STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2014AP000584-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NICHOLAS J. SELK,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW AND APPENDIX

MARTHA K. ASKINS
Assistant State Public Defender
State Bar No. 1008032

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2879
askinsm@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

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ISSUES PRESENTED

1. Was the search warrant affidavit sufficient to establish probable cause when the record failed to establish the reliability of the confidential informant, and where other facts were recklessly omitted from the search warrant affidavit?

Both the trial court and the court of appeals answered: No.

2. Did Selk make a substantial preliminary showing that the search warrant affidavit recklessly omitted facts such that the trial court was obligated to hold a hearing pursuant to ***Franks v. Delaware*** and ***State v. Mann***?

Both the trial court and the court of appeals answered: No.

3. Must Selk's incriminating statements be suppressed because they were not sufficiently attenuated from the unlawful search?

Not answered by the trial court. The court of appeals declined to reach the issue in light of its rejection of Selk's challenge to the search warrant.

CRITERIA FOR REVIEW

This case meets the criteria for review in Wis. Stat. § 809.62(1r)(d) in that the court of appeals' decision is in conflict with opinions of this court and of the court of appeals, namely ***State v. Romero***, 2009 WI 32, 317 Wis. 2d 12, 765 N.W.2d 756; ***State v. Jones***, 2002 WI App 196, 257 Wis. 2d 319, 651 N.W.2d 305; and ***State v. Hanson***,

163 Wis. 2d 420, 471 N.W.2d 301 (Ct. App. 1991). Selk's case involved, in part, the reliance on a confidential informant in obtaining a search warrant. Although the court of appeals relied on ***Jones*** and ***Hanson*** to affirm the trial court's ruling, that reliance was misplaced. Contrary to the court of appeals' conclusion, ***Jones*** and ***Hanson***, and the supreme court's opinion in ***Romero***, require a more rigorous evaluation of a confidential informant's reliability before it will serve as a basis for a search warrant.

Review by this court will also provide an opportunity to develop the law on when a ***Franks/Mann*** hearing is warranted in light of a challenge to a search warrant based on recklessly omitted facts.

STATEMENT OF THE CASE

Nicholas Selk seeks review of the court of appeals decision entered on January 29, 2015.

On December 12, 2012, law enforcement personnel executed a search warrant at Nicholas Selk's home in Oshkosh, Wisconsin. (1:2). Police seized cash, 9.6 grams of heroin, 1.8 grams of marijuana and a long rifle with ammunition. (1:2).

The state charged Nicholas Selk with possession of heroin with intent to deliver as a second or subsequent offense, possession of THC as a second or subsequent offense, and possession of a firearm by a felon. (7).

Selk filed two motions to suppress evidence. On February 25, 2013, Selk filed a "Motion to Suppress Fruits of Search Premises." (16). The motion challenged allegations in the warrant affidavit, and argued the affidavit did not support a finding of probable cause. Selk did not request an

evidentiary hearing. The court heard arguments on the motion on March 15, 2013, and denied it. (44).

Selk filed a second motion to suppress evidence on May 16, 2013. (19). Again, counsel did not request an evidentiary hearing. The court held a hearing on the motion on June 3, 2013, and denied it. (45:3-10).

On June 10, 2013, Selk pleaded no contest to possession of heroin, in an amount between 3 and 10 grams, as a second or subsequent offense. (25). The court sentenced Selk to three years of initial confinement and five years of extended supervision. (25).

Selk filed a notice of intent to pursue postconviction relief, and subsequently a postconviction motion. (35). Selk argued he was deprived of the effective assistance of counsel because trial counsel failed to argue the relevant law in her motions to suppress evidence. Specifically, he alleged that trial counsel failed to cite ***Franks v. Delaware***, 438 U.S. 154 (1978), or ***State v. Mann***, 123 Wis. 2d 375, 367 N.W.2d 209 (1985), and failed to request an evidentiary hearing pursuant to those cases. (35:2). He also argued that the statements he gave to the police should have been suppressed as they were not sufficiently attenuated from the unlawful search. (35:8). He asked that the court hold a hearing and conclude he had made a substantial preliminary showing that the affidavit filed in support of the search warrant omitted relevant facts with reckless disregard for the truth, followed by a ***Machner*** hearing[1] regarding trial counsel's failure to argue the relevant law on the issue. (35:9).

