

APPENDIX

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APPENDIX**

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**COURT OF APPEALS
DECISION
DATED AND FILED**

January 29, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP584-CR
STATE OF WISCONSIN

Cir. Ct. No. 2012CF863

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NICHOLAS J. SELK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: SCOTT C. WOLDT, Judge. *Affirmed.*

Before Blanchard, P.J., Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Nicholas Selk appeals a judgment of conviction and an order denying postconviction relief. Selk argues that he was entitled to an evidentiary hearing on his claim of ineffective assistance of counsel for failing to

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properly argue Selk's suppression motion. We disagree. For the reasons set forth below, we affirm.

¶2 Selk was charged with drug and firearm offenses based on the evidence obtained through the execution of a search warrant at Selk's apartment. Selk moved to suppress the evidence on grounds the affidavit in support of the search warrant was insufficient to establish probable cause. Selk argued that the affidavit was insufficient because it did not establish the reliability of information regarding a controlled buy through a confidential informant. He also argued that the affidavit was insufficient by setting forth incomplete information as to statements provided by two informants, Thomas Perry and Sheldon Tepp. The circuit court found that the search warrant was supported by probable cause and denied the suppression motion. Selk then pled no contest, pursuant to a plea deal, to one count of possession of heroin with intent to deliver, and the remaining counts were dismissed and read-in.

¶3 Selk filed a postconviction motion claiming he was denied the effective assistance of counsel when his trial counsel failed to seek a *Franks*¹/*Mann*² hearing to challenge the search warrant. He argued that the search warrant affidavit omitted critical information and that he was entitled to an evidentiary hearing to show that the search warrant lacked probable cause. The circuit court denied the postconviction motion without an evidentiary hearing. Selk appeals.

¹ *Franks v. Delaware*, 438 U.S. 154 (1978).

² *State v. Mann*, 123 Wis. 2d 375, 367 N.W.2d 209 (1985).

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¶4 Selk argues that he is entitled to an evidentiary hearing on his claim that his trial counsel was ineffective by failing to properly argue his suppression motion. He contends that his counsel performed deficiently by not arguing that he was entitled to a *Franks/Mann* hearing and that he was prejudiced when he did not get an evidentiary hearing to challenge the search warrant. We conclude, however, that Selk's challenge to the search warrant lacks merit. Because we reject Selk's challenge to the search warrant, we conclude that Selk's trial counsel was not ineffective by failing to request a *Franks/Mann* hearing.

¶5 A claim of ineffective assistance of counsel "must show that counsel's performance was deficient ... [in] that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and also that "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. If a defendant fails to satisfy one prong of the ineffective assistance of counsel test, we need not address the other. *Id.* at 697.

¶6 A claim of ineffective assistance of counsel requires an evidentiary hearing only if the motion contains allegations of material fact that, if true, would entitle the defendant to relief. *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. "However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit

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court has the discretion to grant or deny a hearing.” *Id.* We independently determine whether the facts set forth in a postconviction motion require an evidentiary hearing. *Id.* If they do not, we review a circuit court’s decision as to whether to hold a hearing for an erroneous exercise of discretion. *Id.*

¶7 The basis for Selk’s ineffective assistance of counsel claim is Selk’s contention that his counsel failed to obtain a *Franks/Mann* hearing to challenge the search warrant affidavit. Selk acknowledges that his trial counsel moved to suppress the evidence obtained through the execution of the search warrant by attacking the sufficiency of the affidavit to establish probable cause. Selk contends, however, that his trial counsel was ineffective by failing to cite the relevant case law and argue that Selk was entitled to an evidentiary hearing. He argues that an ordinarily prudent lawyer would have recognized that she needed to request a *Franks/Mann* hearing to establish that the affidavit omitted critical facts. Selk contends that, had counsel cited the relevant case law and requested an evidentiary hearing, Selk would have established that the warrant lacked probable cause. We conclude, however, that Selk has not established that he was entitled to a *Franks/Mann* hearing. See *State v. Wheat*, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 647 N.W.2d 441 (failure to bring a meritless motion is not deficient performance).

