STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2017AP2289-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDREW ANTON SABO,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE TIMOTHY M. WITKOWIAK PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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ISSUES PRESENTED FOR REVIEW

1. Did the warrant affidavit establish probable cause for a search of Sabo's residence?

The circuit court answered "yes."

This Court should answer "yes."

2. Did the circuit court err by refusing to hold a *Franks-Mann*[1] hearing?

The circuit court implicitly answered "no."

This Court should answer "no."

3. Did the circuit court err by refusing to grant Sabo's motion to compel disclosure of the State's confidential informant under Wis. Stat. § (Rule) 905.10(3)(c)?

The circuit court implicitly answered "no."

This Court should answer "no."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument would add little to the arguments contained in the parties' briefs.

Publication is not warranted. This appeal involves only the application of well-settled principles of law to the facts presented.

INTRODUCTION

Fairly read, the warrant affidavit established probable cause to search Sabo's residence. Sabo failed to demonstrate a satisfactory basis for either a *Franks-Mann* hearing, or for

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[1] *Franks v. Delaware*, 438 U.S. 154 (1978); *State v. Mann*, 123 Wis. 2d 375, 367 N.W.2d 209 (1985).

disclosure of the informant's identity under section 905.10(3)(c). This Court should affirm the judgment.

If this Court concludes that the affidavit failed to establish probable cause, it should remand the case to the circuit court to determine whether the evidence obtained as a result of the warrant is admissible under the good faith exception to the exclusionary rule. (*See, e.g.,* R. 12:2 (prosecutor's request in circuit court to brief and argue good faith if necessary)); *State v. Marquardt*, 2001 WI App 219, ¶ 22, 247 Wis. 2d 765, 635 N.W.2d 188 (remanding case to circuit court for good faith determination); (*see also* Sabo's Br. 6 n.3.)

STATEMENT OF THE CASE

The warrant affidavit.

In January 2015, a citizen informant contacted City of Milwaukee Police Officer Rodolfo Ayala with information regarding a man the informant knew as Drew. The informant gave Ayala his name and telephone number, (R. 8:2), and the following information:

First, the informant had been in Drew's residence at 3718 West Burnham Street during the previous week. (R. 8:2–3.)

Second, the informant saw Drew holding and manipulating a specific color and type of weapon—a black, semiautomatic pistol, loaded with ammunition. (*Id*. at 2, 3.) Drew removed the magazine and showed it to the informant; it contained unspent rounds of ammunition. (*Id*. at 2.) The informant told Ayala he knew the pistol belonged to Drew. (*Id*. at 3.) The informant also claimed familiarity with the differences between different types of firearms, "specifically pistols and revolvers." (*Id*. at 2.)

Third, the informant believed Drew, as a convicted felon, could not lawfully possess a firearm. (*Id*. at 3.)

Fourth, the informant had seen Drew weighing and packaging cocaine base for distribution, and knew Drew "conduct[ed] narcotic transactions of cocaine base." (*Id*. at 3.)

Fifth, the informant provided Ayala with a physical description of Drew, and described Drew's address. (*Id*. at 2.)

Sixth, the informant contacted Ayala out of fear that Drew would engage in violent activity, using the semiautomatic pistol the informant had seen. (*Id*. at 2.)

Ayala's affidavit described the connection between the informant and Drew as a "relationship." Ayala did not identify the informant because he believed that would create tension in the relationship and endanger the informant. (*Id*.)

Ayala's subsequent investigation confirmed the informant's information in essentials. Ayala learned that Drew was Sabo, and the informant also identified a booking photograph of Sabo as Drew. (*Id*. at 3.) Ayala learned Sabo did have a criminal record. He learned Sabo was a convicted felon who could not lawfully possess firearms. And he learned Sabo had a previous conviction for possessing cocaine with intent to deliver. (*Id*. at 1, 3.)

Ayala also visited 3718 West Burnham Street—the upper unit of a two-story duplex—and saw Sabo leaning out of an upper window of that building. (*Id*.) Ayala spoke with Sabo briefly. (*Id*. at 3.)

A Milwaukee County court commissioner issued the warrant for the Burnham Street residence based on Ayala's affidavit. (R. 7.) Police executed the warrant and seized a loaded semiautomatic pistol, ammunition, cocaine, marijuana, a scale, a cutting agent for the cocaine, a loaded revolver, other indicia of drug dealing activity, and paperwork bearing Sabo's name. (R. 1:2–3.)

The suppression motion.

