STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2017AP2311-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRINKLEY L. BRIDGES,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING PLEA WITHDRAWAL, ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DANIEL L. KONKOL AND THE HONORABLE DAVID C. SWANSON, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUE

Is the defendant-appellant, Brinkley L. Bridges, entitled to a hearing on his claim of post-sentencing plea withdrawal for counsel's failure to file a motion to suppress evidence on the ground that the cellular phone tracking warrant (hereinafter, the "tracking warrant") was defective?

The postconviction court answered no.

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case can be resolved by applying established Wisconsin law to the facts.

INTRODUCTION

Bridges is seeking plea withdrawal, alleging that counsel should have sought suppression of all evidence obtained after the execution of a search warrant and suppression of Bridges' statements made after his arrest. While not fully articulated as such, Bridges' claim is as follows:

A tracking warrant was issued without probable cause. Information obtained from that tracking warrant was improperly used in the search warrant application. If the tracking information was excised from the search warrant application, the search warrant would not have issued. And thus, defense counsel should have sought suppression on those grounds. Counsel did not, and Bridges should be permitted to withdraw his guilty plea because counsel was ineffective.

The circuit court properly denied Bridges' claim without a hearing. Bridges' argument relies on authorities from other jurisdictions and fails to address that the

tracking warrant issued pursuant to Wis. Stat. § 968.373. The record conclusively demonstrates that the tracking warrant was sufficient under the statute. Therefore, there would be no meritorious suppression claim, and Bridges' counsel cannot be ineffective for failing to bring that claim. Because the record conclusively demonstrates that Bridges is not entitled to relief, it was a proper exercise of discretion for the postconviction court to deny his plea withdrawal claim without a hearing. This Court should affirm.

SUPPLEMENTAL STATEMENT OF THE CASE

The State charged Bridges with possession with intent to deliver heroin in excess of 50 grams, subsequent offense; possession with intent to deliver cocaine in excess of 15 grams but not greater than 40 grams, subsequent offense; possession with intent to deliver tetrahydrocannabinols in excess of 200 grams but not greater than 1,000 grams, subsequent offense; and two counts of possession of a firearm by a felon. (R. 4.) Bridges ultimately pled guilty and was convicted of all charges. (R. 14.)

The charges were the result of an investigation by the State and the Drug Enforcement Administration (DEA). As a part of that investigation, a cellular phone warrant issued for the installation and use of a trap and trace device or process, pursuant to Wis. Stat. § 968.36; the installation and use of a pen register device or process, pursuant to Wis. Stat. § 968.36; the release of subscriber information and details, pursuant to Wis. Stat. § 968.375(3); and location tracking pursuant to Wis. Stat. § 968.373. Bridges challenges only the location tracking portion of the warrant. (Bridges' Br. 7.)

Wisconsin Stat. § 968.373 governs the issuance of a warrant to track a communication device. As relevant here, the warrant must "[p]rovide a statement that sets forth facts and circumstances that provide probable cause to believe the criminal activity has been, is, or will be in progress and that

identifying or tracking the communications device will yield information relevant to an ongoing criminal investigation." Wis. Stat. § 968.373(3)(e).

Thus, there are two conditions that must be met for a tracking warrant to issue pursuant to Wis. Stat. § 968.373. First, the warrant application must state probable cause to believe that criminal activity has, is, or will be, afoot. Second, the warrant application must state facts to support that the tracking of the cellular phone will be relevant to an ongoing criminal investigation.

The warrant application was made on January 20, 2015. (R. 37:19.) It contained an affidavit from DEA Special Agent, James Krueger. (R. 37:9.) Krueger alleged that there was an ongoing criminal investigation related to Bridges' involvement in the distribution of heroin. (R. 37:10–11, 15.) During the course of that investigation, it became known that Bridges was using a specific cellular phone number. (R. 37:10–11, 13.) Krueger was aware of the proliferation of cellular phones in society and the increased use of those phones in connection with criminal activity. (R. 37:14.)