¶8 A *Franks/Mann* hearing is required if a defendant makes a “substantial preliminary showing” that the search warrant affidavit omitted undisputed facts that are critical to the determination of probable cause. See *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978) (hearing required upon substantial preliminary showing that a false statement was included in an affidavit with reckless disregard for the truth and that the statement is necessary to finding of probable cause); *State v. Mann*, 123 Wis. 2d 375, 385-89, 367 N.W.2d 209

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(1985) (“[A]n omitted fact [is] the equivalent of ‘a deliberate falsehood or a reckless disregard for the truth’” if it is “an undisputed fact that is critical to an impartial judge’s fair determination of probable cause”). “Where the omitted critical fact is undisputed it will not involve credibility determinations, the weighing of evidence, or the drawing of one of several inferences from a fact.” *Mann*, 123 Wis. 2d at 389. The defendant must show that the omitted facts, if included, would prevent a finding of probable cause. *Id.* at 388-89. “[I]f, when the material previously omitted is inserted into the complaint, there remains sufficient content ... to support a finding of probable cause, no ... hearing is required.” *Id.* at 388.

¶9 Selk contends that the search warrant affidavit omitted critical information and that, with the omitted information added to the affidavit, the search warrant lacks probable cause. Selk points out that the search warrant included information provided by informants Perry and Tepp in their second police interviews, but excluded contradictory statements Perry and Tepp gave in their first police interviews. He argues that the information Perry and Tepp provided in their first and second police interviews, when read together, was so inconsistent that it rendered Perry and Tepp totally lacking in credibility. Selk then contends that the only other information in the search warrant—that a confidential informant had conducted a controlled buy of heroin from Selk at the direction of the police—lacked any showing of reliability. Thus, Selk contends, the omitted contradictory statements by Perry and Tepp are critical to a determination of probable cause. We disagree.

¶10 We conclude 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. The affidavit sets forth the

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following: On October 11, 2012, Perry was treated at the hospital for a heroin overdose after being brought to the hospital by Tepp. On October 16, 2012, police interviewed Perry. Perry informed police that he obtained the heroin from someone at the Cimarron Court apartment complex in Oshkosh with a certain phone number, which police then identified as Selk's residence and phone number. Perry also stated that he had bought heroin from the same individual about twenty times over the past few months, at or near the seller's apartment.

¶11 On October 17, 2012, police interviewed Tepp. Tepp stated that he and Perry obtained the heroin from an individual he knew as "Naka" at the Cimarron Court apartment complex. Tepp identified Selk as "Naka" in a photo array.

¶12 On December 12, 2012, a confidential informant performed a controlled buy of heroin from Selk at Selk's apartment in Cimarron Court. The informant purchased the heroin, packaged in tin foil folds, with pre-recorded currency provided by police. The informant knew Selk as "Naka." After the buy, the confidential informant told police that he saw additional heroin at Selk's apartment.

¶13 Selk argues that the search warrant omitted the following critical information: Police first interviewed Perry and Tepp at the hospital on October 11, 2012. At that time, Perry stated that he bought the heroin from a man outside a gas station, and that Perry had bought heroin from that man in the past but did not know the man's name. Tepp did not identify the source of the heroin. Tepp stated he disposed of the drug paraphernalia after Perry overdosed, but police found the paraphernalia in Tepp's car. Finally, Tepp first stated that he used heroin with Perry, but later said he used heroin earlier in the day.

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¶14 A determination of whether there is probable cause for a search warrant requires a “practical, commonsense decision whether, given all the circumstances set forth in the affidavit ..., there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *State v. Ward*, 2000 WI 3, ¶23, 231 Wis. 2d 723, 604 N.W.2d 517 (citation omitted). All of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of an informant, must be considered. *State v. Lopez*, 207 Wis. 2d 413, 425, 559 N.W.2d 264 (Ct. App. 1996). Independent corroboration by police of information provided can establish an informant’s veracity and basis of knowledge. *State v. Jones*, 2002 WI App 196, ¶15, 257 Wis. 2d 319, 651 N.W.2d 305 (“Independent police corroboration of the informant’s information imparts a degree of reliability to unverified details.” (citation omitted)).

¶15 We conclude that the information in the affidavit, together with the omitted information, supports a finding of probable cause for the issuance of the search warrant.³ The information in the affidavit supports a commonsense, practical determination of a fair probability that contraband would be found in Selk’s apartment. In reaching this conclusion, we reject Selk’s contention that the information as to the confidential informant lacked any indication of reliability. 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. See *State v. Hanson*, 163 Wis. 2d 420, 423-24, 471 N.W.2d 301 (Ct. App. 1991) (“[O]ne ‘situation in which the corroboration will suffice to show veracity is that in which the informant has not been working independently, but

³ Because we reject Selk’s challenge to the search warrant, we also reject his argument that his statements to police were obtained by exploitation of an unlawful search.

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rather has cooperated closely with the police, as is true when the informant makes a controlled purchase of narcotics.” (citation omitted)). While certainly the description of the controlled buy could have been more detailed, we are not persuaded by Selk’s argument that the lack of detail renders the report of the controlled buy irrelevant to a determination of probable cause.

