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

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REPLY BRIEF OF DEFENDANT-APPELLANT

KAITLIN A. LAMB
Assistant State Public Defender
State Bar No. 1085026

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, Wisconsin 53202-4116
(414) 227-4805
lambk@opd.wi.gov

Counsel for Defendant-Appellant

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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. The affidavit does not establish the informant's veracity.

At the beginning of its analysis, the State concludes that the informant is "a citizen informant" requiring a "relaxed test of reliability." (State's Resp. at 11). The State appears to base this conclusion on the fact that the affidavit describes the informant as a "concerned citizen" and Officer Ayala knew the informant's identify and contact information. (*See id.* at 11, 12, 15-16).

However, the State's conclusion that the informant is "a citizen informant" ignores that the informant is characterized inconsistently throughout the affidavit. The affidavit characterizes the informant as a "confidential informant,"[1] a "reliable concerned citizen witness,"[2] and "a

[1] On the first page of the affidavit, the caption preceding paragraph four refers to the informant as "the confidential informant." (8:1; Sabo's Initial Br. 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; Sabo's Initial Br. App. 139-40).

[2] 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); Sabo's Initial Br. App. 139-40).

reliable registered confidential informant."[3] As a result, the affidavit does not explicitly establish the "type" of informant, much less that the informant is a "citizen informant."

Moreover, the fact that Officer Ayala knew the informant's name and contact information does not establish that the informant is a "citizen informant". Presumably, if the informant was a "confidential informant," Officer Ayala would also know the informant's name and contact information.

Further, a "citizen informant" is "someone who happens upon a crime or suspicious activity and reports it to the police." *See generally*, ***State v. Kolk***, 2006 WI App 261, ¶ 12, 298 Wis. 2d 99, 726 N.W.2d 337. Here, there is no indication in the affidavit as to how the informant just happened to see Mr. Sabo, for example, weighing and packaging cocaine. Was the informant invited over to watch t.v.? Or, did the informant come over to buy drugs?

Thus, insufficient information exists to conclude that the informant is a "citizen informant" requiring a relaxed test of reliability.

Additionally, to the extent that the informant is a "confidential informant," there is no information in the affidavit about the informant's past performance. (*See* Sabo's Initial Br. at 15). Nor are there any statements against interest which might establish the informant's credibility. (*See id*. at 16).

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[3] The informant is referred to as "a reliable registered confidential informant" once in paragraph four of the affidavit. (*See* 8:1, ¶ 4; Sabo's Initial Br. App. 138).

The State argues that Officer Ayala "meaningfully" confirmed key aspects of the informant's information. (State's Resp. at 16-17).

However, as set forth in Mr. Sabo's brief (at 16-17), Officer Ayala only corroborated the "innocent details" of Mr. Sabo's life. 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." (*See* State's Resp. at 12-13, 16).

Thus, the affidavit fails to establish that the informant's veracity.

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

The State argues that the informant's basis of knowledge came from "recent, firsthand observation at Sabo's residence, as well as the informant's past experience with Sabo." (State's Resp. 13).

However, as set forth in detail in Mr. Sabo's brief (at 12-13), the affidavit lacks significant detail. Mr. Sabo disagrees with the State's suggestion that these details are "hypertechnical." (State's Resp. at 14). The affidavit fails to describe any characteristics of the informant that would make the informant knowledgeable about illegal narcotics, how the informant knew the substance was cocaine, and how the

informant knew Mr. Sabo was selling cocaine. The affidavit also fails to provide sufficient detail regarding the apartment, the informant's relationship with Mr. Sabo, or the gun. (Sabo's Initial Br. at 12-13).

The State notes that the "[t]he 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." (State's Resp. at 15).

However, the affidavit does not state how the informant "knew of Sabo's past." Did the informant see him sell or buy cocaine? Did the informant sell or buy cocaine from him? Or was this a rumor or hearsay information from someone else?

In sum, the affidavit attached to the search warrant failed to establish the informant's veracity or basis of knowledge. 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.[4]

The State argues that Mr. Sabo fails to make a substantial preliminary showing justifying a ***Franks-Mann*** hearing. (State's Resp. at 18-22).

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[4] The State's brief does not appear to indicate the standard of review for a ***Franks-Mann*** hearing. (*See* State's Resp. at 8-9). As noted in Mr. Sabo's initial brief (at 18), a circuit court's denial of a defendant's motion for a ***Franks-Mann*** hearing is subject to de novo review.

