COURT OF APPEALS
DECISION
DATED AND FILED

September 5, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-2838-CR

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

BRUCE KNUTSON,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Lincoln County: GLENN H. HARTLEY, Judge. *Reversed and cause remanded with directions*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. The State appeals an order dismissing the criminal charges against Bruce Knutson. The State argues that the trial court erred as a matter of law when it ordered the State to produce a confidential informant at an in camera hearing without the defense making the necessary threshold showing. We agree that Knutson failed to make a threshold showing that testimony from the

informant was necessary to his defense. The trial court erred when it ordered an in camera hearing and when it dismissed the complaint. Accordingly, we reverse the order and remand for further proceedings consistent with this opinion.

BACKGROUND

¶2 The Lincoln County Sheriff's Department received an anonymous call on the Crime Stopper's Hotline on January 4, 2000. The caller provided information that Knutson and Arthur Weber had just left the Merrill area to go to Milwaukee to purchase cocaine. The caller detailed how much money they had with them, the amount of drugs they wished to buy, a description of the van they were driving, and where and when they would return to Merrill.

¶3 The Merrill Police Department conducted surveillance at the site to which the caller said Knutson and Weber would return. Officer Brad Becker was on duty when a van matching the caller's description and carrying two men arrived at about 7 a.m. He recognized the passenger as Knutson and later identified the driver of the van as Weber. Becker approached the men, questioned them and waited for a drug dog to arrive. After the drug dog surveyed the perimeter of the van, the police recovered cocaine and marijuana in a consensual search of the vehicle. Weber and Knutson then were taken into custody.

¶4 Knutson was charged with (1) conspiracy to obtain cocaine with intent to deliver; (2) possession of cocaine with intent to deliver within 1,000 feet of a federally funded housing project; and (3) possession of marijuana with intent to deliver within 1,000 feet of a federally funded housing project. He entered a

plea of not guilty. Before trial, Knutson moved to compel disclosure of the informant's identity.[1]

¶5 In response to the motion to compel disclosure of the informant, the State declined to waive the informant privilege under WIS. STAT. § 905.10(2).[2] The trial court directed the State to produce the informant for an in camera inspection. After the State failed to comply, submitting only an affidavit from a City of Merrill police officer with personal knowledge of the informant's identity, the trial court ordered the criminal case against Knutson dismissed under WIS. STAT. § 905.10(3)(b). The State now appeals.

STANDARD OF REVIEW

¶6 The parties disagree on the standard of review. The State proposes that this court should review de novo the adequacy of the defendant's threshold showing of necessity for an in camera review. Conversely, Knutson argues that the trial court's decision to order an in camera hearing is an exercise of discretion entitled to deference. The State contends that even if the court's determination is subject to review for exercise of discretion, the court erroneously exercised that discretion by misapplying the law.

¶7 A canvass of the federal case law on disclosure of informant identity reveals that the federal standard of review is whether the district court erroneously

[1] Although the identities of callers to the Crime Stopper's Hotline are generally unknown to law enforcement, in the course of its investigation of this case, the Merrill Police Department inadvertently learned the identity of the anonymous caller. Knutson became aware that the department knew the informant's identity.

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

exercised its discretion.[3] However, we are applying undisputed facts to the law in this case and are not bound by the trial court's conclusions of law. As such, we would review this case de novo. ***First Nat'l Leasing Corp. v. City of Madison***, 81 Wis. 2d 205, 208, 260 N.W.2d 251 (1977).

¶8 We need not decide, however, which standard applies here. Under either discretionary or de novo review, we conclude Knutson failed to make the requisite threshold showing to proceed to an in camera hearing.

DISCUSSION

¶9 The State argues that when Knutson moved to compel disclosure of the informant's identity, he did not make an offer of proof regarding the necessity of the informant's testimony and that the trial court relied on nothing more than speculation when it ordered the in camera hearing. Conversely, Knutson contends that the trial court properly exercised its discretion when it ordered the State to produce the informant for an in camera hearing and that whether the informant may give testimony "necessary to a fair determination of the issue of guilt or innocence in a criminal case" is an issue to be determined by the trial court after an in camera hearing. We agree with the State. The defendant must meet a minimal burden that the informant may be able to give testimony necessary to a

[3] *See* ***United States. v. Gordon***, 173 F.3d 761, 767 (10th Cir. 1999) (review of a district court's denial of motion to disclose informant is for abuse of discretion); ***United States v. Robinson***, 144 F.3d 104, 106 (1st Cir. 1998) (district court's decision not to force the prosecution to divulge the identity of a confidential informant is reviewed for abuse of discretion); ***United States v. Bender,*** 5 F.3d 267, 269 (7th Cir. 1993) (review of a district court's denial of a motion to disclose the identity of a confidential informant is for abuse of discretion); ***United States v. Fixen***, 780 F.2d 1434, 1439 (9th Cir. 1986) (court's denial of motion to compel disclosure of an informant's identity is reviewed for an abuse of discretion).

fair trial before the trial court orders an in camera hearing. We also agree that Knutson failed to make even a minimal showing.