The probable cause portion of the warrant application explained that Krueger was working with a confidential informant. (R. 37:12.) Krueger averred that the informant was reliable because the informant provided detailed information that would only be known by someone directly involved in purchasing heroin from Bridges. (R. 37:12.) The informant also made multiple statements against the informant's penal interest. (R. 37:12–13.)

The probable cause statement included:

1. The informant identified Bridges from his booking photo and advised that Bridges was currently involved in the sale of heroin in Milwaukee. (R. 37:13.)

2. The informant purchased heroin, totaling approximately one-half kilogram, from Bridges multiple times throughout 2014. (R. 37:13.) The informant provided details regarding the quantity, price, and delivery arrangements of the most recent purchases. (R. 37:12–13.)

3. The informant stated that Bridges traveled to Chicago approximately every three weeks to purchase a kilogram of heroin and, at times, cocaine. (R. 37:13.)

4. The informant provided Krueger with Bridges' cellular phone number. (R. 37:13.) Krueger confirmed the number through records and database searches. (R. 37:13.)

5. The informant knew that Bridges had previously been convicted and incarcerated for drug dealing and that Bridges was currently under federal supervision. (R. 37:13.) Krueger was aware that Bridges was previously prosecuted federally and that Bridges had been incarcerated. (R. 37:14.)

6. The informant stated that Bridges worked at a computer business called C&B Computers and that Bridges would distribute heroin from that business. (R. 37:13.) Krueger confirmed that C&B Computers was a business located in Milwaukee. (R. 37:13.)

7. The informant stated that Bridges had a residence at a gated apartment complex on West Pierce Street. (R. 37:13.) Krueger located that complex, which was the Knitting Factory Loft Apartments. (R. 37:13.) Krueger met with the owner-manager of that apartment complex and showed that individual a photograph of Bridges. (R. 37:13–14.) The owner identified the person in

the photograph as Brink or Brinkley and stated that Bridges paid the rent for apartment #228, which was rented to a female. (R. 37:14.) The owner told Krueger that there was a vehicle assigned to that apartment, and Krueger later confirmed that the vehicle was registered to Bridges. (R. 37:14.)

8. The informant provided details of the vehicles used by Bridges. (R. 37:13.) Krueger confirmed that information through record and database searches. (R. 37:13.)

The circuit court issued the tracking warrant that same day. (R. 37:4–8.) The warrant was executed and location data was obtained for Bridges' cellular phone. (R. 37:3.)

That location data was used in a January 28, 2015, application for no-knock search warrants for 5279 North 44th Street and 2624 North 60th Street in Milwaukee. Bridges is only challenging the warrant issued for 2624 North 60th Street. (Bridges' Br. 14.) The no-knock warrant application for that address also contained an affidavit from Krueger that included, in part, the following factual assertions:

1. The confidential informant said that Bridges was known to carry a gun on a regular basis, including when he was distributing heroin. (R. 38:6.)

2. On January 26, 2015, the confidential informant stated:

    a. He knew from personal observations that Bridges stored heroin at his residence on North 44th Street and Villard. (R. 38:6.)

b. He knew that Bridges stored heroin "where [he] slept." (R. 38:6.)

c. He knew from a member of Bridges' "organization" that Bridges was currently engaged in distributing heroin from both addresses. (R. 38:6.)

3. Through investigation, Krueger confirmed that:

a. Bridges' residence on North 44th Street was 5279 North 44th Street. (R. 38:6.) Bridges paid utilities at that address.

b. The address where Bridges slept was 2624 North 60th Street. (R. 38:6.)

4. The confidential informant said that, for the last one and one-half years, Bridges would travel to Chicago, Illinois, approximately every three weeks to obtain approximately one kilogram of heroin and, at times, an equal amount of cocaine. (R. 38:6.)