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[1] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

The trial court held a hearing on February 24, 2014, and denied the postconviction motion. (47; 36). The court concluded that Selk had not made the substantial preliminary showing required to have an evidentiary hearing pursuant to ***Franks*** and ***Mann***, or to have a hearing to determine whether trial counsel performed deficiently. The court ruled as follows:

> ...I don't think that there is anything in the affidavits or in the motion that in any way indicate that the affiant made allegedly false statements to this court. Even if this court looks at the alleged omissions and puts those—and those facts would have been put in the affidavit, the court still would have had enough issue, based upon the totality of the circumstances and the reasonable inferences from the affidavit, that there was enough evidence in which to grant the search warrant, and therefore, the court would find that the defendant has not made a substantial preliminary showing that that affidavit contains false or omitted evidence which would then call into question whether or not a magistrate would have found probable cause if those facts were in there, so the court will find the defendant has not met their burden and would deny the motion, and, therefore, deny the request for a hearing concerning *Franks/Mann* motion and *Machner* because it wouldn't have won anyway and, in essence, I've already addressed these issues already.

(47:10; App. 118).

Selk appealed, and the court of appeals affirmed in a decision filed on January 29, 2015. The court of appeals concluded that the information included in the search warrant affidavit, together with the information Selk alleged had been recklessly omitted from the affidavit, supported a finding of probable cause for the issuance of the warrant. (Slip op. at ¶15; App. 107). Significant for this petition, the court also rejected Selk's argument that the affidavit did not establish

the reliability of the confidential informant. Relying on ***State v. Hanson***, 163 Wis. 2d 420, 423-24, 471 N.W.2d 301 (Ct. App. 1991), the court stated that the "affiant asserted that the confidential informant acted under the direction of police in conducting the controlled buy, which is sufficient to verify the information." (Slip op. at ¶15; App. 107). Selk now seeks review by this court.

STATEMENT OF FACTS

On October 11, 2012, law enforcement officers went to Mercy Medical Hospital in Oshkosh in response to a report of a heroin overdose. (19:10). Sheriff's deputy Clinton Fettig interviewed Sheldon Tepp at the hospital. (*Id.*). Tepp told Fettig that his friend, Thomas Perry, had injected heroin and then began to lose consciousness, had shallow breathing and was beginning to turn very pale or blue. (19:11-12). Tepp drove Perry to the hospital where he ran inside for help. (19:12). Emergency room staff revived Perry with Narcan. (19:10). Tepp eventually admitted that he had also used heroin earlier that day. (19:11) The police asked Tepp what had happened to the paraphernalia Perry used to inject the heroin. Tepp first said they had thrown it out the car window, and then that he had wrapped the items up in a bag and had thrown it in a garbage can in Oshkosh. (19:11). Fettig's police report is silent on where the heroin came from.

Police searched Tepp's car and found a syringe lying on the passenger side front floor mat, a spoon with a piece of cotton stuck to it, three balled up pieces of aluminum foil, and a piece of blue rubber tubing. (19:16).

Police also talked to Thomas Perry on October 11, 2012. Perry told police he had stopped at a gas station that day because he saw a man, whom he knew to sell heroin,

standing outside a gas station. (19:14-15). Perry said he bought $80.00 worth of heroin in two bindles. (19:15). He said he did not know the name of the man, but that the man would stand outside of the gas station where he would sell heroin. (19:15).

According to the warrant affidavit, Perry also gave a statement to the police on October 16, 2012. This time, Perry told police he obtained the heroin from a man who lives at an apartment complex on Cimarron Court in Oshkosh, and gave police the man's cell phone number. (3:2). The police contacted the property owner who identified the number as belonging to Selk. (*Id.*). Perry told police he had "bought heroin from this same individual about 20 times over the last few months and that the transactions take place at or near the dealers [sic] apartment." (*Id.*).

