**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**March 18, 2008**

**David R. Schanker**
**Clerk of Court of Appeals**

**NOTICE**

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**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. 2007AP1139-CR** **Cir. Ct. No. 2006CF3659**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JAIME ROMERO,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Reversed and cause remanded*.

Before Wedemeyer, Fine and Kessler, JJ.

¶1 KESSLER, J. Jaime Romero appeals from a judgment of conviction based on a guilty plea entered after the trial court denied his motion to suppress evidence seized during the execution of a search warrant, pursuant to

WIS. STAT. § 971.31(10) (2005-06).[1] Romero contends that the affidavit submitted by law enforcement in support of the search warrant did not establish probable cause for issuance of the warrant. We agree and reverse.

## BACKGROUND

¶2 This case involves a confidential informant (CI) who had worked with Milwaukee police officers on several prior occasions and whom the officers believed to be reliable. Romero does not challenge the police explanation for why they concluded the CI was reliable. As material to this case, the CI reported to the police a recent conversation with "an unwitting John Doe Hispanic male #1" ("unwitting"[2]). The CI reported the unwitting claimed that he could purchase cocaine for the CI from unidentified "John Doe Hispanic male #2." Police decided to pursue the CI report by trying to facilitate the purchase of cocaine by the unwitting from the unknown source.

¶3 The record does not indicate the police conducted any investigation of, or even identified, the unwitting, either before or after the activity upon which the warrant at issue here was based. He remains completely unidentified in the police affidavit except as a "John Doe Hispanic male #1" or "unwitting subject #1."

¶4 The search warrant affidavit describes the "controlled buy" protocol applied to the CI. Police searched the CI and his automobile to establish the lack

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] "Unwitting" is a term used by police when the individual does not realize he or she is speaking with, or cooperating with, the police.

of money or controlled substances, gave the CI money, and kept the CI under surveillance insofar as possible during the activities that followed. After ensuring that the CI had only the "buy" money, and no drugs or contraband, according to the search warrant affidavit, the police heard and saw the following:

- Police monitored a phone call from the CI to the unwitting in which the CI ordered cocaine.
- The CI got in his/her vehicle. Police followed the CI vehicle and saw the unwitting enter the CI's vehicle.
- Police followed the CI's vehicle to the area of 205 East Montana.
- Police saw the unwitting exit the CI vehicle.
- Police saw Hispanic male #2 exit the front door of 205 East Montana and motion the unwitting toward the alley/garage directly behind 205 East Montana.
- Police saw Hispanic male #2 walk towards the alley/garage.
- Police saw the garage door open.
- Police saw the unwitting go into the garage. (Police do not report seeing Hispanic male #2 go into the garage.)
- Police saw the unwitting leave the garage and return to CI's automobile.
- Police saw the garage door close.

- Police saw Hispanic male #2 go back to the house at 205 East Montana and go in the front door.

- Police followed the CI's vehicle, saw the unwitting get out of the vehicle (location is not disclosed), then followed the CI's vehicle to a predetermined location.

- The CI gave the police a plastic bag with suspected cocaine, which they field tested and concluded was cocaine.

- The police searched the CI and the vehicle again for drugs or money and found none.

¶5 The information in the search warrant affidavit, which is uncorroborated by any police observation or investigation, is a police officer's report of the CI's report of what the CI says the unwitting said and what the CI reports seeing the unwitting do. This includes:

- The CI reports that the unwitting gave the CI directions as to where to drive.

- Before arriving at 205 East Montana, the unwitting made a call on his cell phone, and requested cocaine.

- The unwitting referred to the person he called as "Jaime."

- The CI gave the unwitting "a quantity of 'buy' money."

- The unwitting got out of the CI's automobile and walked to the alley behind the house.

- The CI does not report seeing Hispanic male #2 or the unwitting enter or leave the garage.

- The unwitting returned a short time later to the CI's vehicle.

- The unwitting gave the CI a clear bag containing cocaine.