5. On January 24, 2015, at 4:00 p.m., Bridges' cellular phone was located in and then departed the area of 2624 North 60th Street in Milwaukee. At 6:54 p.m., Bridges' cellular phone was located in Chicago. At 9:00 p.m., Bridges' cellular phone was traveling north, leaving Chicago. At 10:34 p.m., Bridges' cellular phone had returned to the area of 2624 North 60th Street in Milwaukee. At 11:37 p.m., Bridges' cellular phone was in the area of 5279 North 44th Street in Milwaukee. At 12:39 [a.m.] the following day, Bridges' cellular phone had returned to the area of 2624 North 60th Street in Milwaukee. (R. 38:6.)

6. Krueger believed that the tracking data was evidence that Bridges had made a trip to Chicago to obtain controlled substances.

7. On January 27, 2015, the confidential informant said that a member of Bridges' "organization" said that Bridges had recently obtained heroin and intended to supply 20–30 grams of that heroin to a customer who resides in the 4500 block of North 60th Street in Milwaukee. (R. 38:6–7.) The drug transaction was supposed to occur that same day. (R. 38:7.) Krueger identified that area as North 60th Street and Fond du Lac Avenue. (R. 38:7.)

8. On January 27, 2015, at 12:42 p.m., Bridges' cellular phone was located in the area 2624 North 60th Street and traveled to the area of North 60th Street and Fond du Lac Avenue. (R. 38:7.)

9. Between January 21, 2015, and January 27, 2015, Bridges' cellular phone was located multiple times in the area of 5279 North 44th Street and approximately 328 times in the area of 2624 North 60th Street. (R. 38:7.)

The no-knock search warrant issued on January 28, 2015. (R 38:1.) The next morning, the search warrant was executed at 2624 North 60th Street. (R. 1:3.) Bridges was taken into custody at that time at that location. (R. 1:3.)

Law enforcement recovered approximately 2,922 grams of heroin, 23 grams of cocaine salt, 421 grams of marijuana, $30,810.00 in United States currency, packaging materials, manufacturing materials, a black 40 caliber Glock semi-automatic firearm loaded and chambered, and additional ammunition. (R. 1:3–5.)

On the same day as the search, law enforcement interviewed Bridges. (R. 1:6.) Bridges admitted that he possessed with the intent to distribute the recovered heroin, cocaine, and marijuana. (R. 1:6–7.) Bridges also admitted to possessing the recovered firearms. (R. 1:7.)

After he pled guilty, was convicted, and was sentenced, Bridges filed a motion to withdraw his guilty plea. (R. 29.) He alleged that his trial counsel was ineffective for failing to file a motion to suppress his statements and the evidence obtained from the search of 2624 North 60th Street. (R. 29:1–2.) Bridges alleged that the tracking warrant "should have been denied for three reasons: one is an intentional misrepresentation by the Affiant that Bridges used this cell phone to conduct illegal drug transactions; two, the representation that the statement by the confidential informant was against his penal interest is uncorroborated; and three, the confidential informant only stated that Bridges possessed this cell phone." (R. 29:2.)

The circuit court denied Bridges' motion without a hearing. (R. 42.) The court concluded that the information provided in the affidavit was "*more* than sufficient to establish probable cause that the defendant was involved in heroin trafficking, that the CI had provided objectively verifiable information that showed him/her to be truthful and reliable, and that the information sought (i.e. the defendant's GPS location) would provide evidence that would aid in a conviction for possession with intent to deliver heroin, and possibly, cocaine." (R. 42:4.) The court also concluded that the "claim that the agent made a false statement in the affidavit by claiming that defendant had used the phone to facilitate heroin sales is entirely unsupported and conclusory, and in any event, that specific allegation was unnecessary to find probable cause for the warrant under Wisconsin law." (R. 42:4–5.)

The court then concluded that "assuming, *arguendo*, that the affidavit did not state probable cause . . . the evidence was admissible under the good faith exception to the exclusionary rule, since the standard the defendant asks the court to apply to the validity of the warrant was not law of this state at the time the warrant was issued." (R. 42:5.)

Bridges appeals.