Sabo filed a pretrial motion to suppress all evidence seized and all derivative evidence, based on lack of probable cause. (R. 6.) He also asked the circuit court to order a *Franks-Mann* hearing, and to order the State to disclose the citizen informant's identity under section 905.10(3)(c).[2]

The parties and the circuit court dealt with these challenges at different hearings conducted throughout 2015.

Sabo's probable cause challenge.

At the August 3, 2015 motion hearing, Sabo spent considerable time identifying information he believed should have been included in the warrant. (R. 61:4–6, 8–13.)

In contrast, the circuit court focused on the information actually contained in the warrant. The court considered the informant's firsthand observations regarding "the processing of cocaine" and Sabo's possession and manipulation of the semiautomatic pistol "pretty specific." (*Id.* at 7.) The court also noted the informant's statements "that he believed that the defendant was a felon and that he saw the firearm, and he thought perhaps the defendant should not have a firearm." (Id. at 12–13.)

The prosecutor urged the circuit court to deny Sabo's motion in light of the substantial deference reviewing courts normally give to probable cause determinations involving warrants. (*Id.* at 13.) He contended that, because the case involved a citizen informant, police could presume credibility. (*Id.* at 14.) The prosecutor also stressed the relatively low

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[2] Wisconsin Stat. § 905.10(3)(c) provides that a circuit court may require disclosure of an informant's identity if information from the informant is relied upon to establish the legality of the seizure of evidence, and if the court is not satisfied that the informant was reasonably believed to be reliable or credible.

standard of proof necessary to establish probable cause for a warrant. (*Id*. at 15.)

The circuit court agreed with the prosecutor, and denied Sabo's probable cause challenge. (*Id*. at 17–18.) The court noted that the informant reported seeing Sabo not only manipulate the semiautomatic pistol, but also "saw the defendant working on cocaine." (*Id*. at 17.) The court also noted that Ayala's subsequent investigation confirmed that the street address provided by the informant was Sabo's, and that Sabo had a felony conviction. (*Id*. at 18.)

The circuit court found that the informant's information was sufficiently credible to justify Ayala's reasonable reliance upon it: "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 there was sufficient information provided within the affidavit to establish probable cause and, therefore, the Court will deny the motion." (*Id*.)

Sabo's requests for *Franks-Mann* hearings.

Sabo made two separate requests for *Franks-Mann* hearings. (R. 6; 12.) Sabo alleged the warrant affidavit contained five false statements, and one material omission.

Sabo's original suppression motion identified the first four alleged false statements, and the alleged material omission. (R. 6.) He claimed the affidavit falsely stated: (1) that his nickname was "Drew"; (2) that the informant had been in his residence when he claimed to have been there; (3) that Ayala had spoken to him when he visited the Burnham Street address; and (4) that his semiautomatic pistol was black. (R. 6:15–16.) Sabo also claimed Ayala's failure to mention the elaborate surveillance camera system at his residence constituted a material omission from the affidavit. (*Id*. at 3.)

Sabo also asserted that surveillance video of his residence, coupled with affidavits from Sabo's associates, would prove that the informant had never been in Sabo's residence, and that Ayala never talked with him. (R. 6:15–16; 54:5–17; 61:17–21.) But Sabo never produced the affidavits or the surveillance video, despite having requested and received additional time to do so. (R. 54:4–15.)[3]

Sabo's second motion identified the fifth alleged false statement. (R. 16.) He claimed a man named Albert Martinez—the uncle of Sabo's girlfriend—called 911 and falsely claimed Sabo had guns and drugs in his residence. (*Id*. at 2–4.) Sabo claimed this meant Ayala either lied outright in the warrant affidavit about receiving information from an informant, or "falsified facts within his affidavit in an effort to create probable cause based on Martinez's vague and false tip." (*Id*. at 4.) But Sabo never produced records showing that Martinez actually placed the alleged 911 call, despite having requested and received additional time to do so. (R. 55:2–9; 56:2–13.)

The prosecution opposed a *Franks-Mann* hearing. In response to Sabo's first motion, the prosecutor argued that Sabo failed to make the required substantial preliminary showing that Ayala knowingly and intentionally, or with reckless disregard for the truth, included false statements or omitted material information. (R. 12:9–14.)

The prosecutor also argued that Sabo did not prove that Ayala in fact entertained serious doubts that the informant knew Sabo as Drew, and had no obvious reason to doubt the veracity of the informant's other allegations. (*Id*. at 11.) Sabo's expected use of surveillance video and affidavits from his associates was conclusory and speculative, and did not

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[3] Sabo no longer relies on this contention in support of a *Franks-Mann* hearing. (*See* Sabo's Br. 5 n.2.)

demonstrate the inaccuracy of any information in the affidavit. (*Id*. at 11–12.) Sabo had admitted having the conversation with Ayala at his residence, and even if that had not happened, the remainder of the affidavit established probable cause. (*Id*. at 12–13.) Ayala had no reason to doubt the informant's information regarding the color of the pistol. (*Id*. at 13.) And Sabo failed to explain why the lack of information regarding the surveillance camera system constituted a material omission that brought the correctness of all the informant's information into question. (*Id*. at 14.) The prosecutor also pointed out that inclusion of the information would have added to the evidence supporting probable cause. (*Id*.)