¶6 At the hearing on Romero's motion to suppress, the trial court reviewed the affidavit in support of the search warrant. From the face of the affidavit, the trial court made the following findings and conclusions:

> [T]hey had a target. They could not get to the target correctly because the unwitting was apparently wanting to be the middle man.… [W]hether or not the source of the drugs came from Jaime or did they come from the unwitting[,] I don't know that. Certainly [the magistrate] didn't know that either, okay. I don't think he has to know that.… They apparently had other buys at this location or at least had information of buys about this…. [Y]ou had this unwitting involved in trying to I don't know cash in on the action somehow. I don't know exactly what his function was, whether or not he was part of a chain known to be involved to [sic] Mr. Romero or whoever else, but he involved himself….
>
> All I [know] is that … under the practical considerations there was [sic] actions going on there. They tried to get through it on a confidential informant basis. You've got this inter-meddler that comes into the fray. He's not under their control. He's not searched. There is no apparent protocol as to him and he becomes part of the chain … coming from allegedly Jaime to the confidential informant.

¶7 After the trial court denied the motion to suppress, finding "there was probable cause under the totality of the circumstances and the reasonable information available to the commissioner at that time," Romero entered a guilty plea. This appeal followed pursuant to WIS. STAT. § 971.31(10).

## STANDARD OF REVIEW

¶8 When reviewing the validity of a search warrant, we are limited to the record that was before the issuing magistrate. ***State v. Lindgren***, 2004 WI App 159, ¶16, 275 Wis. 2d 851, 687 N.W.2d 60. "The existence of probable cause for a search warrant is determined by applying the 'totality-of-the-circumstances' test adopted by the United States Supreme Court in ***Illinois v. Gates***, 462 U.S. 213, 231 (1983)." ***State v. Sloan***, 2007 WI App 146, ¶24, 303 Wis. 2d 438, 736 N.W.2d 189. In ***Gates***, the Court ruled that "[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit ... a fair probability [exists] that contraband or evidence of a crime will be found in a particular place." ***Id.*** at 238. "Elaborate specificity is not required, and the officers are entitled to the support of the usual inferences which reasonable people draw from facts." ***Sloan***, 303 Wis. 2d 438, ¶24 (quoting ***State v. Marten***, 165 Wis. 2d 70, 75, 477 N.W.2d 304 (Ct. App. 1991)).

## DISCUSSION

¶9 Although much of the affidavit in support of the search warrant describes the protocol used by police for a "controlled buy," and the application of that protocol to the CI here, the only "controlled buy" that occurred was the CI's exchange of money for cocaine with the unwitting. Neither the CI nor any police officer determined whether the unwitting already had cocaine in his possession when he first got into the CI's vehicle. Neither the CI nor any police officer knows how the unwitting got the cocaine he ultimately delivered to the CI because no one observed the unwitting receive cocaine from, or deliver money to, Hispanic male #2, nor anyone else. No one saw Hispanic male #2 enter or leave the garage.

Probable cause to believe any criminal activity involved the 205 East Montana residence or garage, if it exists, rests exclusively on the hearsay statements attributed to the unwitting.

¶10 We have said that police are not required to establish the reliability of a source used by a reliable CI. *See* ***State v. McAttee***, 2001 WI App 262, ¶12, 248 Wis. 2d 865, 637 N.W.2d 774 ("police were entitled to rely on information from a known and reliable informant without independently determining the reliability of the informant's source or the source's information"). We have also repeatedly held that probable cause "may be based on hearsay information that is 'shown to be reliable and emanating from a credible source.'" ***Id.***, ¶9 (citation omitted). In order to overcome the obvious dangers of accepting uncorroborated or unreliable hearsay as the basis for probable cause, however, Wisconsin courts require some evidence of reliability of the proffered hearsay, even when it comes from a reliable CI.

¶11 In ***McAttee***, a reliable CI reported statements made by three other people, each of which implicated McAttee in a homicide. ***Id.***, ¶3. The report of these statements resulted in McAttee's arrest. ***Id.***, ¶4. We considered at length whether the hearsay was reliable and concluded for numerous reasons that it was: the CI had an established relationship with a speaker (CI was the "best friend" of one of the speakers); one of the speakers was McAttee's girlfriend who was also the mother of his children; and one was his girlfriend's mother. ***Id.***, ¶3. The statements reported details for which the police already had independent corroboration, i.e., McAttee had previously been taken in for questioning on the murder but released, and the man killed was shot in a car, a woman was present, and the man's name was "Leroy." ***Id.***, ¶¶2-3. The police interviewed the girlfriend's mother and corroborated the statements the CI attributed to her. ***Id.***

Hence, in ***McAttee***, the third party hearsay, although reported by a reliable CI, established probable cause because it was corroborated in significant part by police investigation. ***Id.***, ¶13.