¶16 We also reject Selk’s contention that Perry and Tepp’s statements implicating Selk lacked credibility. The fact that Perry and Tepp provided prior inconsistent information to police does not render their subsequent statements patently incredible. Reading the statements together supports one reasonable inference that Selk was the source of the heroin that caused Perry’s overdose. The information regarding the controlled buy, together with the statements by Perry and Tepp, is sufficient to support a finding of probable cause. We affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

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STATE OF WISCONSIN CIRCUIT COURT WINNEBAGO COUNTY
BRANCH 2

COPY

STATE OF WISCONSIN,
Plaintiff,

-vs-

CASE NO. 2012-CF-863

NICHOLAS J. SELK,
Defendant.

POSTCONVICTION MOTION HEARING

BEFORE: HONORABLE SCOTT C. WOLDT

DATE: February 24, 2014

PLACE: Winnebago County Courthouse
Circuit Court Branch 2
415 Jackson Street
Oshkosh, Wisconsin

APPEARANCES: Assistant District Attorney Tracy Paider
Appearing on Behalf of the Plaintiff, the
State of Wisconsin

Assistant State Public Defender Martha
Askins Appearing on Behalf of the
Defendant, Nicholas Selk, who Appears via
Videoconferencing

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EXHIBITS

NONE MARKED

PROCEEDINGS

1
2 **THE COURT:** We'll call the case of State of
3 Wisconsin versus Nicholas Selk, Case No. 2012-CF-863.
4 Defendant appears via videoconferencing, and you would be
5 Martha Askins?

6 **MS. ASKINS:** Askins, that's correct.

7 **THE COURT:** Make sure you pull up your mic. so
8 we can hear you. And we have Miss --

9 **THE DEFENDANT:** Oh.

10 **THE COURT:** -- Miss Paider on behalf of the State
11 and, as I said, the defendant via videoconferencing. Before
12 we started he was making some statements. Go ahead,
13 Mr. Selk.

14 **THE DEFENDANT:** Okay, thank you, Your Honor.
15 In the event I need to address my attorney so she can more
16 effectively represent me, how do you suggest I address her?

17 **THE COURT:** Well, since this is a motion hearing, I
18 don't think that should be an issue.

19 Counsel.

20 **MR. SELK:** Oh.

21 **THE COURT:** Counsel.

22 **MR. SELK:** Well --

23 **MS. ASKINS:** Your Honor, I guess what I would
24 suggest is that, if there are questions that maybe Mr. Selk has
25 or he wants to make a comment to me, he wait until we finish

1 with our arguments and then -- then we just take it from
2 there. I don't know whether he has something he feels he
3 needs to say right off the bat, but maybe we should just make
4 our arguments and then, if there's something he feels has
5 been left out, he could have a moment to -- and I'm not sure
6 if you have the capability to do it privately or not --

7 **THE COURT:** We -- we can even put you --

8 **MS. ASKINS:** -- but we --

9 **THE COURT:** -- we can put you in our office and
10 you can talk to him there if you want to.

11 **MS. ASKINS:** Okay.

12 **THE COURT:** Good idea.

13 All right. We're here today for a hearing to decide
14 whether or not the court is going to grant the defendant's
15 request for a *Franks/Mann* and *Machner* hearing. Counsel,
16 I've reviewed your submissions, I've reviewed the file.
17 Anything you wish to add on top of your motions?

18 **MS. ASKINS:** Just -- just a couple things, Your
19 Honor, and I appreciate that you're doing this in -- in two
20 stages. That seemed to me to make the most sense given
21 the posture of where we are, and by that I mean that it made
22 sense to me to ask that the court have a hearing to
23 determine whether a *Machner* hearing is appropriate. The
24 reason, of course, I bring this as an ineffectiveness claim is
25 that, with the state of our appellate law, all claims have to be

1 preserved at the trial court level and, in reviewing the -- the
2 filings in this case, it seemed to me that trial counsel was
3 close to asking for what I had thought she needed to ask for
4 but that she didn't explicitly cite to the court *Franks and Mann*
5 and didn't explicitly ask for an evidentiary hearing and
6 without doing that she didn't really preserve this claim for
7 appellate review, and I could not tell whether Your Honor
8 would have been inclined to grant a hearing at which time the
9 officer would come in and testify about why he -- why he put
10 what he put in the affidavit.

11 Now, I put in my motion the things that I thought
12 the court needed to have in order to make a probable cause
13 finding, and by that I mean the whole picture, not just the
14 things that supported probable cause but, also, the things
15 that would call into question the credibility of both the
16 confidential informant, which trial counsel did litigate, but
17 also why Tepp and Perry, these other two informants or
18 witnesses, were not credible.