In response to Sabo's second motion, the prosecutor argued that, even if Martinez made a 911 call, Sabo simply assumed "that this person would be the sole source of law enforcement information about [him]. I don't think there's any reason to make that assumption." (R. 55:4.)

The prosecutor again contended that Sabo's allegations regarding Martinez did not rise to the level of a substantial preliminary showing that Ayala knowingly and intentionally, or with reckless disregard for the truth, included false statements in the affidavit. (R. 56:2–3.) The prosecutor also questioned Sabo's ability to prove that Martinez actually made the 911 call. (*Id*. at 10–11.)

The circuit court denied both of Sabo's separate motions. (R. 56:13; 61:20.)

As to the first motion, the court implicitly concluded that Sabo had failed to make the substantial preliminary showing required for a *Franks-Mann* hearing. (R. 61:20.)

As to the second motion, the circuit court noted that no proof existed that Martinez actually made the 911 call. (R. 56:8–9.) The court said a recording of the 911 call would make

it "crystal clear" what was said, but "obviously the tape isn't there." (*Id*. at 9.)

The circuit court refused to order a *Franks-Mann* hearing, finding that Sabo failed to make the necessary substantial preliminary showing: "What they're 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, [t]he Court will deny the motion." (*Id*. at 13.)

Sabo's request for disclosure of the informant's identity under section 905.10(3)(c).

The prosecution took the position that, with respect to an in camera disclosure of the informant's identity under section 905.10(3)(c), the circuit court had no reason to be dissatisfied with the reliability or credibility of the informant. (R. 56:11–12.) The court apparently agreed; it denied Sabo's request. (*Id*. at 13.)

Sabo's pleas.

Sabo pleaded guilty to two counts of being a felon in possession of a firearm, and one count of possessing between 5–15 grams of cocaine with intent to deliver, as a second or subsequent offense. (R. 38.) He received sentences totaling eight years of initial confinement and eight years of extended supervision. (*Id*.) He now appeals under Wis. Stat. § 971.31(10).

STANDARD OF REVIEW

"In reviewing a motion to suppress, we apply a two-step standard of review. First, we review the circuit court's findings of historical fact, and will uphold them unless they are clearly erroneous. Second, we review the application of

constitutional principles to those facts de novo." *State v. Eason*, 2001 WI 98, ¶ 9, 245 Wis. 2d 206, 629 N.W.2d 625.

The decision whether to grant a disclosure motion under section 905.10 is discretionary. *See State v. Fischer*, 147 Wis. 2d 694, 703, 433 N.W.2d 647 (Ct. App. 1998). This Court will uphold a discretionary determination if it can independently conclude that the facts of record applied to the proper legal standards support the circuit court's decision. *See Andrew J.N. v. Wendy L.D.,* 174 Wis. 2d 745, 767, 498 N.W.2d 235 (1993).

ARGUMENT

I. The warrant affidavit established probable cause to search Sabo's residence.

A. The controlling principles of law.

"A search warrant may only issue on probable cause." *State v. Romero,* 2009 WI 32, ¶ 16, 317 Wis. 2d 12, 765 N.W.2d 756. "[A] probable cause determination must be 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, 604 N.W.2d 517.

Probable cause exists if the warrant affidavit demonstrates a "fair probability" that a search of the target area will yield evidence of wrongdoing. *State v. Hillary,* 2017 WI App 67, ¶ 8, 378 Wis. 2d 267, 903 N.W.2d 311.

Certainty is not the standard. "[P]robable cause is far short of certainty—it 'requires only a probability or substantial chance of criminal activity, not an actual showing of such activity', and not a probability that exceeds 50 percent ('more likely than not'), either." *United States v. Seiver,* 692 F.3d 774, 777 (7th Cir. 2012) (citation omitted).

The probable cause standard is practical and nontechnical; it relies on common sense. *Hillary,* 378 Wis. 2d

267, ¶ 8. It requires courts to consider factual and practical considerations that occur in everyday life, and upon which reasonable and prudent people—not legal technicians—act. *Id*. And it allows courts to draw inferences that reasonable people would draw from the facts presented. *Id*.