Mr. Sabo disagrees. In ***State v. Anderson***, 138 Wis. 2d 451, 462, 406 N.W.2d 398 (1987), the Wisconsin Supreme Court explained that a defendant challenging the veracity of a statement made in a search warrant affidavit "must first make a substantial preliminary showing that a false statement[5] knowingly and intentionally, or with reckless disregard for the truth, was included" in the affidavit. To make a substantial preliminary showing:

> - There must be allegations of deliberate falsehood or of reckless disregard for the truth, and
>
> - those allegations must be accompanied by an offer of 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.

Id. (citing ***Franks v. Delaware***, 438 U.S. 154, 171 (1978)).[6]

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[5] 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." ***State v. Mann***, 123 Wis. 2d 375, 388-89, 367 N.W.2d 209 (1985).

[6] In its discussion of the law, the State notes that "conclusory, self-serving statements will not justify a ***Franks-Mann*** hearing." (State's Resp. at 18). To be clear, ***Franks v. Delaware,*** 438 U.S. 154 (1978), does not use the term "self-serving." ***Franks*** states "[t]o mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine." ***Id.*** at 171. Additionally, the State does not cite, nor did counsel locate any published United States Supreme Court or Wisconsin case using the term "self-serving." The State cites a Seventh Circuit case—***United States v. Reed***, 726 F.2d 339 (7th Cir. 1984)—which is not binding. *See, e.g.*, ***State v. Lepsch***, 2017 WI 27, ¶ 34 n. 14, 374 Wis. 2d 98, 892 N.W.2d 682.

Here, the two motions filed by Mr. Sabo's trial counsel made the necessary preliminary showing for a hearing.

First, as discussed in detail in Mr. Sabo's initial brief (at 19-23), the motions alleged that the officer either intentionally included false information in the affidavit or included information with reckless disregard. (*See* 6:16-17; 16:1, 4). The first motion also asserted that details were omitted that an actual informant would have passed on to the police. (*See* 6:16).

Second, as also discussed in Mr. Sabo's initial brief (at 19-23), the motions pointed out specifically the portions of the warrant claimed to be false and were accompanied by offers of proof in support. (*See* 6:15, 16; 16:2-3). For example, the second motion provided an extensive offer of proof regarding Martinez. (*See* 16:2-3). Thus, contrary to the State's argument, Mr. Sabo made the necessary preliminary showing for a hearing. [7]

The State also argues that Mr. Sabo failed to establish that Officer Ayala "perjured himself or acted recklessly." (*See* State's Br. at 18, 19, 20, 22). However, the hearing "by necessity, focuses, on the state of mind of the affiant." ***Anderson***, 138 Wis. 2d at 464. At a hearing, Mr. Sabo would need to "prove, by a preponderance of the evidence, that the challenged statement is false, that it was made intentionally or with reckless disregard for truth, and that absent the challenged statement the affidavit does not provide probable

[7] The State discusses Mr. Sabo's trial court allegations regarding affidavits from people in his residence and claims regarding the content of the surveillance video. (*See* State's Resp. at 19). To be clear, Mr. Sabo does not raise these claims or arguments on appeal. (*See* Sabo's Initial Br. at 5, 19-24).

cause." ***Anderson***, 138 Wis. 2d at 462 (citing ***Franks***, 438 U.S. at 156).

Additionally, the State critiques the absence of an affidavit from Martinez. (*See* State's Resp. at 21, 22). However, an affidavit was not necessary. The allegations must be stated in an affidavit *or* offer of proof. *See* ***State v. Mann***, 123 Wis. 2d 375, 388, 367 N.W.2d 209 (1985). And, given that an offer of proof was provided regarding Martinez, this does not provide grounds to deny a hearing. (*See* 16:2-3).

Therefore, this Court should remand for an evidentiary hearing.

III. This Court should remand this case to the circuit court to conduct an in camera review of the identity of the informant.

A. This issue is not forfeited on appeal.

The State indicates that it 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." (State's Resp. at 23). The State then acknowledges that "because the issue arose in the context of a suppression motion, Sabo may obtain appellate review under Wis. Stat. § 971.31(10)." (*Id.*).

The State is correct that because the issue arose in the context of a suppression motion, this issue is not forfeited.

