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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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

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

Mr. Brown seeks a *Franks* hearing, asserting that the search warrant affiant recklessly omitted and distorted facts regarding JRR by referring to her as a “citizen victim” rather than revealing that she was an arrested fugitive. In response, the State presents two arguments. The State argues that JRR’s statements were sufficiently corroborated to establish probable cause despite the withheld information bearing on her reliability. State’s br. 10-13. The State also argues that “JRR’s recent legal difficulties” relate merely to her credibility and would not have undermined the magistrate’s probable cause determination. State’s br. 13-16. Neither argument withstands scrutiny.

Corroboration

The State asserts that police independently corroborated JRR’s statements regarding: Mr. Brown’s connection to his house (State’ br. 10-11); prostitution at the house (State’s br. 11-12); and drug trafficking (State’s br. 12-13).

Indeed, Mr. Brown lived at the Burnham Street house. That he parked his Jeep near the house is neither surprising nor incriminating. Thus, police viewing Mr. Brown's house, and seeing him leave his house and drive off in his Jeep, corroborates nothing but innocent and "easily obtained facts." *Alabama v. White*, 496 U.S. 325, 332 (1990) (contrasting the minimal value of such facts from a tipster compared to a tipster's accurate predictions of future events).

JRR did have corroborated information regarding prostitution activities. She provided a telephone number which police confirmed was associated with backpage.com advertisement for prostitution. One advertisement had photos dated September 11, 2016 of a woman on a bed in undergarments which JRR said depicted her. Apx. 109. Thus, JRR had knowledge of prostitution activities. However, the connection to the Burnham Street residence was solely through JRR's statement. The purported connection of prostitution to Mr. Brown's house, the object of the search warrant, was not corroborated.

Likewise, JRR's claims of drug trafficking activity at the Burnham Street house was uncorroborated, except

to the extent Mr. Brown had 6 year old prior drug convictions. JRR's admission of being a recovering addict is not corroborative, nor is her claim of consuming drugs in the Burnham street residence.

Reliability/credibility

Is an informant's credibility relevant to a probable cause determination? The State's brief suggests inconsistent answers. Relying on and quoting *State v. Anderson*, 138 Wis.2d 451, 470-471, 406 N.W.2d 398 (1987), the State contends that "the credibility of an informant, for the purpose of finding probable cause, is established by the fact that his or her statement is against his or her penal interest." State's br. 12. However, the State then asserts that Mr. Brown is inviting this court to improperly weigh evidence and determine credibility. State's br. 13-14.

In the context of analyzing information from an informant, the concepts of credibility and reliability are difficult to differentiate:

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.

State v. Paszek, 50 Wis.2d 619, 630-631, 184 N.W.2d 836 (1971) (emphasis added).

Mr. Brown asserts more than merely that JRR's reliability and credibility are suspect. He asserts that the magistrate was deprived of information essential to determining JRR's reliability and credibility. The magistrate was not informed:

- that JRR had a pending case;
- that this case resulted in a deferred prosecution agreement;
- that JRR missed her court date and thus violated her deferred prosecution agreement;
- that a warrant was issued on JRR's violation;
- that she was arrested in a motel room; and,
- that she was in custody when she first made her allegations against Mr. Brown.

Instead, the magistrate was given the affiant's assessment that JRR is a "citizen victim and is not providing this information for financial gain or receive credit for pending criminal matters." Apx. 110.

The Seventh Circuit has held:

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).

Mr. Brown cited and discussed *Glover* in his brief. Def. br. 14, 17, 18. The State makes no attempt to refute or distinguish *Glover* or its holding quoted above.

Had the magistrate been provided with the omitted information, she would have known that JRR is not a “citizen victim” who promptly reported a crime out of concern for society. Instead, as with any police informant, the magistrate would have questioned whether JRR might be acting from hope for some benefit of concession in her legal predicament, or even out of malice. As *Paszek* instructs, the magistrate would have demanded some evidence of JRR’s credibility and reliability. As discussed in the previous section, such evidence and corroboration are not present. The improperly withheld information thus tainted the finding of probable cause, which would not have been made had the magistrate been informed of the

withheld information on JRR's reliability.

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 reply brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this brief is 1163 words.

John T. Wasielewski

CERTIFICATE OF COMPLIANCE

I hereby certify that I have submitted an electronic copy of this reply brief, identical to the printed form of the reply brief, and which has no appendix, as required by Wis. Stat. §809.19(12).

John T. Wasielewski