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STATE OF WISCONSIN :: COURT OF APPEALS - DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 2018-AP-766-CR

vs.

Trial No. 16-CF-4327

CALVIN LEE BROWN,

Defendant-Appellant.

Appeal from a judgment of conviction entered March 29, 2017
and an order denying postconviction relief entered April 9, 2018
in the Circuit Court of Milwaukee County,
Honorable Jeffrey A. Wagner, Judge, presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIESii

STATEMENT OF THE ISSUEii

STATEMENT ON ORAL ARGUMENT
AND PUBLICATIONiii

STATEMENT OF THE CASE 1

Procedural history..... 1

The search warrant affidavit 2

Pretrial suppression proceedings 5

Postconviction proceedings 6

ARGUMENT 8

**The postconviction court erred
in denying Mr. Brown’s request
for an evidentiary *Franks* hearing** 8

CONCLUSION 19

FORM AND LENGTH CERTIFICATION..... 19

APPENDIX CERTIFICATION 20

CERTIFICATE OF COMPLIANCE 21

APPENDIX CONTENTS 21

TABLE OF AUTHORITIES

Cases

<i>Franks v. Delaware</i> , 438 U.S. 154 (1978)	8-9
<i>Illinois v. Gates</i> , 462 U.S. 213 (1983).....	11-12
<i>State v. Delgado</i> , 194 Wis.2d 737, 535 N.W.2d 450 (Ct. App. 1995).....	13
<i>State v. Mann</i> , 123 Wis.2d 375, 367 N.W.2d 209 (1985)	9
<i>State v. Paszek</i> , 50 Wis.2d 619, 184 N.W.2d 836 (1971)	10-11
<i>United State v. Dorfman</i> , 542 F.Supp 345 (N.D. Ill. 1982).....	9-10
<i>United States v. Glover</i> , 755 F.3d 811 (7 th Cir. 2014).....	14, 17, 18

STATEMENT OF THE ISSUE

Whether the postconviction court erred in denying Mr. Brown's request for an evidentiary Frank's hearing.

STATEMENT ON ORAL ARGUMENT
AND PUBLICATION

Neither oral argument nor publication are requested
in this appeal.

STATEMENT OF THE CASE

Procedural history

A complaint dated September 23, 2016 charged Mr. Brown with five counts: two counts of possession of controlled substance with intent to deliver in violation of Wis. Stat. §961.41(1m) (one for heroin, the other for cocaine); one count of keeping a place of prostitution in violation of Wis. Stat. §944.34(1); and two counts of human trafficking in violation of Wis. Stat. §940.302(2)(a). 1: 1-2.

On January 4, 2017 the Honorable Jeffrey A. Wagner heard arguments and denied, without holding an evidentiary hearing, a *Franks* motion to suppress the fruits of a police search conducted pursuant to a warrant. Apx. 103; 53: 8.

On January 30, 2017 Judge Wagner accepted Mr. Brown's guilty plea to one count of possession of heroin with intent to deliver and his no-contest plea to one count of human trafficking. The other three counts were dismissed, and two of them were read in. 55: 1-8.

On March 27, 2017 Judge Wagner imposed a sentence on the heroin count of 11 years imprisonment (7 years initial confinement and 4 years extended

supervision), and a concurrent sentence on the human trafficking count of 12 years imprisonment (7 years initial confinement and 5 years extended supervision). 58: 24-25.

Mr. Brown filed a postconviction motion renewing his *Franks* motion and seeking an evidentiary hearing. 42: 1-14. The postconviction court denied this motion without a hearing in a written decision and order. Apx. 101-102; 43: 1-2.

The search warrant affidavit

On September 20, 2016 West Allis Police Detective Nick Stachula signed a 27-paragraph affidavit in support of a warrant to search Mr. Brown's house. Apx. 106-115; 12: [5]-[14].

Paragraphs 1-4 and 14-24 recount Det. Stachula's experience in investigating drug and prostitution cases and the purported bases for seeking a plethora of items associated with such offenses. Apx. 106-107, 110-114; 12: [5]-[6], [9]-[13].