¶12 Similarly, in ***State v. Lopez***, 207 Wis. 2d 413, 559 N.W.2d 264 (Ct. App. 1996), the court sustained a finding of probable cause to search Augustin Lopez's property in rural Wisconsin based on hearsay statements reported by a reliable informant, when the police investigation corroborated many details contained in the informant's statements. ***Id.*** at 426-27. The reliable informant reported statements by Roger Lopez, that Roger sold marijuana which he obtained from his brother "Gus," that Roger described generally where Gus lived, that Roger described how much marijuana Gus had, and that Gus needed to sell the marijuana. ***Id.*** at 421-22. The police used their reliable informant to telephone a request to Roger for a large amount of marijuana, then set up surveillance of Roger's residence after the call. ***Id.*** at 422. By police surveillance and other investigation, the police identified Augustin as the person arriving at Roger's home carrying a duffle bag large enough to contain the amount of marijuana requested, obtained Augustin's address from vehicle registration and utility bills, followed Augustin to his residence, and later overheard conversations between the informant, who wore a wire transmitter, and Roger implicating "Gus" and identifying Gus's house as the location of substantial marijuana. ***Id.*** at 422-23. Here, unlike in ***Lopez***, we have no identification of the third party to whom the hearsay is attributed (the unwitting), no investigation that corroborates illegal activity by anyone other than the unwitting, and the only illegal activity that does not rest on the unwitting's hearsay statement is the CI's admission to giving the unwitting money and receiving cocaine in exchange.

¶13 Corroborating important aspects of hearsay statements from a reliable informant was important in sustaining probable cause for a search warrant in ***State v. Jones***, 2002 WI App 196, 257 Wis. 2d 319, 651 N.W.2d 305. Where the reliable informant does not explain how he got the information, "it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." ***Id.***, ¶16 (citation and one set of quotation marks omitted). In ***Jones***, the details included identifying Jones by name, identifying the approximate location of Jones's land in rural Wisconsin and providing a phone number there, and describing a particular type of trailer on the land and a secret compartment in the trailer where the drugs were stored. ***Id.***, ¶4. The police investigation located the land, confirmed Jones's ownership of it, observed the trailer, confirmed with neighbors Jones's presence from time to time at the land, and observed evidence that someone had been at the trailer within two weeks of the police visit. ***Id.***, ¶¶4, 6. If the reliability of the informant alone were sufficient, without more, to establish probable cause, there was no need for the discussion of the significant corroboration of the hearsay which we see in the ***Jones*** opinion.

¶14 In ***State v. Anderson***, 138 Wis. 2d 451, 406 N.W.2d 398 (1987), our supreme court considered a search warrant based in part on hearsay from a reliable informant. The informant agreed to buy several pounds of marijuana for the police officer from a person at a particular residence. ***Id.*** at 455-56. The informant told the officer to wait in the car because strangers were not allowed in the house. ***Id.*** at 458. The officer saw the informant approach the residence, come back a short time later, and tell the officer the person was not in but would be back

shortly. ***Id.*** at 455-56. The officer and the informant waited a short while, then the informant, again observed by the officer, approached the residence a second time. ***Id.*** at 456. The officer lost sight of the informant when he walked along the side of the house, so he did not actually see the informant enter or leave the residence. ***Id.*** at 458-59. The informant returned with a small bag of green leafy material which he gave to the officer, saying this was a sample taken from the three pounds which the informant had arranged for the officer to purchase and which would be delivered that evening. ***Id.*** at 456. The substance tested positive for marijuana. ***Id.*** Although the officer never actually saw the informant enter the residence, our supreme court concluded there was probable cause to search the residence because: the officer had prior experience with the informant and found him to be reliable; the officer personally observed the informant twice approaching the house and returning the second time with marijuana; and possession of the marijuana which he delivered to the officer was a criminal offense and an admission against the informant's penal interest, ***id.*** at 470, which together provided sufficient indicia of reliability of the informant's statement to the officer as to the quantity of marijuana in the house, ***id.***

¶15 In the case before us, unlike the situation in ***Anderson***, the police here witnessed no criminal activity by the person to whom all hearsay statements are attributed—the unwitting. The unwitting made no admission to the police against his penal interest. The record discloses no investigation of the unwitting before he delivered cocaine to the CI, while he was still in the CI's vehicle, or thereafter. In short, no facts in the search warrant affidavit tend to corroborate the hearsay from the unwitting upon which the search warrant depends.