This Court has previously rejected an argument that a plea waives or forfeits a request to disclose the identity of an informant. In ***State v. Fischer***, 147 Wis. 2d 694, 700-01, 433 N.W.2d 647 (Ct. App. 1988), the State argued the defendant lost his right to appellate review of the disclosure of the informant's identity because "a plea of guilty or no contest

waives nonjurisdictional defects and defenses." This Court rejected this argument because the "motion to compel disclosure as made in the course of his suppression hearing" and Wis. Stat. § 971.31(10) allows an appeal from an order denying a motion to suppress evidence after a judgment is entered on a plea of guilty or no contest. ***Id.***

Like the defendant in ***Fischer***, Mr. Sabo requested the disclosure of the identity of the informant in the context of a suppression motion, thus his claim is not forfeited. (*See* 6; 16).

Moreover, assuming for the sake of argument, but not conceding that this claim is forfeited, this Court should still consider it. *See generally*, ***State v. Caban***, 210 Wis. 2d 597, 609, 563 N.W.2d 501 (1997) (forfeiture is a rule of judicial administration and a reviewing court has the inherent authority to disregard a forfeiture and address the merits of an unpreserved argument). This claim was fully litigated in the circuit court and the circuit court had an opportunity to decide this issue. Additionally, this argument was raised in Mr. Sabo's initial brief and the State has had an opportunity to respond.

B. This case should be remanded for the circuit court to conduct an in camera review.

Regarding the merits of request for disclosure, the State agrees that Mr. Sabo met the first requirement for disclosure of the identity of the informant pursuant to Wis. Stat. § 905.10(3)(c), but disagrees that Mr. Sabo met the second requirement which states "the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible." (State's Resp. at 23). In support, the State argues that:

> 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. That is not the standard. ***Disclosure depends on whether the court was satisfied that Ayala reasonably believed the informer was reliable and credible. The court was satisfied; no disclosure was necessary or appropriate***.

(State's Resp. at 24) (Emphasis added).

Mr. Sabo disagrees with the State's characterization of the standard.

First, Mr. Sabo reads the State's argument to suggest that, because the circuit court was satisfied, the inquiry on appeal simply ends. Contrary to the State's suggestion, it is Mr. Sabo's position that the inquiry on appeal is whether the circuit court erroneously exercised its discretion in refusing to conduct an in camera review of the informant's identity. In other words, the inquiry is not simply whether the circuit court was satisfied, but whether the circuit court erred in being satisfied. And, here, as discussed above and in Mr. Sabo's brief (at 25-26), the circuit court's refusal to conduct an in camera review was an erroneous exercise of discretion because: (1) the information was relied upon to establish the legality of the means by which evidence was obtained; and (2) the informant was not reliable or credible.

Second, Mr. Sabo disagrees with the State's statement that "[d]isclosure depends on whether the court was satisfied that *Ayala reasonably believed the informer was reliable and credible*." (State's Resp. at 24). By requiring that the court be satisfied that the *officer* reasonably believed the informer was reliable and credible, the State incorrectly reads an extra requirement into the statute. Wis. Stat. § 905.10(3)(c) provides that:

> 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.

(Emphasis added). The statute does not state that "the information was received from an informer [that an officer] reasonably believed to be reliable or credible." Thus, the State's interpretation requires inserting extra language regarding an officer into the statute, which is not permitted. See e.g., ***State v. Boyd***, 2012 WI App 39, ¶ 7, 340 Wis. 2d 168, 811 N.W.2d 853; ***Mayo v. Boyd***, 2014 WI App 37, ¶ 11, 353 Wis. 2d 162, 844 N.W.2d 652. Rather, the plain language of the statute simply requires that disclosure is required when the judge is not satisfied that the informer is reliable or credible.

Thus, in this case, the circuit court's refusal to conduct an in camera review was an erroneous exercise of discretion because the information was relied upon to establish the legality of the means by which evidence was obtained and the informant was not reliable or credible. As discussed above and in Mr. Sabo's initial brief (at 25-26), an in camera review should have been conducted based on the fact that: (1) the affidavit failed to establish that the informant is credible and reliable; (2) the informant was wrong about important details; (3) the informant omitted details; and (3) trial counsel's offer of proof regarding Mr. Martinez.

Therefore, Mr. Sabo respectfully requests that this Court remand for an in camera review hearing of the informant's identity.

CONCLUSION

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 24th day of August, 2018.

Respectfully submitted,

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KAITLIN A. LAMB
Assistant State Public Defender
State Bar No. 1085026

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, Wisconsin 53202-4116
(414) 227-4805
lambk@opd.wi.gov

Attorney for Defendant-Appellant

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 2,757 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 24th of August, 2018.

KAITLIN A. LAMB
Assistant State Public Defender
State Bar No. 1085026

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, Wisconsin 53202-4116
(414) 227-4805
lambk@opd.wi.gov

Attorney for Defendant-Appellant