STANDARD OF REVIEW

Bridges alleges that the circuit court erred when it denied his motion for plea withdrawal without a hearing. The standard of review for the circuit court's actions is the erroneous exercise of discretion standard. *See State v. Phillips*, 2009 WI App 179, ¶ 17, 322 Wis. 2d 576, 778 N.W.2d 157 (denial of evidentiary hearing); *State v. Thomas*, 2000 WI 13, ¶ 13, 232 Wis. 2d 714, 605 N.W.2d 836 (denial of post-sentencing plea withdrawal).

ARGUMENT

The circuit court properly denied Bridges' claim without a hearing.

A. Legal principles of post-sentencing plea withdrawal predicated on a claim of ineffective assistance of counsel

A motion to suppress evidence was never litigated in the circuit court, and Bridges waived any such claim when he pled guilty. *See State v. Multaler*, 2002 WI 35, ¶ 54, 252 Wis. 2d 54, 643 N.W.2d 437 (a guilty plea waives non-jurisdictional defects, including un-litigated claims that evidence and statements should have been suppressed for an alleged Fourth Amendment violation). Thus, whether there was a meritorious suppression claim is only relevant insofar as it relates to the issue of post-sentencing plea withdrawal due to ineffective assistance of counsel.

When a defendant seeks to withdraw his or her plea post-sentencing, he or she must establish by clear and convincing evidence that withdrawal is necessary to prevent a manifest injustice. *State v. Taylor*, 2013 WI 34, ¶ 24, 347 Wis. 2d 30, 829 N.W.2d 482 (citations omitted). A defendant can satisfy the manifest injustice test by proving that he or she received ineffective assistance of counsel. *See State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). To prove ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance actually prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Bridges' claim was denied without a hearing. A postconviction motion alleging ineffective assistance of counsel does not automatically trigger a hearing. *Phillips*, 322 Wis. 2d 576, ¶ 17. Nor does a motion for post-sentencing plea withdrawal. *Bentley*, 201 Wis. 2d at 309–11. "[N]o hearing is required if the defendant fails to allege sufficient facts in his or her motion, if the defendant presents only conclusory allegations or subjective opinions, or if the record conclusively demonstrates that he or she is not entitled to relief." *Phillips*, 322 Wis. 2d 576, ¶ 17 (citing *Bentley*, 201 Wis. 2d at 309–10).

B. The record conclusively demonstrates that defense counsel was not ineffective for failing to file a suppression motion.

Bridges' claim rests on his assertion that the tracking warrant was defective. It was not, and any suppression motion based on such an allegation would have been meritless. Counsel cannot be ineffective for failing to file a meritless motion. *State v. Cummings*, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996) ("It is well-established that an attorney's failure to pursue a meritless motion does not constitute deficient performance"); *State v. Simpson*, 185

Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994) (if a suppression motion would have been denied, counsel's failure to make it cannot constitute prejudice).

The record conclusively demonstrates that any challenge to the tracking warrant would have been meritless because the warrant application established probable cause for criminal activity and established that the tracking information would be relevant to an ongoing criminal investigation.

1. The probable cause requirement for a tracking warrant is probable cause of criminal activity, not probable cause that the tracking information will be evidence of criminal activity.

Pursuant to Wisconsin law, a tracking warrant that issues pursuant to Wis. Stat. § 968.373 must meet two conditions. First, the warrant application must state probable cause to believe that criminal activity has, is, or will be, afoot. Wis. Stat. § 968.373. Second, the warrant application must state facts to support that the tracking of the cellular phone will be relevant to an ongoing criminal investigation. Wis. Stat. § 968.373. Here, the warrant application provided sufficient facts to establish probable cause that criminal activity was afoot and that tracking of Bridges' cellular phone would be relevant to an ongoing criminal investigation.