Courts look at the totality of the circumstances to determine the existence of probable cause. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). "Where there is evidence that would lead a reasonable person to conclude that the evidence sought is likely to be in a particular location, there is probable cause for a search of that location." *Ward*, 231 Wis. 2d 723, ¶ 34.

This Court gives "great deference to the warrant-issuing judge's determination of probable cause, and that determination will stand unless the defendant establishes that the facts are clearly insufficient to support a finding of probable cause." *Romero*, 317 Wis. 2d 12, ¶ 18. Such deference furthers "the Fourth Amendment's strong preference for searches conducted pursuant to a warrant." *Id*.

This is an important consideration. In close cases, this Court will give the warrant-issuing judge the benefit of the doubt, and sustain the search. *State v. Watkinson*, 161 Wis. 2d 750, 755, 468 N.W.2d 763 (Ct. App. 1991).

The court commissioner issued the search warrant based on the information contained in Ayala's warrant affidavit. That procedure poses no Fourth Amendment problem. "When an affidavit is the only evidence presented to a judge in support of a search warrant, 'the validity of the warrant rests solely on the strength of the affidavit.'" *United States v. Hansmeier*, 867 F.3d 807, 811 (7th Cir. 2017) (citation omitted). The probable cause standard remains the same. *United States v. Mykytiuk,* 402 F.3d 773, 776 (7th Cir. 2005).

Warrant affidavits often receive hypertechnical attack based on what they do *not* contain. That is the case here.

(Sabo's Br. 11–16.) This Court should shun that approach. "The affidavit is judged on the adequacy of what it does contain, not on what it lacks, or on what a critic might say should have been added." *United States v. Allen*, 211 F.3d 970, 975 (6th Cir. 2000) (en banc).

Ayala's affidavit also contained hearsay information from a person best described as a citizen informant whose identity and contact information was known to Ayala. *See generally State v. Kolk*, 2006 WI App 261, ¶¶ 12–13, 298 Wis. 2d 99, 726 N.W.2d 337. Again, that poses no Fourth Amendment problem. Assessing the reliability of such information is part of the totality of the circumstances determination. *Gates*, 462 U.S. at 241.

Generally, courts apply a relaxed test of reliability to citizen informants who say they witnessed criminal activity. *State v. Williams*, 2001 WI 21, ¶ 36, 241 Wis. 2d 631, 623 N.W.2d 106. The focus is on observational reliability—the nature of the citizen's report, the opportunity to see and hear the matters reported, and the verification provided by independent police investigation. *Kolk*, 298 Wis. 2d 99, ¶ 13.

B. The warrant affidavit established probable cause to search Sabo's residence.

A purely conclusory affidavit—one that simply asserts the existence of probable cause, without describing the underlying circumstances supporting that conclusion—does not satisfy the Fourth Amendment. *United States v. Ventresca*, 380 U.S. 102, 108–09 (1965). Likewise, an affidavit that presents little more than "a casual rumor" will not establish probable cause. *Spinelli v. United States*, 393 U.S. 410, 416 (1969).

But that is not what we have here. This was a properly issued warrant.

Here, the court commissioner had a warrant affidavit that contained fresh, firsthand observations of criminal activity committed by Sabo. The affidavit easily established probable search to search Sabo's residence.

This is the thrust of the affidavit: a citizen informant known to Ayala by name and contact information told him that, within the previous week, the informant had been in Sabo's residence. The informant described Sabo's physical appearance and described the address. The informant saw Sabo—whom the informant knew to be a convicted felon who sold ("conducted transactions") cocaine base—weighing and packaging cocaine, while possessing a specific color and type of weapon—a black, semiautomatic pistol loaded with ammunition.

No apparent reason existed for Ayala to question the informant's reliability. The allegations themselves were not unbelievable, incredible, or internally inconsistent. And in the case of drug dealing, evidence is likely to be found where the dealer lives. *United States v. Ellis*, 499 F.3d 686, 691 (7th Cir. 2007).

Probable cause does not require proof that something is more likely true than false. It requires only that, under the totality of the circumstances, a fair probability exists that police will find contraband or evidence of a crime in the area searched. The affidavit met that standard.

And Ayala did not simply take the informant's word for it. He sought out and found corroboration. Ayala confirmed Sabo's identity as Drew, the man seen by the informant. Ayala confirmed Sabo's address. He confirmed that Sabo did in fact occupy the residence. He confirmed Sabo's status as a convicted felon. And he confirmed that Sabo had a past conviction for at least one drug-distribution-related offense.

