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**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 1**

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 2017AP002311 CR
Circuit Case No. 2015CF000575

v.

BRINKLEY L. BRIDGES,

Defendant-Appellant.

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of Conviction and Sentence
entered in Milwaukee County Circuit Court
Honorable Donald L. Konkol, presiding
And
Appeal from the Order Denying Post-Conviction Motion
entered in
Milwaukee County Circuit Court
Honorable David Swanson, presiding

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v.
BRINKLEY L. BRIDGES,
Defendant-Appellant.

COMPLIANCE CERTIFICATE

I hereby certify that this Reply Brief conforms to the form and length requirements of Rule 809.19(8)(b) and (c) in that it is typewritten using a proportional font. The length of this Reply Brief is 1,676 words. I further certify in accordance with Rule 809.19(12)(f) that the text of the electronic copy of this Reply Brief is identical to the text of the paper copy of this Reply Brief.

Dated this _____ day of June 2018.

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ARGUMENT

A warrant that permitted the GPS tracking of Bridges' cell phone was issued in violation of his fourth amendment rights. As a result, a search warrant was issued and executed resulting in the seizure of evidence, the arrest of Bridges and an in- custody statement by Bridges. Bridges' trial counsel failed to challenge the tracking warrant by filing a motion to suppress evidence and his statement. As a result, Bridges contends that he is entitled to withdraw his guilty plea on the basis that both his fourth and sixth constitutional amendments were violated causing a manifest injustice.

The State contends that because the GPS tracking of Bridges' cell phone satisfied the requirements for Wis. Stat. § 968.373, Bridges' constitutional rights were not violated. As such, Bridges is not entitled to withdraw his guilty plea. (State's Brief at 11).

I. WIS. STAT. § 968.373 DOES NOT AUTHORIZE A WARRANT FOR GPS TRACKING ON BRIDGES CELL PHONE AND THE AFFIDAVIT FOR THE PHONE WARRANT FAILED TO ESTABLISH A NEXUS BETWEEN BRIDGES' CELL PHONE AND CRIMINAL ACTIVITY.

The State's argument that compliance with Wis. Stat. § 968.373 for the warrant authorizing GPS tracking on Bridges' cell phone is misplaced. (State's Brief at 11). Wis. Stat. § 968.373(3) authorizes "a person to identify or track the location of a communications device." Because the mere tracking of a cell phone's location and the authorization of GPS tracking of a cell phone are distinctly different, the State's argument must fail.

As noted in *State v. Subdiaz-Osorio*, 2014 WI 87, 849 N.W.2d 748:

The privacy landscape is shifting as we embrace new technologies. Electronic devices afford us great convenience and efficiency, but unless our law keeps pace with our technology, we will pay for the benefit of our gadgets in the currency of privacy. As we incorporate more of our lives into our smartphones and tablets, we are not merely using

technology as a tool for societal and professional navigation; we are digitizing our identities. Thus, efforts to access the information in our electronic devices invade and expose the marrow of our individuality.

The balancing is especially important as citizens pay close attention to their privacy rights in the context of wireless technology. As awareness of our dwindling privacy increases, surveys consistently reveal that people are apprehensive about losing privacy with regard to their personal information. As cell site location and GPS technology become ubiquitous, Americans are adding cell phone location information to the list of concerns. This concern makes sense as an estimated 335.65 million wireless subscriber connections existed in the United States at the end of 2013. The court is mindful of the pervasiveness of wireless technology and of our citizens' concern for their privacy as we analyze the constitutional protections against unreasonable government intrusions.

Subdiaz–Osorio at ¶ 42 and ¶ 45.

In *Commonwealth v. Augustine*, 4 N.E.3d 846, 467

Mass. 230 (Mass. 2014), the court stated that a GPS tracking on a cell phone “may yield a treasure trove of very detailed and extensive information about the individual’s ‘comings and goings’ in both public and private places”; “can function as a substitute for 24/7” surveillance; and “can reveal not just

where people go – which doctors, religious services, and stores they visit” in short, “provide an intimate picture of one’s daily life.” *Id.* at 862-63; *also cited in State v. Tate*, 2014 WI 89, 849 N.W.2d 798, *C.J. Abrahamson, dissenting*, *fn* 32.

Cell phones can thus serve as powerful tracking devices that can pinpoint our movements with remarkable accuracy. They can isolate in time and place our presence at shops, doctors' offices, religious services, Alcoholics Anonymous meetings, AIDS treatment centers, abortion clinics, political events, theaters, bookstores, and restaurants, and identify with whom the user of the cell phone associates. Cellular service providers have records of the geographic location of almost every American at almost every moment of the day and night. Accessing this information reveals intimate details about a person and intrudes on the constitutional right of association. The United States Supreme Court characterizes location data as “qualitatively different” from physical records, noting that location data can “reconstruct someone's specific movements down to the minute, not only around town but also within a particular building.” The more precise the tracking, the greater the privacy concerns.

Tate, supra, ¶ 55, *C.J. Abrahamson, dissenting*.

As shown in Appellant’s Brief, the mere possession of a cell phone by a suspect is not sufficient to support a finding

of probable cause to use GPS tracking. Because a GPS tracking device is considered an intrusive invasion of privacy, before a court can find probable cause to authorize the use of a GPS tracking device on a cell phone, a nexus must be established between the cell phone and criminal activity to protect an individual's fourth amendment privacy rights.

The affidavit in support of the warrant for the installation of the GPS tracker on the cell phone lacks probable cause because; one, no nexus between use of the cell phone and drug trafficking; two, the affiant's intentional misrepresentation that the cell phone was used in drug transactions; and three, no showing that the confidential informant is credible and reliable. *See Appellant's Brief.*

Thus, contrary to the State's position that a motion to challenge the cell phone warrant authorizing the GPS as being without merit (State's Brief at 11); the warrant was clearly issued in violation of Bridges' fourth amendment rights.

The State also argues that the warrant was justified because it was part of an ongoing criminal investigation.

(State' Brief at 18). This is misleading. No investigation was in progress until after the confidential informant spoke to the investigator. (R. 32; Exhibit #1, Phone Warrant, paragraph 7).

II. THE PREJUDICE RESULTING FROM BRIDGES' TRIAL COUNSEL'S FAILURE TO FILE A MOTION TO SUPPRESS EVIDENCE AND HIS STATEMENT IS A MANIFEST INJUSTICE THAT WOULD ENTITLE BRIDGES TO WITHDRAW HIS GUILTY PLEA.

As shown above, and in Appellant's Brief, the claim by the State that a motion to suppress evidence and Bridges' statement would have been meritless is unfounded.

Trial counsel was ineffective by failing to challenge the cell phone warrant authorizing GPS tracking; failed to challenge the search warrant based on the illegally obtained information from the cell phone warrant and failed to suppress Bridges' statement after he was apprehended during the execution of the search warrant.

Upon a showing of "manifest injustice" Bridges is entitled to withdraw his guilty plea. The "manifest injustice"

test is met when a defendant was denied the effective assistance of counsel. *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996).

CONCLUSION

For all of the reasons stated above and in Appellant's Brief, Bridges requests this court to vacate the judgment of conviction and remand this case back to the circuit court.

Respectfully submitted,

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