The warrant affidavit also stated that Tepp gave a statement to the police on October 17, 2012. Tepp told officers that on the day of Perry's overdose, he and Perry had bought heroin from a man they knew as "Naka," who lived at an apartment complex on Cimarron Court in Oshkosh. (3:2; App. 121-22). Tepp identified "Naka" from a photo array, picking Selk, and told police he had purchased two aluminum foil bindles of heroin from Selk for $80.00. (*Id.*).

The warrant affidavit also reported that a confidential informant had purchased heroin from Selk some two months after Perry's overdose, on December 12, 2012. According to the warrant affidavit, a confidential informant working under the direction of the Lake Winnebago Area Drug Unit and the City of Oshkosh Police Department reportedly bought heroin from Selk using pre-recorded currency. (3:1-2; App. 121-22). The confidential informant said he knew Selk also as "Naka,"

and that he had seen additional heroin at Selk's residence. (*Id.*).

On that same day, Officer Josh Turner of the City of Oshkosh Police Department, swore an affidavit in support of a search warrant for Selk's residence. (3: App. 121-22). The affidavit reported the information provided by the confidential informant, the fact of Perry's overdose on October 11, 2012, Perry's statement to the police on October 16, 2012, and Tepp's statement on October 17, 2012. (*Id.*). The affidavit omits the fact that law enforcement interviewed Tepp and Perry on October 11, 2012, that there was no mention of "Naka" in the earlier statements, and that Perry had originally told police he had bought heroin from a man standing outside of a gas station.

Judge Woldt issued the search warrant, and police went to Selk's home the same day. (1). According to the criminal complaint, police found Selk laying on his couch. (1). Selk told police he had drugs in his pocket. (1:2). Police found 9.6 grams of heroin and 1.8 grams of marijuana in Selk's pocket. (1:2). They found cash, paraphernalia and a long rifle in the search of Selk's apartment, but no other drugs. (1:2). The state subsequently charged Selk with possession of heroin with intent to deliver, possession of THC, and possession of a firearm by a felon. (1; 7).

As noted above, Selk filed two motions to suppress the evidence seized as a result of the search, which Judge Woldt denied. (16; 19). Selk then pleaded no contest to possession of heroin with intent to deliver, as a second or subsequent offender, pursuant to a plea agreement. Judge Woldt sentenced Selk to three years of initial confinement and five years of extended supervision. (25).

Selk filed a motion for postconviction relief in which he alleged he was deprived of the effective assistance of counsel because, although trial counsel filed two motions to suppress evidence, counsel did not alert the court to the relevant case law and failed to request an evidentiary hearing, and therefore, had not had the opportunity to have a ***Franks/Mann*** hearing. (35).

Judge Woldt held a hearing on the motion and concluded that Selk had failed to make the showing necessary to warrant a hearing under ***Franks/Mann***, and therefore, denied the hearing without requiring trial counsel to testify pursuant to ***Machner***.

Selk appealed, and the court of appeals affirmed. The court rejected Selk's challenge to the search warrant, and therefore concluded Selk's trial counsel was not ineffective for failing to request a ***Franks/Mann*** hearing.

Selk now seeks review by this court.

ARGUMENT IN SUPPORT OF GRANTING REVIEW

I. The Search Warrant Affidavit was Insufficient to Establish Probable Cause When the Record Failed to Establish the Reliability of the Confidential Informant, and Where Other Facts Were Recklessly Omitted from the Search Warrant Affidavit.

The search warrant affidavit in Selk's case relied on two chief sources of information: information from police interviews with Sheldon Tepp and Thomas Perry who purportedly bought heroin from Selk; and a confidential informant who purportedly bought heroin from Selk. The information obtained from the confidential informant was insufficient to constitute probable cause because the

informant's reliability and veracity was not established. Review by this court is warranted because the court of appeals misapplied ***State v. Jones***, 2002 WI App 196, 257 Wis. 2d 319, 651 N.W.2d 305; and ***State v. Hanson***, 163 Wis. 2d 420, 471 N.W.2d 301 (Ct. App. 1991), and ignored ***State v. Romero***, 2009 WI 32, 317 Wis. 2d 12, 765 N.W.2d 756, to conclude that the confidential informant could be relied upon to establish probable cause.