Information is only as good as its source. Ayala's corroboration established that his source was good—that his

informant had inside information and familiarity with Sabo's affairs, including Sabo's involvement in concealed criminal activity. "[If] an informant is shown to be right about some things, he is probably right about other facts that he has alleged, including the claim that the object of the tip is engaged in criminal activity." *Alabama v. White*, 496 U.S. 325, 331 (1990). In particular, confirming the informant's claim that Sabo was a convicted felon who had been involved in drug dealing allowed Ayala and the court commissioner to reasonably conclude that the informant's complete fund of information was worthy of belief. It established Sabo's involvement in criminal activity, and fully justified issuing the warrant.

Additional indicators of reliability appear here. The informant provided his/her name and telephone number to Ayala, thereby increasing the likelihood that he/she might be held accountable for inaccuracies or lies. "Unlike the anonymous tipster, a witness who directly approaches a police officer can also be held accountable for false statements. As the Supreme Court has observed, citizens who personally report crimes to the police thereby make themselves accountable for lodging false complaints." *United States v. Christmas*, 222 F.3d 141, 144 (4th Cir. 2000).

The basis of the informant's knowledge of the conveyed information came from recent, firsthand observation at Sabo's residence, as well as the informant's past experience with Sabo. It was not based on rumor or hearsay. The informant's stated information went far beyond mere suspicion of criminal activity, or repetition of someone else's suspicions.

The informant's knowledge that Sabo was a convicted felon, not allowed to possess firearms, also indicates something more than casual observation by a member of the general public. It indicates an acquaintanceship with Sabo—a relationship—and more intimate, detailed familiarity with his affairs. The citizen informant's firsthand observation and

stated motivation for speaking with Ayala—a concern that Sabo, armed with a semiautomatic pistol, would engage in violent activity—also militate in favor of reliability. "[I]nformation from a citizen informant is presumed reliable where circumstances indicate the information was gained from first-hand experience, and the motivation for speaking with law enforcement authorities is based on 'the interest of society or personal safety.'" *State v. Day*, 263 S.W.2d 891, 904 (Tenn. 2008) (citation omitted). *See also Gates*, 462 U.S. at 234 ("[I]f we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case.").

The State does not consider this a close case. The warrant affidavit established probable cause to search Sabo's residence. But if this Court considers it a close case, it should nonetheless defer to the court commissioner's probable cause determination. *Romero*, 317 Wis. 2d 12, ¶ 18. It should give the commissioner the benefit of the doubt and sustain the search. *Watkinson*, 161 Wis. 2d at 755. If this Court disagrees, it should remand the case to the circuit court to determine whether police acted in good faith reliance on the warrant. *Marquardt*, 247 Wis. 2d 765, ¶ 22.

Sabo's appellate argument regarding the lack of probable cause fails to persuade. He claims the warrant affidavit failed to adequately establish the citizen informant's basis of knowledge. (Sabo's Br. 11–14.) He buttresses his claim by listing information the affidavit does not contain—information as to the informant's familiarity with unlawful narcotics transactions, with cocaine, and the like. He also complains that the affidavit does not identify the caliber of the loaded semiautomatic pistol, the room in which Sabo handled

it, whether Sabo had a case or holster for the gun, and whether it was large or small. (*Id.* at 14.)[4]

Sabo's argument on point seems hypertechnical. "The affidavit is judged on the adequacy of what it does contain, not on what it lacks, or on what a critic might say should have been added." *Allen*, 211 F.3d at 975.

A commonsense reading of the affidavit shows that Sabo was engaged in what an experienced court commissioner would immediately recognize as the preparation of cocaine for delivery. The informant also knew of Sabo's past involvement with the sale of cocaine, making it reasonable for the court commissioner to infer that the informant accurately recognized and related what Sabo was doing—weighing and packaging cocaine for delivery. The State has also stressed the importance of the citizen informant's fresh, firsthand observations of Sabo and his conduct to the informant's basis of knowledge. (State's Br. 13–14.)

Sabo claims the affidavit failed to adequately establish the informant's veracity. (Sabo's Br. 14–16.) He claims the affidavit contained no information pertaining to the informant's "past performance." (*Id.* at 15.) That is not a fatal defect. Ayala confirmed key aspects of the informant's information through his own investigation. (State's Br. 12–13.)

Sabo also claims the affidavit does not clearly identify the informant's status—confidential informant, citizen informant, paid informant, etc. (Sabo's Br. 15.) The affidavit described the informant as a "concerned citizen," which seems

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[4] Since Sabo ejected the pistol's magazine—loaded with cartridges—and showed it to the informant, the court commissioner could safely assume the pistol was neither cased nor holstered. It was ready for use. Similarly, the felon-in-possession statute does not distinguish between possession of holstered or unholstered guns, or large or small guns.

apt. (R. 8:3.) The informant does not appear to have committed any criminal wrongdoing, and came forward "out of fear that the target would become engaged in violence utilizing the firearm" the informant saw. (*Id*. at 2; *See also* State's Br. 13 (treating informant as a citizen who personally reported Sabo's criminal activity to police).)