¶10 We begin with the statute that sets forth a framework by which Knutson may learn the identity of the informant. *See* WIS. STAT. § 905.10. First, § 905.10(1) and (2) recognize the informer's privilege to remain anonymous, and then § 905.10(3) details the exceptions to the privilege. Section 905.10(3)(b) provides, in relevant part:

> *Testimony on merits.* If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case ... and the ... state ... invokes the privilege, the judge shall give the ... state ... an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits but the judge may direct that testimony be taken if the judge finds that the matter cannot be resolved satisfactorily upon affidavit. If the judge finds that there is a reasonable probability that the informer can give the testimony, and the ... state ... elects not to disclose the informer's identity, the judge on motion of the defendant in a criminal case shall dismiss the charges to which the testimony would relate, and the judge may do so on the judge's own motion.

¶11 The threshold showing under the statute "does not place a significant burden upon the party seeking disclosure." ***State v. Outlaw***, 108 Wis. 2d 112, 125, 321 N.W.2d 145 (1982). There need only be a showing that an informer may be able to give testimony necessary to a fair trial. ***Id.*** at 126. The test for the necessity of the testimony is whether it "could have created in the minds of the

jurors a reasonable doubt" as to the defendant's guilt. ***Id.*** at 140 (Callow, J., concurring).[4]

¶12 We acknowledge that under ***Outlaw***, the showing Knutson must make is minimal, but it is necessary to justify the trial court's further inquiry. ***State v. Hargrove***, 159 Wis. 2d 69, 75, 469 N.W.2d 181 (Ct. App. 1990). Knutson must explain, to some extent at least, what evidence the informant would be able to give and how it is relevant. It is not sufficient for Knutson merely to speculate that because the Crime Stoppers call was detailed, the informant might possibly know something that would perhaps be useful to the defense.

¶13 The purpose of the in camera hearing is not to send the trial court on a fishing expedition. Rather, the goal is to determine whether the informer can, in fact, supply testimony necessary to a fair determination of guilt or innocence, which the defense showed earlier that the informer *may* be able to give. WIS. STAT. § 905.10(3)(b). Knutson, though, offered nothing regarding the informant's possible testimony or its relevance.

¶14 At a July 19, 2000, hearing, Knutson argued incorrectly that the burden was on the State, but the trial court recognized that Knutson had the initial burden under WIS. STAT. § 905.10(3)(b). The court then requested a more specific motion from Knutson, with accompanying affidavits, but Knutson contended that that put "the cart before the horse." He provided no documentation, oral or

[4] In ***State v. Dowe***, 120 Wis. 2d 192, 194-95, 352 N.W.2d 660 (1984) (*per curiam*), our supreme court held that the concurring opinions in ***State v. Outlaw***, 108 Wis. 2d 112, 321 N.W.2d 145 (1982), stated the law on the test to be applied to determine the necessity of the testimony.

written, suggesting how the informant's testimony could create reasonable doubt for a jury.

¶15 When the hearing continued on July 25, Knutson again failed to make the requisite showing that the informant may be able to give testimony necessary to a fair determination of the issue of guilt or innocence pursuant to WIS. STAT. § 905.10(3)(b). Without any proof offered by Knutson, the trial court nevertheless ordered the State to produce the informant for an in camera hearing.

¶16 The trial court speculated that the detailed information from the call showed that the informant may have exculpatory information establishing that Knutson was not involved in the drug deal or was a lesser player. The informant's call was specific as to the trip, contained detailed knowledge and did not, in the court's opinion, sound like a product of "the rumor mill." The court thus deemed an in camera proceeding necessary to see if the informant would have more information that might be of value to the defense.

¶17 The trial court improperly proceeded to the next level of proceedings, pursuant to WIS. STAT. § 905.10(3)(b), when it ordered the in camera hearing without a threshold showing by Knutson.[5] We reject Knutson's argument that he made a sufficient showing under ***Outlaw*** to entitle him to disclosure of the informer's identity. We conclude that, as a matter of law, Knutson failed to make

[5] Because our resolution of this issue is dispositive of the appeal, we need not consider the State's second argument that it sufficiently complied with the *in camera* inquiry when it submitted an affidavit from an officer who had personal knowledge of the informant's identity. *See* ***Norwest Bank Wis. Eau Claire, N.A., v. Plourde***, 185 Wis. 2d 377, 383 n.1, 518 N.W.2d 265 (Ct. App. 1994). However, the manner (witnesses or affidavits) in which the court chooses to proceed in camera rests within the discretion of the court, not the State. *See* WIS. STAT. § 905.10(3)(b). Therefore, the State proceeded at its peril when it chose to ignore the court's order to produce the informant and instead substituted an affidavit from a police officer.

the preliminary showing required by WIS. STAT. § 905.10(3)(b). We remand the cause to the trial court to reinstate the criminal complaint.

By the Court.—Order reversed and cause remanded with directions.

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