The search warrant affidavit gave the following information about the confidential informant:

> On December 12, 2012 CI #1854 while under the direction of the Lake Winnebago Area Drug Unit (LWAM) and the City of Oshkosh Police Department went to 170 Cimarron Ct. Apartment F, City of Oshkosh, Winnebago County, WI and purchased a quantity of suspected heroin from Nicholas J. Selk DOB: 09/04/82 using pre-recorded U.S. currency provided by police investigators. This pre-recorded U.S. currency included two $20 bills with serial numbers.....Investigator Timm of LWAM field tested the suspected heroin purchased by CI and received a positive indication for the presence of heroin. CI #1854 purchased the heroin from an individual CI knows as Nicholas Selk AKA "Naka." The heroin was packaged in toil [sic] foil folds. CI told investigators that CI saw additional heroin at the residence.

(3:1-2; App. 121-22).

Other than stating the confidential informant was working with the Lake Winnebago Area Drug Unit, the affidavit provides no information about why the confidential informant was a credible source. The court of appeals, however, concluded the confidential informant was credible because "[t]he affiant asserted that the confidential informant acted under the direction of police in conducting the

controlled buy, which is sufficient to verify the information." (Slip op. at ¶15; App. 107). The court of appeals cited ***Hanson***, 163 Wis. 2d 420, 423-24 in support. Contrary to the court of appeals' statement, ***Hanson*** did not state that "acting under the direction of police" was sufficient to show veracity of the informant. Rather, as the court of appeals later noted, ***Hanson*** found credible an informant who "cooperated closely with the police." ***Id.*** at 423. In the context of confidential informants, "close cooperation" is not the same as "working under the direction of police." This court should clarify that "working under the direction of the police" does not grant reliability, credibility and veracity to a confidential informant.

The court of appeals' reliance on ***Hanson*** is also misplaced because of the difference in facts. In ***Hanson***, the police officer took the informant to the suspect's address, searched the informant, gave him the money to buy the cocaine, watched the informant enter the residence, return from the residence, and come directly to the officer. The officer took the drugs from the informant and searched him for additional money or drugs. ***Id.*** at 423.

By contrast, the affidavit in Selk's case does not name the officer who provided the informant with money, does not state that the informant told the officer he could buy heroin at Selk's address, does not state that an officer searched the informant before and after the supposed controlled buy, or that the officer watched the informant enter and exit the targeted residence. A comparison of the facts shows that the confidential informant in ***Hanson*** indeed "cooperated closely" with the police; the affidavit in this case fails to establish close cooperation sufficient to rely on this informant.

Similarly, the court of appeals' reliance on ***Jones***, is misplaced. While it is accurate that ***Jones*** stated independent police corroboration of the informant's information can impart "a degree of reliability to unverified details," the confidential informant in ***Jones*** was bolstered by a high level of detail and a track record. In ***Jones***, "the affidavit establishes that the confidential informant provided reliable information in the past." ***Jones***, 2002 WI App 196, at ¶14. The affidavit in Selk's case makes no such assertion. In ***Jones***, the confidential informant gave the police detailed information about the suspect, including that the suspect had a white, refrigerated semitrailer which he had modified to form a hidden compartment, removing insulation in the ceiling to make room for the compartment. ***Id.*** at ¶¶15, 17. As the court observed, this specific "additional information is not of the type a confidential informant is likely to supply without a basis in fact." ***Id.*** at ¶17. And third, the police in ***Jones*** were able to corroborate the informant's information. For example, the police observed a white, refrigerated semitrailer parked on Jones' property. ***Id.*** at ¶15.