"[I]t is well established in our case law that 'probable cause' does not refer to a uniform degree of proof, but instead varies in degree at different stages of the proceedings." *Cty. of Jefferson v. Renz*, 231 Wis. 2d 293, 304, 603 N.W.2d 541 (1999). The Legislature has authorized the use of tracking warrants to assist criminal investigations. Tracking warrants are unlike traditional search warrants. A tracking

warrant is not looking for evidence of criminal activity. Location data, in and of itself, is not evidence of a crime.[1]

The purpose of a tracking warrant is to uncover data that would be "relevant" to an ongoing investigation. Wis. Stat. § 968.373. Relevance is thought of in terms of evidence that would have "any tendency" to make a fact of consequence more or less probable than it would be without the evidence. Wis. Stat. §§ 904.01 and 904.02. "The 'any tendency' standard reflects the broad definition of relevancy." *State v. Richardson*, 210 Wis. 2d 694, 707, 563 N.W.2d 899 (1997). Thus, a tracking warrant differs from a search warrant. A tracking warrant is not a warrant to search for evidence of a crime per se; it is a warrant for the purposes of uncovering information *relevant* to the criminal investigation.

Bridges ignores Wis. Stat. § 968.373 and asks this Court to reach a different conclusion based on case law from foreign jurisdictions. (Bridges' Br. 8–10.) This Court should reject that request as completely inappropriate. Wisconsin has a statute that specifically authorizes tracking warrants. Common law from foreign jurisdictions does not trump codified Wisconsin law. *See Burbank Grease Servs., LLC v. Sokolowski*, 2006 WI 103, ¶ 32, 294 Wis. 2d 274, 717 N.W.2d 781 ("[C]ases from other jurisdictions cannot substitute for [the] construction of the relevant Wisconsin Statute.").

Moreover, even if Bridges were to argue—which he does not—that the requirements for a tracking warrant are unsettled, counsel cannot be ineffective for failing to file a motion based on unsettled law. *See, e.g., State v. Breitzman*,

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[1] While there may be limited circumstances in which an individual's location in a specific area is criminal, that is not the case here.

2017 WI 100, ¶ 48, 378 Wis. 2d 431, 904 N.W.2d 93. Thus, his claim fails.[2]

The level of probable cause needed for a tracking warrant must be addressed in the context of the statute that authorizes the use of such warrants. A tracking warrant requires "facts and circumstances that provide probable cause to believe the criminal activity has been, is, or will be in progress." Wis. Stat. § 968.373. As addressed below, the warrant application provided sufficient facts to establish that criminal activity was afoot.

2. The facts within the warrant application established probable cause that criminal activity was afoot.

"Review of the warrant-issuing judge's finding of probable cause is not de novo." *State v. DeSmidt*, 155 Wis. 2d 119, 132, 454 N.W.2d 780 (1990). Rather, in reviewing whether there was probable cause for the issuance of a warrant, the appellate court accords great deference to the determination made by the warrant-issuing magistrate; and "[t]he magistrate's determination will stand unless the defendant establishes that the facts are clearly insufficient to support a probable cause finding." *State v. Ward*, 2000 WI 3, ¶ 21, 231 Wis. 2d 723, 604 N.W.2d 517. "It is the duty of the reviewing court to ensure that the magistrate had a substantial basis to conclude that the probable cause existed." *Id.* ¶ 21.

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[2] The postconviction court concluded as much in a truncated good-faith analysis. (R. 42:5.) In the context of a claim of ineffective assistance of counsel, this Court does not have to go as far as to find that the good-faith exception applies. Rather, the analysis is complete if the law is unsettled. *See State v. Blalock*, 150 Wis. 2d 688, 703, 422 N.W.2d 514 (Ct. App. 1989) (appellate courts should decide issues on the narrowest grounds possible).

For a tracking warrant, deciding whether probable cause exists involves the examination of the totality of the circumstances presented to the warrant-issuing judge to determine whether there was a fair probability that criminal activity has been, is, or will be in progress. *See, e.g., State v. Romero*, 2009 WI 32, ¶ 3, 317 Wis. 2d 12, 765 N.W.2d 756 (explaining the traditional standard for review of a search warrant) and Wis. Stat. § 968.373 (requiring probable cause for criminal activity). The requisite evidence needed to establish probable cause need not reach a degree of certainty. *State v. Secrist*, 224 Wis. 2d 201, 214–15, 589 N.W.2d 387 (1999). Rather, "probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Illinois v. Gates*, 462 U.S. 213, 243 n.13 (1983).