¶16 The affidavit clearly states police understanding from the beginning that "informant could purchase cocaine from another John Doe Hispanic male #2

*through the … unwitting*." (Emphasis added.) The trial court's characterization of the unwitting as "apparently wanting to be the middle man" and "this inter-meddler that comes into the fray" is contrary to the specific statement in the affidavit described above. Precisely because of the obvious integral role of the unwitting in the acquisition of cocaine, the utter lack of any information about him or test of the reliability of his purported information is particularly troubling. Nothing in the affidavit suggests that the CI had any reason to believe that the unwitting is reliable or that the police have any independent basis for such a belief. With no details about the putative supplier, no advance identification of the "John Doe Hispanic male #2" as a supplier of cocaine is possible. The affidavit discloses no information suggesting that, before the hearsay statements reported by the CI as having been made by the unwitting, the police had information that independently corroborated the possibility of illegal activity at 205 East Montana. The affidavit does not mention surveillance of the property disclosing suspicious activity, neighbor complaints about activity at the property, police dispatches to the property, or arrests of anyone living at the property. The fact that Jaime Romero paid utility bills and had two motor vehicles registered at 205 East Montana does not equate with probable cause to believe he or anyone else at that address engaged in illegal activity there. The only criminal activity identified in the affidavit that establishes probable cause is the cocaine purchase by the CI from the unwitting in the CI's vehicle, which the CI parked in front of 205 East Montana.

*By the Court.*—Judgment reversed and cause remanded.

Not recommended for publication in the official reports.

¶17 FINE, J. (*dissenting*). The Majority cites all the right law but, in my view, reaches the wrong result by imposing an absolute chain-of-custody requirement. As the Majority implicitly concedes, "probable cause" for the issuance of a warrant requires neither proof beyond a reasonable doubt nor proof by a preponderance of the evidence. If an absolute chain-of-custody is not needed to convict someone of a crime, *see* ***State v. McCoy***, 2007 WI App 15, ¶9, 298 Wis. 2d 523, 528, 728 N.W.2d 54, 56, where the requisite proof *is* beyond a reasonable doubt, it certainly is not needed to establish probable cause to issue a search warrant. The Majority makes new law—in my view, bad, unsupported law.

¶18 In this case, we have actions by two persons relied on by the warrant-issuing judicial officer: (1) the confidential informant, whose reliability is unquestioned; and (2) a person with whom the confidential informant dealt. The person to whom the Majority refers as "unwitting" was, in the context of this case, akin to a citizen informant because he had no "'expectation of some gain or concession in exchange for the information,'" and whose good faith is thus presumed for the purposes of establishing probable cause. *See* ***State v. Friday***, 147 Wis. 2d 359, 372–373, 434 N.W.2d 85, 90 (1989) (quoted source omitted). Indeed, the warrant-issuing judicial officer was permitted to draw the reasonable inference that the "unwitting" person *was actually unwitting*—that is, that he did not know that the confidential informant was working for the police, and thus was bereft not only of any motive to falsely accuse the defendant but also had no expectation that he would get anything from law-enforcement in return for telling the confidential informant where he could get cocaine.

¶19 Further, the Majority is wrong when it asserts in ¶16 that "[n]othing in the affidavit suggests that the [confidential informant] had any reason to believe that the unwitting is reliable." First, the confidential informant trusted that person sufficiently to go with him to a strange place even though that person knew that the confidential informant had enough money to buy cocaine. Second, the confidential informant also trusted him enough to let him walk off with the money leaving behind only his promise to come back with the contraband.

¶20 The reasonable permissible inferences drawn by the warrant-issuing judicial officer from the totality of the circumstances set out in the affidavit amply supported issuance of the warrant. In my view, it is not even a close call. Accordingly, I respectfully dissent.