or credible. As discussed in detail in Section I of this brief, the affidavit in support of the search warrant did not establish that the informant is credible or reliable. It appears that the informant is an unproven, first time informer. Additionally, the police did not meaningfully corroborate the informant's story. Moreover, as discussed in Section II of this brief, given that Mr. Sabo denies that his

⁹ The State's written response in this case opposed disclosure. (12:14). However, the State indicated that if the circuit court "is not so satisfied, or if in camera disclosure of the informant's identity will help the Court be satisfied, the State is not opposed." (*Id.*). Mr. Sabo construes the State's response to constitute a request that the disclosure be made in camera. The language of Wis. Stat. § 905.10(3)(c) provides that "[t]he judge *shall* on request of the . . . state . . . direct that the disclosure be made in camera." As a result, Mr. Sabo would anticipate that any disclosure in this case would be made in camera.

nickname is “Drew,” the informant was wrong about important details, omitted details, and the offer of proof that Mr. Martinez came to trial counsel’s office and stated that he called 911 and “lied” about Mr. Sabo having “guns and drugs” in his residence, does not establish that the informant is reliable and credible.

As trial counsel argued, “all of this could be solved . . . with a five-minute conversation in the Court’s chambers with Officer Ayala or with the State.” (56:10; App. 131).

Therefore, this Court should remand this case to the circuit court for an in camera review of the identity of the informant.

CONCLUSION

For the reasons stated in this brief, Mr. Sabo respectfully requests that this Court vacate his judgment of conviction and remand to the circuit court with directions that his plea be withdrawn and that all evidence derived from the search of his home be suppressed.

Alternatively, Mr. Sabo requests that this case be remanded with directions that the circuit court grant a *Franks-Mann* hearing and conduct an in camera review.

Lastly, if this Court decides that it is necessary to address the good faith exception, Mr. Sabo requests that this case be remanded for the circuit court to address this argument.

Dated this 20th day of April, 2018.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,713 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 20th day of April, 2018.

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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; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) 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 one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically 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.

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