Here, the warrant application contained facts sufficient to establish probable cause that criminal activity was afoot. The bulk of those facts were provided by a confidential police informant. With respect to information from confidential informants, probable cause may be based on hearsay information that is shown to be reliable and emanating from a credible source. *State v. McAttee*, 2001 WI App 262, ¶ 9, 248 Wis. 2d 865, 637 N.W.2d 774.

There are no specific prerequisites to finding a confidential informant reliable. The court assesses reliability under the totality of the circumstances. *State v. Boggess*, 115 Wis. 2d 443, 455, 340 N.W.2d 516 (1983). Courts balance the quality of the information and the quantity or content of the information to determine whether the police acted reasonably in reliance on information from an informant. *State v. Miller*, 2012 WI 61, ¶ 31, 341 Wis. 2d 307, 815 N.W.2d 349. These two factors have an "inversely proportional relationship." *Id.* A reliable informant does not need as much detail in the tip for police to rely on that information. *Id.* ¶ 32. If the informant's reliability is

questionable or unknown, "the tip must contain more significant details or future predictions along with police corroboration." *Id.*

Among the factors to be considered are the basis of the informant's information, the specificity of the information, and the independent corroboration of the information by the police. *State v. Moretto*, 144 Wis. 2d 171, 186, 423 N.W.2d 841 (1988). A deficiency in one area of reliability may be compensated by a strong showing of some other indicia of reliability. *Id.* No single factor is dispositive. *Id.* Predictive information is not necessary for information to be reliable. *State v. Kolk*, 2006 WI App 261, ¶ 18, 298 Wis. 2d 99, 726 N.W.2d 337. And the police can establish reliability based upon the "corroboration of innocent, although significant, details." *State v. Robinson*, 2010 WI 80, ¶ 29, 327 Wis. 2d 302, 786 N.W.2d 463.

Here, the informant provided sufficient details to allow the police and the warrant-issuing magistrate to conclude that the informant was reliable and that there was a probability or substantial chance that criminal activity was afoot.

First, the informant identified Bridges from his booking photo. (R. 37:13.) The informant said that he had purchased heroin, totaling approximately one-half kilogram, from Bridges multiple times throughout 2014. (R. 37:13.) The informant provided details regarding the quantity, price, and delivery arrangements of the most recent purchases. (R. 37:12–13.) The detail and specificity of that information is indicative of reliability. And those statements were against the informant's penal interest. Statements against penal interest are indicative of reliability. *Romero*, 317 Wis. 2d 12, ¶ 55 (citing 2 Wayne R. LaFave, *Search and Seizure* § 3.3(c), at 131 (4th ed. 2004)).

Bridges asserts that a statement against penal interest is only indicative of reliability if the statement against penal interest is specifically collaborated. (Bridges' Br. 12.) Bridges is wrong.[3] "[I]t cannot be said . . . that reliability flows from the fact that one does not lightly admit to criminal conduct otherwise unknown to the police. It *can* be said, however, that one who knows the police are already in a position to charge him with a serious crime will not lightly undertake to divert the police down blind alleys." 2 Wayne R. LaFave, *Search and Seizure* § 3.3(c), at 170 (5th ed. 2012). "Thus, where the circumstances fairly suggest that the informant 'well knew that any discrepancies in his story might go hard with him,' that is a reason for finding the information reliable." *Id.* (citation omitted).

Second, the informant stated that Bridges traveled to Chicago approximately every three weeks to purchase a kilogram of heroin and sometimes cocaine. (R. 37:13.) That is yet another detailed statement that suggests reliability.

Third, Krueger was able to collaborate details provided by the informant, such as Bridges' cellular phone number, his vehicles, his place of employment, and that Bridges had a residence, not leased to Bridges, in a gated apartment complex on West Pierce Street. (R. 37:13–14.)

Fourth, the informant knew that Bridges had previously been convicted and incarcerated for drug dealing and that Bridges was currently under federal supervision. (R. 37:13.) Krueger was aware that Bridges was previously prosecuted federally and that Bridges had been incarcerated. (R. 37:14.)