He also submits that the absence of statements against the informant's penal interest renders him not credible. (Sabo's Br. 16.) While an informant's statements against penal interest may bolster credibility, *see Romero*, 317 Wis. 2d 12, ¶ 6, their absence does not render an informant's other statements unworthy of belief. The informant was sufficiently reliable. (State's Br. 11–14.)

Finally, Sabo faults Ayala for not "meaningfully" corroborating the informant's information. (Sabo's Br. 16–17.) The State disagrees, noting the subjective nature of the word *meaningfully*.

Corroboration serves an important purpose—it gives the affiant and the warrant-issuing judge confidence in the totality of the informant's allegations. Ayala's corroboration served that purpose here. Ayala confirmed Sabo's identity as Drew, the man seen by the informant. Ayala confirmed Sabo's address. He confirmed that Sabo did in fact occupy the residence. He confirmed Sabo's status as a convicted felon. And he confirmed that Sabo had a past conviction for at least one drug-distribution-related offense. That confirmation allowed the court commissioner to reasonably rely on the remainder of the informant's information. "[If] an informant is shown to be right about some things, he is probably right about other facts that he has alleged, including the claim that the object of the tip is engaged in criminal activity." *White*, 496 U.S. at 331.

To reiterate: the State does not consider this a close case. But if this Court disagrees, it should still defer to the

court commissioner's finding of probable cause, give the commissioner the benefit of the doubt, and sustain the search. *Romero*, 317 Wis. 2d 12, ¶ 18; *Watkinson*, 161 Wis. 2d at 755.

II. The circuit court did not err by refusing to hold a *Franks-Mann* hearing.

A. The controlling principles of law.

As a general rule, this Court presumes the validity of an affidavit supporting a search warrant. *See State v. Anderson*, 138 Wis. 2d 451, 463, 406 N.W.2d 398 (1987); *United States v. Johnson*, 580 F.3d 666, 670 (7th Cir. 2009). That presumption is hard to overcome.

In *Franks,* 438 U.S. at 155–56, the United States Supreme Court held 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 *Mann*, 123 Wis. 2d at 385–90, the Wisconsin Supreme Court extended *Franks* to include omissions from a warrant affidavit that are the equivalent of deliberate falsehoods or reckless disregard for the truth. "For an omitted fact to be the equivalent of 'a deliberate falsehood or a reckless disregard for the truth,' it must be an undisputed fact that is critical to an impartial judge's fair determination of probable cause." *Id.* at 388 (footnote omitted).

To obtain a hearing, Sabo had to establish by a "substantial preliminary showing" that (1) Ayala's affidavit contained a false material statement or material omission; (2) Ayala made the false statement or omitted the fact intentionally, or with reckless disregard to the truth; and (3) the false statement or material omission is necessary to

support the probable cause finding. *Franks*, 438 U.S. at 155–56. "These elements are hard to prove, and thus *Franks* hearings are rarely held." *United States v. Swanson*, 210 F.3d 788, 790 (7th Cir. 2000).

Three additional principles deserve comment.

First, conclusory, self-serving statements will not justify a *Franks-Mann* hearing. *See Franks*, 438 U.S. at 171. "[T]he *Franks* presumption of validity of an affidavit supporting a search warrant cannot be overcome by a self-serving statement which purports to refute the affidavit." *United States v. Reed*, 726 F.2d 339, 342 (7th Cir. 1984).

Second, "an unimportant allegation, even if viewed as intentionally misleading, does not trigger the need for a *Franks* hearing." *Swanson*, 210 F.3d at 790.

Third, it was not enough for Sabo to show that the informant lied to Ayala, who then included the lies in the warrant affidavit. Sabo had to show that Ayala perjured himself or acted recklessly because he harbored serious doubts—or had obvious reason to doubt—the truth of the informant's allegations. *See Johnson*, 580 F.3d at 670. "This burden is substantial, and *Franks* hearings are rarely required." *Id.*

B. The circuit court properly refused to hold the hearing.

It is easy to call someone a liar. Here, one of Sabo's attorneys called Ayala a liar in open court. (R. 55:6.)

But it is hard—very hard—for a defendant to make the substantial preliminary showing *Franks* requires before he can receive a hearing on whether a warrant contains material falsehoods or omissions, made with deliberate or reckless disregard for the truth. Sabo failed to make that showing.