Paragraphs 5-8 recount information Det. Stachula received from his September 20, 2016 interview of JRR, whom he characterizes as an "adult victim." Apx. 107, ¶5; 12: [6]. JRR asserted that from 9/10/16 to 9/16/16 Mr. Brown held her against her will at his house at 6408 West

Burnham Street in West Allis. Apx. 107, ¶6; 12: [6]. Mr. Brown took away JRR's cell phone and purse and refused access to these items without supervision. Apx. 107, ¶6; 12: [6]. JRR is a "recovering" heroin and cocaine addict. Apx. 107-108, ¶7; 12: [6]-[7]. Mr. Brown supplied JRR and another woman, Valarie Miller, each with a gram of heroin per day, and several grams of cocaine during JRR's stay. Apx. 108, ¶7; 12: [7]. On her second day with Mr. Brown, JRR overdosed on heroin and passed out; while passed out, Valarie Miller took photos of JRR in her undergarments and posted them on Backpage.com. Apx. 108, ¶7; 12: [7]. Cell phone #773-587-9907 was used in prostitution activities at Mr. Brown's house. Apx. 108, ¶7; 12: [7]. Mr. Brown and Ms. Miller asked JRR to engage in prostitution, but JRR declined. Apx. 108, ¶7; 12: [7]. JRR saw 10 grams of heroin in Mr. Brown's house; Mr. Brown concealed heroin, cocaine and sale proceeds in a Tupperware container with a red lid which he kept under the living room couch or in the side compartment of the refrigerator. Apx. 108, ¶7; 12: [7] JRR identified Mr. Brown and Ms. Miller from photos. Apx. 108, ¶8; 12: [7].

Paragraphs 9-13 set forth purported corroboration of JRR's account. Apx. 108-110; 12: [7]-[9]. Police

surveilled a Jeep registered to Mr. Brown parked in front of Mr. Brown's house. Apx. 108-109, ¶9; 12: [7]-[8]. A traffic stop of the Jeep revealed Mr. Brown as the driver, and Valarie Miller and another woman as passengers. Apx. 109, ¶10; 12: [8]. A review of Backpage.com in association with the cell phone number JRR provided showed nude photos of Ms. Miller and another woman, and two photos of a person in bed in undergarments which JRR identified as herself while passed out taken in Mr. Brown's home. Apx. 109, ¶11; 12: [8]. Det. Stachula viewed Mr. Brown's house and describes it. Apx. 110, ¶13; 12: [9]. In summarizing corroboration of JRR's account, the affidavit states: "Affiant believes that the information provided by JRR is reliable and accurate. JRR is a citizen victim and is not providing this information for financial gain or to receive credit for pending criminal matters." Apx. 110, ¶12; 12: [9].

Paragraph 25 indicates that Mr. Brown, while in custody, admitted residing at 6408 W. Burnham St. and declined to permit a search of his home. Apx. 115; 12: [14]. Paragraph 26 recounts Mr. Brown's 2010 drug offense convictions. Apx. 115; 12: [14].

Pretrial suppression proceedings

On November 30, 2016 Mr. Brown's trial counsel filed a motion to suppress the fruits of the search of his home. 12: 1-2. Among the grounds in the motion was an assertion that the warrant contained intentional or reckless omissions of fact, the inclusion of which would have negated probable cause. 12: 2. In the brief filed in support of this motion, Mr. Brown asserted that warrant omitted the facts that on 9/9/16, a bench warrant issued on JRR's failure to appear in a drug possession case where she had apparently violated her deferred prosecution agreement, and that JRR and her husband, also a wanted person, were arrested by the U.S. Marshal's Fugitive Task Force at motel in Franklin. 13: 2. Only after this arrest did JRR report her "captivity" that had ended 4 days earlier. 13: 2.

On January 3, 2017 the State filed a response in opposition to Mr. Brown's motion. 15: 1-6.

On January 4, 2017 the motion came before the Honorable Jeffrey A. Wagner for a hearing. Mr. Brown's counsel offered argument in favor of his motion. 53: 2-6. The prosecutor responded. 53: 6-7. The court then issued a ruling:

[T]here was additional investigation that

was made. It was brought to the court commissioner. The commissioner reviewed the affidavit. And based upon – I would – the totality of the circumstances and what was represented by the affidavit, what was being asked for, found probable cause. And the Court believes that that was -- that is in fact sufficient for the commissioner to have found based upon what was presented to it.

I don't see any problems of, quite frankly, with the fact that warrant was issued based upon the facts that were contained as alleged in the affidavit. Plus, I don't believe that there – there's any lapse in time when they make it defective either. So that's the ruling of the court.

Apx. 103; 53: 8.