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[3] Bridges relies on *State v. Verhasselt*, 83 Wis. 2d 647, 661, 266 N.W.2d 342 (1978), and *Triplett v. State*, 65 Wis. 2d 365, 372, 222 N.W.2d 689 (1974). (Bridges' Br. 12.) Neither case concerns the assessment of a confidential informant's reliability.

The detailed information provided, the statements against penal interest, and the collaboration of innocent details were sufficient to establish the informant's reliability. *See, e.g., Robinson*, 327 Wis. 2d 302, ¶¶ 27–29.

The details the informant provided were also sufficient to establish probable cause that criminal activity was afoot. The informant said that he had purchased heroin on multiple occasions from Bridges. (R. 37:13.) The informant said that Bridges was still involved in the distribution of heroin and would distribute heroin from his place of business. (R. 37:13.) The informant also said that Bridges would travel to Chicago to purchase his supply of heroin to distribute in Milwaukee. (R. 37:13.) That is sufficient to establish "a probability or substantial chance of criminal activity." *Gates*, 462 U.S. at 243 n.13.

Bridges' argument that the warrant application did not establish probable cause because there was no basis for Krueger's assertion that Bridges used the cellular phone to facilitate drug transactions is unavailing. (Bridges' Br. 11–12.) The probable cause inquiry is whether there was "probable cause to believe the criminal activity has been, is, or will be in progress." Wis. Stat. § 968.373. Krueger's assertion that the cellular phone was used in criminal activity was not necessary for the warrant-issuing judge's probable cause determination. The inquiry was not whether the cellular phone was directly involved in criminal activity. Rather, the required nexus to the cellular phone is that the tracking data would be relevant to the investigation. That requirement, addressed below, was also met.

3. The facts within the warrant application established that the tracking information would be relevant to an ongoing criminal investigation.

It is undisputed that there was an ongoing criminal investigation into Bridges' distribution of heroin in Milwaukee. (R. 37:11, 15.) Thus, the only remaining question is whether the tracking information would be relevant to that investigation. The answer to that question is yes.

One of the confidential informant's assertions was that Bridges regularly traveled to Chicago to purchase his supply for distribution. (R. 37:13.) Thus, tracking data establishing Bridges' travel from Milwaukee to Chicago, and back, would be relevant to the ongoing criminal investigation.

Krueger had averred that he was aware of the proliferation of cellular phones in society and the increased use of those phones in connection with criminal activity. (R. 37:14.) It is also common knowledge that cellular phones, by design, are regularly carried by individuals when they travel.

It is common sense, which the warrant-issuing judge was permitted to employ, *Romero*, 317 Wis. 2d 12, ¶ 19–20, that the location tracking data would be relevant to the ongoing investigation into Bridges' involvement in the distribution of heroin.

Because the warrant application established probable cause to believe that criminal activity was afoot and that the tracking data would be relevant to an ongoing investigation, there would be no basis to challenge the tracking warrant. With no basis to challenge the tracking warrant, Bridges' fruits of the poisonous tree argument is a non-starter. (*See* Bridges' Br. 13–17.)

In sum, any motion to suppress on the ground that the tracking warrant was defective would have been without merit, especially in light of the deference owed to the warrant-issuing judge. The record conclusively demonstrates that Bridges is not entitled to relief because defense counsel cannot be ineffective for failing to file a meritless motion. *Cummings*, 199 Wis. 2d at 747 n.10; *Simpson*, 185 Wis. 2d at 784. Since Bridges was not entitled to the relief he sought, it was proper for the court to deny his motion for post-sentencing plea withdrawal without a hearing. *Phillips*, 322 Wis. 2d 576, ¶ 17.

CONCLUSION

This Court should affirm Bridges' judgment of conviction and the order denying plea withdrawal.

Dated this 1st day of June, 2018

Respectfully submitted,

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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 4,848 words.

Dated this 1st day of June, 2018.

_____
TIFFANY M. WINTER
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 1st day of June, 2018.

_____
TIFFANY M. WINTER
Assistant Attorney General