The allegations contained in Sabo's first motion did not justify a *Franks-Mann* hearing.

As to Sabo's claim that his nickname was not "Drew," the affidavit never said it was. The affidavit said only that the informant knew Sabo as Drew. (R. 8:2.) That some other people might—or might not—refer to Sabo as "Butch," or by some other nickname, is not material to the question whether the informant saw what he said he saw in Sabo's residence. And Sabo never established that Ayala perjured himself or acted recklessly because he harbored serious doubts—or had obvious reason to doubt—the truth of the informant's implicit statement that he knew Sabo as Drew. *See Johnson*, 580 F.3d at 670.

As to Sabo's claims that the informant had never been in Sabo's apartment—because the people in his apartment all denied being the informant—and that Ayala never spoke to Sabo when Ayala visited the residence, those surely qualify as self-serving statements which purport to refute the affidavit. *Reed*, 726 F.2d at 342. As such, they do not justify a *Franks-Mann* hearing.

Recall also that Sabo promised to provide the circuit court with (1) affidavits from the people who Sabo claimed really were in his residence, stating that none of them informed on him; and (2) surveillance video that would confirm only the presence of those people in the residence, and confirm that Ayala and Sabo did not speak. The reliability and value of such affidavits would be questionable, at best. The circuit court recognized this: "[B]ut the six or seven people that may have been in his apartment, my goodness, if they are the confidential informant, they're not likely to tell and [sic, an?] investigator or prosecutor that, are they?" (R. 54:5.) No matter. Sabo never provided the court with their names, their affidavits, or the purported surveillance video. (R. 61:18–20.) And even if the video had definitively shown that Ayala and Sabo never spoke, the omission of that piece of information from the warrant affidavit would still leave the affidavit sufficient to establish probable cause.

As to Sabo's claim that his semiautomatic pistol was really silver and black in color, not black as the informant described it, the prosecutor pointed out—without refutation by Sabo—that Sabo simply could not show that Ayala perjured himself or acted recklessly because he harbored serious doubts—or had obvious reason to doubt—the truth of the informant's allegation. (R. 12:13.) *See Johnson*, 580 F.3d at 670. The prosecutor asked rhetorically: "What obvious reason could P.O. Ayala have had to doubt the veracity of this particular statement prior to the recovery of the black and chrome pistol?" (R. 12:13.) The answer, of course, is that Ayala had no reason at all to doubt the veracity of the informant's statement.

And as to Sabo's claim that omission of information regarding Sabo's surveillance system somehow brought the informant's credibility into doubt, this is again the type of self-serving, conclusory statement that does not justify a *Franks-Mann* hearing. Sabo never fully explained how the omission constituted an undisputed fact that was critical to the court commissioner's fair determination of probable cause. *See Mann*, 123 Wis. 2d at 388. If anything, the absence of that information probably helped Sabo more than hurt him. It would have been manifestly reasonable for the commissioner to conclude that the presence of an elaborate surveillance system lent credence to the informant's claim that he saw Sabo processing cocaine inside his residence.

And the allegations contained in Sabo's second motion did not justify a *Franks-Mann* hearing. They turned on the significance—more precisely, the lack of significance—attached to the possibility that Albert Martinez called 911 and falsely reported that Sabo had guns and drugs in his apartment. (R. 55.)

That does not constitute a *substantial preliminary showing* that the affidavit contained a material false statement that Ayala included intentionally, or with reckless

disregard to the truth. It constitutes a self-serving, conclusory contention that Sabo did not buttress with an affidavit from Martinez, or any records establishing that Martinez made such a call, much less under circumstances that bring Ayala's credibility into reasonable question.

Sabo's counsel admitted that Martinez "didn't talk to any detective." (R. 55:3.) And the prosecutor sensibly pointed out that Sabo simply assumed "that [Martinez] would be the sole source of law enforcement information about [him.] I don't think there's any reason to make that assumption." (R. 55:4.) Sabo proffered no evidence that, even if Martinez made the 911 call, it led Ayala to knowingly, intentionally, or with reckless disregard for the truth include material false statements in his warrant affidavit.

The circuit court also noted the inadequacy of the proof that Martinez actually made a 911 call. (R. 56:8–9.) The court implicitly questioned Martinez's credibility: "What they're 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, [t]he Court will deny the motion." (*Id*. at 13.)

Sabo believed Ayala lied about the existence of a citizen informant. (R. 55:6.) But he provided a patently inadequate evidentiary basis to support that belief. Recognizing that, the circuit court properly denied Sabo's request for a *Franks-Mann* hearing.