Postconviction proceedings

Mr. Brown filed a postconviction motion requesting a *Franks* hearing on the issue whether the search warrant affiant willfully or recklessly made misleading omissions from the affidavit. The postconviction motion made an offer of proof as to these omissions:

The warrant affidavit fails to disclose that:

- In 2016, JRR had a pending charge of possession of controlled substance;
- On August 5, JRR entered a guilty plea pursuant to a deferred prosecution agreement (DPA);
- On August 9, 2016 JRR failed to appear in court in violation of her DPA and the court

issued a bench warrant;

- On or about August 20, 2016 JRR was arrested on the warrant;

- When police interviewed JRR on August 20, 2016, she was in custody;

- Prior to her custodial statement on August 20, 2016, JRR had made no report or allegation of any sort against Mr. Brown;

- [in] addition to the 2016 conviction, JRR had at least one addition[al] conviction, for JRR described in her police interview how she and Valarie Miller spent nine or ten months together as roommates in Meta House (a drug rehab facility) six years earlier when JRR was on probation.

On information and belief, these facts were known to warrant affiant, who nonetheless falsely and deceptively described JRR as an “adult victim” (¶6), and further stated that “JRR is a citizen victim and is not providing this information for financial gain or to received credit for pending criminal matters” (¶12) without revealing that JRR had a pending criminal matter and criminal record as described above.

42: 6-7.

The postconviction court denied the postconviction motion in a decision and order. Apx. 101-102; 43: 1-2.

ARGUMENT

The postconviction court erred in denying Mr. Brown's request for an evidentiary *Franks* hearing

The Fourth Amendment requires that, certain exceptions aside, police must obtain a warrant from a neutral and disinterested magistrate before performing a search; and, since the Warrant Clause requires probable cause supported by oath or affirmation, the showing of probable cause must necessarily be a *truthful* showing. *Franks v. Delaware*, 438 U.S. 154, 164-165 (1978). The court in *Franks* rejected the State's assertion that truthfulness of the allegations in a search warrant affidavit are beyond review. The court set forth a remedy to challenge the truthfulness of factual statements in a search warrant affidavit:

[W]e hold 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 the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a

preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Franks, 438 U.S. at 155-156.

The decision in *Franks* addressed a situation involving false *statements* in support of probable cause. Wisconsin has not only recognized and applied *Franks*, but enlarged its scope to address situations involving “an *omission* of critical material where inclusion is necessary for an impartial judge to fairly determine probable cause.” *State v. Mann*, 123 Wis.2d 375, 385-386, 367 N.W.2d 209 (1985) (emphasis added). Likewise, Federal courts have extended *Franks* to situations involving omissions of material facts. *United State v. Dorfman*, 542 F.Supp 345, 367-368 (N.D. Ill. 1982) (collecting cases). The Court in *Dorfman* explain why *Franks* must be applicable in cases of material omissions:

If the government could intentionally or recklessly omit material facts from warrant affidavits and applications, the same danger would be created [as with false statements]. If the government had unfettered power to pick and choose which facts to present to the magistrate

regardless of how misleading the presentations were, the magistrate's review of the affidavit would be rendered meaningless. The magistrate would not be provided with a fair opportunity to review the government's evidence in making the probable cause determination. He would perform his crucial role at the whim, caprice or duplicity of the governmental agents involved in the case. Such a result cannot be squared with *Franks'* demand that the government not frustrate the magistrate's review of probable cause by deliberately or recklessly providing misleading information.

Dorfman, 542 F.Supp. at 367.

When considering whether information is sufficient to establish probable cause, the person who is the source of the information, whether anonymous caller, confidential police informant or ordinary citizen, is crucial to the probable cause determination:

A different rationale exists for establishing the reliability of named "citizen-informers" as opposed to the traditional idea of unnamed police contacts or informers who usually themselves are criminals. Information supplied to officers by the traditional police informer is not given in the spirit of a concerned citizen, but often is given in exchange for some concession, payment, or simply out of revenge against the subject. The nature of these persons and the information which they supply conveys a certain impression of unreliability, and it is proper to demand that some evidence of their

credibility and reliability be shown. One practical way of making such a showing is to point to accurate information which they have supplied in the past.