That level of detail is utterly missing in the affidavit in this case. The affidavit fails to show anything about this confidential informant to establish his reliability except that he evidently did a buy with money from the Lake Winnebago Drug Unit. There is no indication that this informant had given accurate information in the past, how this informant supposedly knew Selk, whether the informant was searched before or after the buy, whether any surveillance occurred, or whether the informant provided information specific enough that it could be deemed reliable. ***Jones*** and ***Hanson*** do not support a finding of reliability in this case.

The court of appeals' decision also conflicts with this court's decision in ***Romero***, 2009 WI 32, 317 Wis. 2d 12.

There, the court held that "[t]o demonstrate a declarant's veracity, facts must be brought to the warrant-issuing officer's attention to enable the officer to evaluate either the credibility of the declarant or the reliability of the particular information furnished." ***Id.*** at ¶21. Examining the facts averred in the ***Romero*** affidavit, the court concluded the warrant was supported by probable cause. In ***Romero***, however, unlike in this case, the affidavit provided a great deal of detail as outlined by the court. ***Id.*** at ¶10.

Among the details cataloged in ***Romero*** were that Officer Correa, who prepared the affidavit in support of the search, spoke with the confidential informant (hereinafter, C.I.) who stated he had had contact with the target within the past 72 hours, and the target could obtain cocaine. ***Id.*** at 22. Correa monitored a phone call between the C.I. and the target in which the C.I. ordered cocaine. ***Id.*** Correa searched the C.I. and his car before the C.I. met with the target. ***Id.*** Correa and other law enforcement officers watched the target get into the C.I.'s vehicle, followed them, and watched as the target went into a garage and then got back into the C.I.'s vehicle. ***Id.*** at 23. Officer Correa met the C.I. at a predetermined location and C.I. turned a bag over to Correa which the C.I. believed to be cocaine. ***Id.*** at 24. And, the C.I. had a successful track record with the police. The affidavit said:

> Officer Correa believed the confidential informant to be a credible person because Officer Correa knew that the confidential informant had assisted law enforcement officers in purchasing controlled substances on more than three prior occasions and because the confidential informant's assistance had resulted in more than three drug convictions.

Id. at 25. Plainly, the affidavit in ***Romero*** was far more detailed than the affidavit in this case. The Selk affidavit was not sufficient to establish the credibility of the informant, as is demonstrated by a comparison to ***Jones***, ***Hanson*** and ***Romero***. Accordingly, Selk asks this court to grant review of the court of appeals' decision.

II. Selk Made a Substantial Preliminary Showing That the Search Warrant Affidavit Recklessly Omitted Facts Such That the Trial Court was Obligated to Hold a Hearing Pursuant to ***Franks v. Delaware*** and ***State v. Mann***.

In addition to the confidential informant, the affidavit also relied on two other informants, Sheldon Tepp and Thomas Perry. The affidavit reported that Tepp and Perry told police they had purchased heroin from an individual with a particular address and phone, approximately two months before the confidential informant buy. The address and phone number provided by Tepp and Perry matched that of Nicholas Selk.

Tepp and Perry made other statements to the police, however, which were not included in the warrant affidavit. The failure to include all of the statements, several of which were contradictory to those included in the affidavit, was Selk's basis for the ***Franks/Mann*** claim. The court of appeals concluded that "had the search warrant affidavit included the information Selk asserts was erroneously omitted, the search warrant would still have been sufficient to establish probable cause." (Slip op. at ¶10; App. 105). Selk respectfully disagrees, and asks the court to review the court of appeals' conclusion.

Pursuant to the Fourth and Fourteenth Amendments to the United States Constitution, a defendant may attack the

veracity of a warrant affidavit after the warrant has been issued and executed. ***Franks v. Delaware***, 438 U.S. 154, 164 (1978). Because the "bulwark of Fourth Amendment protection" lies in the warrant requirement based on probable cause, the warrant affidavit must be truthful. ***Id.*** at 164-65. If the warrant affidavit contains deliberate falsehoods or statements made with reckless disregard for the truth, the warrant application must be viewed without those statements to see if probable cause still exists. If probable cause does not exist once the offending statements are removed, "the effect and sanction is the exclusion of the seized evidence." ***State v. Mann***, 123 Wis. 2d 375, 387, 367 N.W.2d 209 (1985).