Sabo's appellate argument does not bring the correctness of that denial into doubt. He begins by reciting the allegations contained in his first motion for a *Franks-Mann* hearing and then states, in conclusory and declaratory fashion, that they established the substantial preliminary

showing required to receive a hearing. (Sabo's Br. 19–20.) They did not, as more fully appears at pages 18–20 of this brief.

Sabo then restates the offer of proof he made in his second motion regarding Martinez's alleged 911 call. (Sabo's Br. 20–23.) He suggests three possible conclusions: (1) Martinez was not Ayala's informant; (2) Ayala had no informant; or (3) Ayala used Martinez's information "and falsified facts to create probable cause." (*Id.* at 23.)

The first conclusion is benign. The second and third conclusions constitute rank speculation, lacking any evidentiary support. Sabo never provided an affidavit from Martinez confirming that the 911 call occurred, or its substance. Sabo never presented records confirming that the 911 call occurred. And he never presented evidence or argument showing that, even if Martinez made the 911 call, it led Ayala to knowingly, intentionally, or with reckless disregard for the truth include material false statements in his warrant affidavit.

Sabo failed to make the requisite preliminary showing required by *Franks*. Nothing he presented to the circuit court—or this Court—rises to the level of showing that Ayala deliberately presented false information in his affidavit, or showed a reckless disregard for the truth.

III. The circuit court did not err by refusing to grant Sabo's motion to compel disclosure of the State's confidential informant under Wis. Stat. § (Rule) 905.10(3)(c).

Wisconsin Stat. § (Rule) 905.10(3)(c) provides that a circuit court *may* require disclosure of an informer's identity *if* (1) information from the informer is relied upon to establish the legality of the seizure of evidence, and (2) the court is not satisfied that the informer was reasonably believed to be reliable or credible.

The circuit court's dissatisfaction—not the defendant's—matters. "It may be invoked only where the judge is not satisfied that the information was received from an informer reasonably believed to be reliable and credible." Daniel D. Blinka, *Wisconsin Practice Series: Wisconsin Evidence*, § 510.202 at 447 (4th. ed. 2017).

The State is uncertain whether the ability to challenge an adverse decision under section 905.10(3)(c) exists when a defendant pleads guilty or no contest. "The general rule is that a guilty, no contest, or Alford plea 'waives all nonjurisdictional defects, including constitutional claims.'" *State v. Kelty*, 2006 WI 101, ¶ 18, 294 Wis. 2d 62, 716 N.W.2d 886 (footnote omitted) (citation omitted). But because the issue arose in the context of a suppression motion, Sabo may obtain appellate review under Wis. Stat. § 971.31(10).

The State will assume for completeness Sabo may challenge the adverse decision as part of his suppression motion challenge. The challenge lacks merit. Here, the first requirement for disclosure was met, but not the second. By denying Sabo's motion to suppress and his requests for a *Franks-Mann* hearing, the circuit court impliedly denied any motion under section 905.10(3)(c). *State v. Gordon*, 159 Wis. 2d 335, 350, 464 N.W.2d 91 (Ct. App. 1990).

In the context of his motion to suppress and his motions for a *Franks-Mann* hearing, Sabo did his best to persuade the circuit court that Ayala lied about what his informant told him, or lied about the informant's existence. Because the court denied both motions, we know the court was satisfied that (1) the informant existed, and (2) Ayala reasonably believed the informant was both reliable and credible.

It does not matter if another court—or this Court—would have, on the facts of this case, ordered disclosure. "It is recognized that a trial court in an exercise of its discretion may reasonably reach a conclusion which another judge or

another court may not reach, but it must be a decision which a reasonable judge or court could arrive at by consideration of the relevant law, the facts, and a process of logical reasoning." *State v. Robinson*, 146 Wis. 2d 315, 330, 431 N.W.2d 165 (1988). Here, the circuit court's implicit determination that disclosure was not warranted finds support in both the record and in law, as set forth in the State's brief.

Sabo appears to believe that the circuit court had to require in camera disclosure simply because Sabo alleged that the informant was neither reliable nor credible. (Sabo's Br. 25.) That is not the standard. Disclosure depends on whether the court was satisfied that Ayala reasonably believed the informer was reliable or credible. The court was satisfied; no disclosure was necessary or appropriate. Sabo's dissatisfaction did not—and does not—automatically trigger the need for disclosure.

CONCLUSION

This Court should affirm Sabo's judgment of conviction.

Dated at Madison, Wisconsin, this 21st day of June, 2018.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,598 words.

Dated this 21st day of June, 2018.

_____
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Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 Wis. Stat. § 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 21st day of June, 2018.

_____
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Assistant Attorney General