However, an ordinary citizen who reports a crime which has been committed in his presence, or that a crime is being or will be committed, stands on much different ground than a police informer. He is a witness to criminal activity who acts with an intent to aid the police in law enforcement because of his concern for society or for his own safety. He does not expect any gain or concession in exchange for his information. An informer of this type usually would not have more than one opportunity to supply information to the police, thereby precluding proof of his reliability by pointing to previous accurate information which he has supplied.

State v. Paszek, 50 Wis.2d 619, 630-631, 184 N.W.2d 836 (1971). After setting forth this distinction, the court in *Paszek* determined that the complaining witness, a pharmacy clerk who reported that Mr. Paszek had approached her and offered to sell her marijuana, fell in the latter category. As an ordinary citizen reporting a crime, her reliability need not be established as is required of a police informant.

Probable cause is a practical and non-technical concept, and it is determined by assessing the totality of

the circumstances. *Illinois v. Gates*, 462 U.S. 213, 230-231 (1983). An informant's veracity, reliability and basis of knowledge are all highly relevant to this the determination. *Gates*, 462 U.S. at 230. The ultimate determination must be made by a magistrate independent from any opinion or conclusion of the law-enforcement affiant: "Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others." *Gates*, 462 U.S. at 239.

The day before the 6-day period in which JRR said Mr. Brown held her against her will in his home, JRR missed court on her drug case. She thus violated her deferred prosecution agreement. A bench warrant was issued, and JRR was a wanted fugitive. When her purported involuntary confinement ended, JRR did not go to the police and did not report the offenses Mr. Brown had supposedly committed. Four days after the 6-day period ended, JRR was arrested and taken into custody. While she was in custody JRR gave the statement recounted in paragraphs 6-8 of the warrant affidavit. The magistrate reviewing the search warrant affidavit was informed of none of these facts. Rather, the magistrate was

informed in the affidavit that JRR was an “adult victim.” (¶6) and further that “JRR is a *citizen victim* and is not providing this information for financial gain or to receive credit for pending criminal matters.” ¶12. The existence of JRR’s pending criminal matters was not revealed.

It may be strictly true that JRR was not provided financial gain; Mr. Brown has no evidence to the contrary. It may also be true that JRR was not *promised* consideration on her pending criminal matter. However, what matters in assessing JRR’s credibility regarding her pending case is not only any promise she may have received, but JRR’s reasonable *expectations*. A “prototypical form of bias arises in a situation in which a witness might have or realistically perceive an interest in testifying so as to favor the prosecution . . . in exchange for reduction in charges or sentence.” *State v. Delgado*, 194 Wis.2d 737, 752, 535 N.W.2d 450 (Ct. App. 1995) (internal quotation marks and citation omitted). In the same way, JRR, just having been arrested and in custody after violating her deferred prosecution agreement, may have perceived an interest in portraying herself as a sympathetic victim and thus tailor her remarks out of self-interest in implicating Mr. Brown. Her account is of a

victim, when circumstances suggest she was a fugitive seeking refuge. However, the magistrate was never informed of the circumstances suggesting why JRR should not be believed. The omission of negative information, known to the affiant, about a witness' credibility, suggests reckless disregard for the truth:

An officer's omission from the probable cause affidavit of known and substantial adverse information about the informant's credibility is sufficient to support a reasonable inference of recklessness, requiring that Glover's request for a *Franks* hearing be granted.

United States v. Glover, 755 F.3d 811, 820 (7th Cir. 2014).

In Mr. Brown's case, as in *Glover*, the warrant affiant omitted information crucial to the assessment of JRR's credibility: that she had a pending case in which she had violated the terms of her deferred prosecution agreement, that she had been arrested on a bench warrant, and that she was in custody at the time she made her accusations against Mr. Brown.

These omissions are aggravated by misleading terms which the affiant included in the affidavit. The affiant labels JRR as an "adult victim" and, when recounting JRR's allegations, repeatedly uses the phrase

“JRR reported that. . .” Apx. 107; 12: [6]. This suggests, contrary to the omitted facts, that JRR voluntarily contacted police to report her allegations. This misleading inference is reinforced by the affiant’s assertion that JRR is believed reliable and accurate because she is a “citizen victim.” Apx. 110; 12: [9]. The affiant informs the court that JRR “is not providing this information for financial gain or to receive credit for pending criminal matters.” Apx. 110; 12: [9]. This is the *affiant’s* assessment of JRR’s motivations. However, the affiant withheld crucial information from the magistrate that would allow the *magistrate* to assess JRR’s motives, for the magistrate was never told of JRR’s warrant deferred prosecution agreement violation or that she was in custody.