19 And I wanted to just add one more, and that was
20 relating to Sheldon Tepp who was the driver of this car. He at
21 first said -- you know, he was questioned relating to the
22 paraphernalia for the other individual who overdosed. First
23 he told the police that he threw it out the window, then he
24 said he threw it in the trash, and then he said, when asked if,
25 well, do you mind if we search your vehicle, he said, well, I'd

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rather you didn't, I'm concerned that you'll find paraphernalia, and of course, they did search and did find paraphernalia.

So my position is that this court needed to know more in order to assess the affidavit to assess whether there was probable cause and, had the court known this complete picture with the omitted information, the court would not have found probable cause to -- to issue the search warrant.

So that's the claim, Your Honor, and I would ask that you find that a substantial preliminary showing has been made, and this would be in the context of material omissions from the warrant affidavit, it would fall within that type of a case law claim, and then we would have a hearing at which time trial counsel would come in to testify and there would also be evidence presented regarding the decision-making of what to put in that affidavit.

Thank you.

THE COURT: Miss Paider.

MS. PAIDER: Your Honor, I have really nothing to add if Mr. Sparr had indicated something to the court or maybe not.

THE COURT: Not --

MS. ASKINS: Not that I'm aware of.

MS. PAIDER: I apologize. He told me he had filed something, but apparently, he had not filed anything; but obviously, the court makes the determination, the court

1 knows what was filed in the underlying case and what issues
2 were litigated. Obviously, if the court finds that the defense
3 has met their burden for a hearing, then we have the hearing
4 and then we have the *Machner* hearing and have testimony,
5 so the State doesn't really take a position other than that it's
6 really a determination for the court to make.

7 **THE COURT:** Well, in this case, as counsel notes,
8 the defense must make a substantial preliminary showing
9 that the affidavit contains false statements that were
10 knowingly, intentionally, and were recklessly made and
11 defendant must show that the magistrate could not have
12 found probable cause but for the false or untrue information.
13 According to *State v. Marshall*, 92 Wisconsin 2d 101, a 1979
14 case, hearing required -- is required only when the affiant, not
15 a witness or informant, makes allegedly false statements so --

16 **THE DEFENDANT:** Or misleading, *State versus*
17 *Mann, State versus Harris* --

18 **THE COURT:** Hold on.

19 **THE DEFENDANT:** -- *United States versus Harris*.

20 **THE COURT:** Hold on. Hold on. I'm looking at the
21 affiant. There is nothing -- there is not a allegation, nor has
22 there ever been, that the affiant made an untrue,
23 intentionally knowing, reckless statement to the court.

24 **THE DEFENDANT:** I need to talk to my attorney.

25 **THE COURT:** Got a number there? Do you have a

1 phone?

2 **THE DEFENDANT:** Yes, I do, Your Honor.

3 **THE COURT:** What's the number?

4 **THE DEFENDANT:** I don't know. Hold on. I gotta
5 get it.

6 *(Pause in proceedings while the defendant talks to*
7 *an officer at the institution.)*

8 *(Proceedings resume.)*

9 **THE OFFICER:** You can dial the institution at
10 742 -- that would be 608-742-9100.

11 **THE COURT:** Will that phone be in that room or
12 another one?

13 **THE OFFICER:** And then the extension is 9160.

14 **MS. ASKINS:** Nine one six what?

15 **THE COURT:** "Nine one six what?"

16 **THE OFFICER:** Zero.

17 **THE COURT:** Will that phone be in that room or
18 another room?

19 **THE OFFICER:** In this room.

20 **THE COURT:** Okay. All right.

21 **MS. ASKINS:** Should we take a brief recess,
22 Judge --

23 **THE COURT:** Sure.

24 **MS. ASKINS:** -- and do that?

25 **THE COURT:** And then when counsel comes back,

1 we'll restart the video at that point.

2 **MS. ASKINS:** I'll call back.

3 **THE COURT:** We'll call back.

4 *(Brief recess. Discussion held off the record*
5 *between Ms. Askins and the defendant.)*

6 *(Proceedings resume.)*

7 **THE COURT:** And now we are going back on the
8 record. Your microphone's off again. You need to turn it on.

9 *(Defendant complies.)*

10 **THE COURT:** There you go. Now we can hear you.
11 All right. We're back -- we're back on the record, and I was in
12 the process of making my decision. Anything you want to
13 add in the middle of it?