In ***Mann***, the Wisconsin Supreme Court extended the ***Franks*** rule to omissions from the warrant requirement. ***Mann***, 123 Wis. 2d at 385.

The court in ***State v. Anderson***, 138 Wis. 2d 451, 406 N.W.2d 398 (1987), explained the procedure for a challenge brought pursuant to ***Franks*** and ***Mann***. In order to challenge the veracity of statements in support of a search warrant, the defendant must:

> first make 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 that the allegedly false statement is necessary to the finding of probable cause. [citing ***Franks*** at 155-56].
>
> To make a substantial preliminary showing "[t]here 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." [citing ***Franks*** at

> 171]. If the court concludes that the defendant has made the substantial preliminary showing, then the defendant is entitled to a hearing at which the defendant must then prove, by a preponderance of the evidence, that the challenged statement is false, that it was made intentionally or with reckless disregard for the truth, and that absent the challenged statement the affidavit does not provide probable cause. [citing ***Franks*** at 156]. If the defendant meets this burden, the fourth amendment requires that the search warrant be voided and the evidence discovered pursuant to the warrant requirement be suppressed.

Anderson, 138 Wis. 2d at 462-63.

Applying this standard to this case, Selk was entitled to a ***Franks/Mann*** hearing because the affidavit Officer Turner filed in support of the search warrant application omitted information in reckless disregard for the truth. Turner omitted the inconsistent information Tepp and Perry provided, thus giving the court only some of the relevant information. If the affidavit had provided all of the relevant information, it would not have provided probable cause for the search.

Although police interviewed Tepp and Perry on two occasions, Officer Turner's affidavit in support of the warrant only used information from the second interview with each man. The omission of information from the first statements constituted reckless disregard for the truth because the statements, when read together, were so inconsistent that they lacked credibility. Rather than inform the court of the totality of the information in the statements, the affidavit included only those statements which would bolster the confidential informant's information. The court needed all of the information to properly consider whether probable cause existed to justify a warrant.

For example, Thomas Perry, who had overdosed, first told police that he had bought the heroin from a man standing outside of a gas station, whom he knew to sell heroin from that location. (19:14-15). In his second statement to the police, Perry told police he bought the heroin from a man who lives on Cimarron Court in Oshkosh, and he provided the man's cell phone number. (3:2; App. 122). Perry told police he had bought heroin from this person about 20 times over the past few months, and that the transactions took place at or near the dealer's apartment. (3:2; App. 122).

In Sheldon Tepp's first statement to the police, he did not tell the police anything about a drug dealer he knew as "Naka," or that he had purchased drugs from someone on Cimarron Court. (19:10-13). In his second statement, however, he said he had bought heroin from "Naka" on the day of the overdose, and said he had bought it at the apartment on Cimarron Court, not at a gas station. (3:2).

Tepp also gave inconsistent statements to the police when asked about the drug paraphernalia. First, when asked about the paraphernalia, Tepp told police they threw it out the window. (19:11). Then he said he wrapped it up and threw it in a garbage can. (*Id.*). When police asked if they could search his car, he said he did not want them to do that, and when the search occurred, police found the syringe, spoon with cotton on it and a piece of rubber tubing. (19:12-13). And, Tepp gave differing statements about whether and when he used heroin. When first questioned, he indicated he had injected heroin when he was with Perry in the car, but later said he had used the heroin earlier in the day. (19:11).

Of these different statements, Officer Turner used only those statements which fit with the confidential informant's

information. With respect to Tepp and Perry, the warrant affidavit says only that Perry had overdosed and was revived by Narcan at the hospital; that Perry said he obtained the heroin from someone at Cimarron Court in Oshkosh, providing the phone number, and that Tepp said he and Perry had both bought the heroin from someone known as "Naka" at Cimarron Court, and later identified Selk as "Naka" from a photo array. The affidavit omitted the fact that Perry first said he bought the drugs from someone outside of a gas station, that Perry did not say anything about someone known as "Naka," and that Tepp gave different statements about what happened to the drug paraphernalia. By omitting this information, the affidavit did not reveal facts which the court would need to determine whether probable cause existed to justify the search.