The postconviction court accepted the State’s argument that there was nothing false about the affiant’s statement that the victim did not provide information to receive credit on her pending case, as the victim did not receive such credit. Apx. 102: 43: 2. This was erroneous, for the issue concerns who assesses the reliability of the informant. Rather than provide the relevant facts to allow the magistrate to assess JRR’s reliability, the affiant simply provided his own assessment.

Nor does the warrant affidavit contain substantial verification or corroboration of JRR's statement. Paragraph 9 states that police confirmed that a vehicle registered to Mr. Brown was observed parked in front of Mr. Brown's residence. Paragraph 10 recounts Mr. Brown's arrest after a traffic stop of this vehicle. Paragraph 11 recounts Backpage.com posts suggesting prostitution activities in relation to the telephone number JRR provided, including two photos JRR said were of her passed out in Mr. Brown's house. From this, one might reasonably conclude that JRR knew where Mr. Brown lived, and knew a telephone number used for prostitution activities on Backpage.com. However, identification of the photos as portraying JRR and taken in Mr. Brown's home rests solely on JRR's credibility. The affiant does not confirm from his own observation that the photos portray, or appear to portray, JRR, nor could the affiant confirm where the photos were taken.

JRR's account is essential to the finding of probable case. Facts raising serious doubts about JRR's credibility, known to the warrant affiant, were omitted from the affidavit. Such omissions gives rise to an inference of reckless disregard for the truth, and warrants a *Franks*

hearing. The affiant may have an innocent explanation or asserted justification for the omissions. However, Mr. Brown need not anticipate or refute such explanation or justification at this point:

[T]o obtain a *Franks* hearing, the defendant need not overcome the court's speculation regarding an innocent explanation for the falsity or omission. While reasonable explanations for the omission of the information might well exist, the defendant need not disprove them before the *Franks* hearing itself.

Glover, 755 F.3d at 820.

While Mr. Glover sought to raise the *Franks* issue in pretrial proceedings, the court's decision denying the motion (quoted above in full at pages 5-6) shows no understanding of the issue, and seems to be nothing more than a finding of probable cause within the four corners of the warrant affidavit. Apx. 103; 53: 8. Nothing in the court's remarks takes any account of the circumstances under which JRR made her allegations which are the basis for this motion.

In the postconviction decision, the court accepts the State's claim that there was nothing false about the affiant's claim that JRR did not provide information to obtain credit on her pending case, for no such credit was

given. However, this does not consider the omissions: that JRR *had* a pending case, that she had violated the deferred prosecution agreement in that case, that she had been arrested on that case and that she was in custody when she provided information. These facts are crucial to determining JRR's reliability. Regarding these omissions, the postconviction court simply concluded that if the omitted facts had been included, the affidavit would still establish probable cause. The court fails to consider that JRR's credibility was at issue, and that the magistrate had been deprived of information essential to assessing JRR's credibility. As the court in *Glover* found, where "vital credibility information was omitted from the affidavit," the "magistrate is unable to fulfill his role as a neutral arbiter." *Glover*, 755 F.3d at 818.

Mr. Brown has made a substantial preliminary showing that information essential to a valid probable cause determination was omitted from the warrant affidavit in favor of misleading labels of JRR as a citizen victim, and that such was done with reckless disregard for the truth. Mr. Brown prays that the court order a Frank's hearing.

CONCLUSION

Calvin Lee Brown prays that this court vacate the postconviction order and remand the case for an evidentiary *Franks* hearing.

Respectfully submitted,

John T. Wasielewski
Attorney for
Calvin Lee Brown

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 4213 words.

John T. Wasielewski

APPENDIX CERTIFICATION

I hereby certify that I filed with this brief, an appendix that complies with §809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

John T. Wasielewski
Attorney for
Calvin Lee Brown

CERTIFICATE OF COMPLIANCE

I hereby certify that I have submitted an electronic copy of this brief, identical to the printed form of the brief, but excluding any appendix, as required by Wis. Stat. §809.19(12).

John T. Wasielewski

APPENDIX CONTENTS

Decision and order denying postconviction
motion for *Franks* hearing (43: 1-2)101-102

Pretrial oral decision denying *Franks*
motion (53: 8)..... 103

Search warrant (12: 3-4).....104-105

Affidavit for search warrant (12: 5-14).....106-115