14 **MS. ASKINS:** Just two minor things, Your Honor.
15 One is that the -- the other thing that there -- the other way in
16 which there are inconsistencies in the police report between
17 Tepp and Perry relates to the use of the heroin, and it was
18 Sheldon Tepp who was the driver who gave inconsistent
19 statements about when and whether he also shot up heroin
20 so those were -- that was another way in which the -- there
21 were inconsistencies. And I want to be clear that what I'm
22 alleging is that the affidavit was misleading to this court in
23 that the material omissions did not give a correct picture to
24 the court about the facts by which this court could then
25 analyze probable cause.

1 And by the way, thank you for giving me the
2 opportunity to confer with Mr. Selk.

3 **THE COURT:** I would note you had about five
4 minutes to talk to him. We're just back on the record.

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

24 **MS. ASKINS:** Judge, should I prepare an order for
25 your signature?

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THE COURT: That would be fantastic, and then you can move to the next stage.

MS. ASKINS: Thank you, Your Honor.

THE COURT: You're welcome. Have a great day.

(Proceedings adjourned.)

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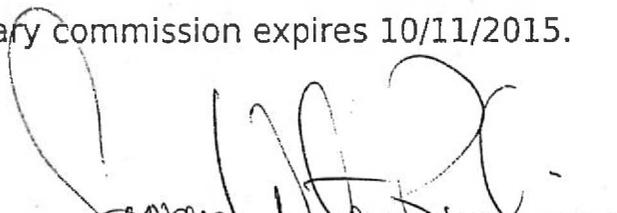
CERTIFICATION PAGE

STATE OF WISCONSIN }
COUNTY OF WINNEBAGO } SS:

I, TAMARA WATERS-RUEDINGER, official court reporter for Circuit Court Branch 2, Winnebago County Courthouse, Oshkosh, Wisconsin, do hereby certify that I have carefully compared the foregoing 11 pages with my stenographic notes and that the same is a true and correct transcription of said notes.

Dated at Oshkosh, Wisconsin, this 18th day of March, 2014.

My Notary commission expires 10/11/2015.



Tamara Waters-Ruedinger, RPR, CRR

Tamara Waters-Ruedinger, RPR, CRR, Official Court Reporter for Circuit Court Br. 2
P.O. Box 2808, Oshkosh, Wisconsin 54903.....920-236-4824

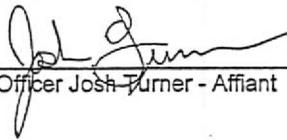
and the City of Oshkosh Police Department went to 170 Cimarron Ct. Apartment F, City of Oshkosh, Winnebago County, WI and purchased a quantity of suspected heroin from Nicholas J. Selk DOB:09/04/82 using pre-recorded U.S. currency provided by police investigators. This pre-recorded U.S. currency included two \$20 bills with serial numbers JG05944377 and I181183883A. 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 foil foil folds. CI told investigators that CI saw additional heroin at the residence.

On 10/11/12 your affiant is aware from Oshkosh Police Department report #12-36585 that Thomas D. Perry DOB: 12/28/90 overdosed on heroin and was brought to Mercy Medical Center by his friend Sheldon D. Tepp DOB: 03/19/91. Perry was revived at the hospital by Narcan.

On 10/16/12 Detectives Frey and Artus of the Oshkosh Police Department interviewed Thomas Perry about the overdose. Perry said that he got the heroin that he overdosed on from a male who lives at Cimarron Ct. in Oshkosh and has the cell phone number 920-376-3308. Detective Artus contacted Mokler Properties who owns the Cimarron Ct. complex and provided them with the cell phone number. Mokler Properties said their records showed that number belonging to a Nicholas Selk who currently lives at 170 Cimarron Ct., Apartment F. Perry said 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 apartment.

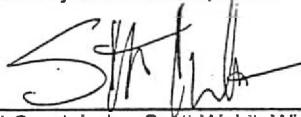
On 10/17/12 Detectives Frey and Artus interviewed Sheldon Tepp about the overdose. Tepp said that on the day of the overdose himself and Perry went to a Cimarron Ct apartment complex and bought heroin from a dealer they know as "Naka." From a photo array Tepp identified "Naka" as Nicholas J. Selk DOB: 09/04/82. According to Tepp he purchased two aluminum foil bindles or folds containing heroin from Selk for \$80. Tepp and Perry then used the heroin and Perry overdosed.

WHEREFORE, your affiant prays that a search warrant be issued to enter said premises to search for the items identified herein along with the items listed on the face sheet of the search warrant.



Officer Josh Turner - Affiant

Subscribed and sworn to before me
this 12th day of December, 2012.



Circuit Court Judge Scott Woldt, Winnebago County