The court of appeals concluded that even with the omitted information, the affidavit would have provided probable cause to search. (Slip op. at ¶15; App. 107). The court of appeals conclusion was wrong, however, because it failed to also consider how dated Tepp and Perry's information was—some two months old, and that the confidential informant was not reliable, in addition to the omitted facts. In sum, Tepp and Perry's information was two months old. They gave the police different versions of how they came to have the heroin. Then the affidavit tried to corroborate the information of an informant who is not shown to be reliable. With all of the information, including the conflicting information, the affidavit failed to support probable cause.

III. Selk's Incriminating Statements Must Be Suppressed Because They Were Not Sufficiently Attenuated from the Unlawful Search.

On appeal, Selk argued that if the court concluded the search warrant was not based on probable cause, it should order suppressed not only the heroin and THC discovered in the search, but also Selk's subsequent incriminating statements. He argued that his statements were not sufficiently attenuated from the unlawful search. Because the court rejected Selk's challenge to the search warrant, it also rejected his argument that his statements to police were obtained by exploitation of an unlawful search. (Slip op. at ¶15 n.3; App. 107). If this court agrees that the search warrant was not based on probable cause, he asks the court to order suppression of the drugs found in the search and Selk's subsequent incriminating statements as the statements were not attenuated from the search.

When a defendant's statement is obtained by exploitation of prior unlawful law enforcement activity, then a subsequent incriminating statement must be suppressed unless the connection between the police illegality and the statement is so attenuated as to dissipate the taint. ***State v. Phillips***, 209 Wis. 2d 559, 568-569, 563 N.W.2d 573 (Ct. App. 1997). In order to analyze whether a statement is tainted by the earlier illegality, the court looks at the temporal proximity of the official misconduct and the defendant's statement, the presence of any intervening factors, and the purpose and flagrancy of the official misconduct. ***Id.*** at 569.

Here, police executed the search warrant at 8:22 p.m., and Selk told police right away that he had drugs in his pocket. (35:18). At 8:41 p.m., he waived his *Miranda* rights and made incriminating statements to the police. (*Id.*). Thus,

in less than 30 minutes from the time that police entered Selk's apartment, he had admitted he possessed drugs and made incriminating statements. Applying the temporal proximity factor, Selk's statements are not attenuated from the unlawful search.

Nor are there intervening circumstances that could attenuate the taint. While Selk received *Miranda* warnings, by that time, Selk's home and person had been searched, and he had admitted to having drugs in his pocket. The second statement was "clearly the result and the fruit of the first." ***Phillips***, 209 Wis. 2d at 569, quoting ***Brown v. Illinois***, 422 U.S. 590, 605 (1975). Even if the police misconduct was not flagrant, the other two factors articulated in ***Phillips*** warrant the conclusion that Selk's statements were attenuated from the unlawful search, and therefore, must be suppressed.

As such, if the court grants review and concludes that the search warrant was not supported by probable cause, Selk asks that the court also conclude his subsequent statements to the police must be suppressed as a fruit of the unlawful search.

CONCLUSION

For the above reasons, Selk respectfully requests that the court grant his petition for review. He asks that the court conclude the confidential informant was not demonstrated to be reliable such that his information could not form the basis for probable cause. He also asks that the court conclude he made the necessary showing for a ***Franks/Mann*** hearing, and thus reverse the decisions of the court of appeals and trial court. And, he asks that the court rule any statements he made following the unlawful search be suppressed as well.

Dated this 2nd day of March, 2015.

Respectfully submitted,

MARTHA K. ASKINS
Assistant State Public Defender
State Bar No. 1008032

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2879
askinsm@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

CERTIFICATION AS TO FORM/LENGTH

I certify that this petition meets the form and length requirements of Rules 809.19(8)(b) and 809.62(4) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the petition is 5,290 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this 2nd day of March, 2015.

Signed:

MARTHA K. ASKINS
Assistant State Public Defender
State Bar No. 1008032

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2879
askinsm@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner