COURT OF APPEALS
DECISION
DATED AND FILED

May 25, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP888-CR **Cir. Ct. No. 2007CF3244**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL J. CONNERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS and KEVIN E. MARTENS, Judges. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Michael J. Conners appeals from a judgment of conviction, entered upon a jury's verdicts, on one count of felon in possession of a firearm and one count of possession with intent to deliver 200 grams or less of

THC, as a second or subsequent offense. Conners also appeals from an order denying his postconviction motion.[1] He claims that the trial court applied the wrong legal standard in determining whether to order the State to disclose the identity of a confidential informant, and that insufficient evidence supports the felon-in-possession conviction. We disagree with Conners and affirm the judgment and order.

BACKGROUND

¶2 Based on information from a confidential informant, police applied for and received a search warrant for Conners' residence. Conners was renting a bedroom in the attic space of a duplex, accessible through the upper unit. The attic apparently consists of a large, open, A-framed space from which two bedrooms were "framed out." A common area remained after creation of the two bedrooms and, from this common area, it is possible to access the ceiling/roof of the bedrooms. A woman rented the second attic room, and five to six other individuals were occupying the upper unit of the duplex.

¶3 The warrant application alleged the informant had been in the house approximately four days prior to the application and had observed a rifle in the residence, in Conners' possession, which Conners used for protection while distributing marijuana from a van in the back of the house. While executing the warrant, one officer observed Conners throwing something, later determined to be marijuana, out the attic window. Conners was found in his attic bedroom, where police recovered, among other things, four digital scales, $700 from a safe, and

[1] The Honorable Jeffrey A. Kremers presided over the trial and entered the judgment of conviction. The Honorable Kevin E. Martens reviewed and denied the postconviction motion.

over $400 on Conners. In the ceiling area of Conners' room, police found additional marijuana and a rifle.

¶4 Conners was charged with being a felon in possession of a firearm and possession with intent to deliver THC, and was convicted following a jury trial. He was sentenced to forty months' initial confinement and forty months' extended supervision for the weapon conviction and a concurrent thirty-six months' imprisonment for the drug conviction.

¶5 Postconviction counsel wrote to the State, requesting the identity of the confidential informant. The assistant district attorney indicated that the State was not inclined to disclose that information unless so ordered by the court. Conners filed a postconviction motion, seeking disclosure of the informant's identity under WIS. STAT. § 905.10(3)(b)-(c) (2007-08).[2] In the alternative, Conners requested a ***Machner***[3] hearing on whether trial counsel was ineffective for failing to file a § 905.10 motion before trial. As a separate issue, Conners also moved to vacate the felon-in-possession conviction, alleging that insufficient evidence supported the verdict. Following briefing, the circuit court denied the motion, adopting by reference the State's reasoning with regard to the § 905.10 motion and concluding sufficient evidence supported the jury's verdict. Conners appeals.

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

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

DISCUSSION

I. Disclosure under WIS. STAT. § 905.10(3)(b).

¶6 Under WIS. STAT. § 905.10(1), the State "has a privilege to refuse to disclose the identity of a person who has furnished information relating to … an investigation of a possible violation of law to a law enforcement officer[.]" However,

> [i]f 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.

§ 905.10(3)(b).

¶7 Conners sought disclosure of the confidential informant's identity, asserting that the informant "held unique and intimate information and knowledge of the relevant facts[,]" entitling him to disclosure under WIS. STAT. § 905.10(3)(b). The circuit court adopted the State's reasoning, which essentially deemed any information from the informant unnecessary to Conners' defense.

¶8 Whether to grant a WIS. STAT. § 905.10 motion is committed to the trial court's discretion.[4] *See* ***State v. Outlaw***, 108 Wis. 2d 112, 128, 321 N.W.2d 145 (1982). Conners asserts that, in adopting the State's reasoning, the trial court applied the wrong legal standard by requiring an initial showing of necessity

[4] Conners acknowledges that a WIS. STAT. § 905.10 disclosure motion is ordinarily brought before trial. However, the State does not challenge Conners' use of the motion in postconviction proceedings.

before an *in camera* inspection of the State's evidence. Application of an incorrect legal standard is an erroneous exercise of discretion. *See* ***City of Brookfield v. Milwaukee Metro. Sewerage Dist.***, 171 Wis. 2d 400, 423, 491 N.W.2d 484 (1992).

¶9 WISCONSIN STAT. § 905.10(3)(b) imposes only a minimal burden on a party seeking disclosure. *See* ***Outlaw***, 108 Wis. 2d at 125-26. "The showing need only be one of a possibility that the informer could supply testimony necessary to a fair determination." ***Id.*** at 126.

¶10 Conners contends that this standard requires simply "a showing that 'an informer *may* be able to give testimony necessary to a fair determination of the issue of guilt or innocence.'" (Emphasis by Conners.) Further, Conners asserts "the 'is necessary' standard cited by the State and adopted by the court at this stage … is just incorrect."

¶11 Conners' proposed legal standard, however, is a suggestion that we ignore the word "necessary," which is expressly included in the statute and present even in Conners' various quotations. If we disregarded the "necessary" qualifier, an *in camera* examination would be required any time the evidence or a party showed that "an informer may be able to give testimony." It is self-evident, however, that given the nature of an informant, he or she may always be able to give testimony—adopting Conners' reading of WIS. STAT. § 905.10(3)(b) would be to disregard the plain language of the statute and to eliminate a portion of the law.

¶12 "Necessary" testimony, for purposes of WIS. STAT. § 905.10(3)(b), "means that the evidence must support an asserted defense to the degree that the evidence could create reasonable doubt." ***State v. Vanmanivong***, 2003 WI 41,

¶24, 261 Wis. 2d 202, 661 N.W.2d 76. Once a movant shows an informant may be able to give necessary testimony, the State is to be given the opportunity to offer, *in camera*, evidence regarding what the informant actually can or cannot testify to. *See* ***id.***, ¶32. Then, if the court determines the informant really can offer testimony necessary to the defense, the State's privilege will give way and disclosure will be required. ***Id.*** Although a showing of concrete necessity is the final test for disclosure, that ultimate burden does not relieve Conners of his initial, tentative burden.

¶13 Conners asserts that "given the very detailed description of the rifle by the confidential informant, the easy access to those outside of Conners' room, and one of Conners' defenses—that somebody else placed the rifle up in the attic portion above the room … Conners meets an 'initial showing'" that the informant could give testimony necessary to a fair determination. We disagree.

¶14 Nothing about the informant's detailed knowledge of the rifle inherently supports Conners' defense that someone else placed the rifle above his room. Further, nothing in Conners' motion or briefs explains why the informant's testimony regarding the open attic space was necessary for the defense. Officers Jon Osowski and Matthew Knight both testified about the attic's layout, with Knight specifically opining it would have been easy for anyone to place objects in the ceiling area. In other words, police offered the exact testimony Conners thought the informant could provide. Given Conners' failure to make an initial showing that the informant might have necessary testimony, the circuit court did not err when it refused to proceed with an *in camera* review of the State's evidence. *See* ***State v. Hargrove***, 159 Wis. 2d 69, 75-76, 469 N.W.2d 181 (Ct. App. 1990).

II. Disclosure under WIS. STAT. § 905.10(3)(c).

¶15 Conners also asserted the trial court should have conducted an *in camera* review of "information, i.e., affidavits and questioning of the confidential informant" under WIS. STAT. § 905.10(3)(c), which provides:

> If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible, the judge may require the identity of the informer to be disclosed.

Conners noted the search warrant affidavit was based solely on information from the confidential informant and, for that reason, asserted review should have occurred.[5]

¶16 WISCONSIN STAT. § 905.10(3)(c) does not specifically provide for *in camera* review of details relating to the informant's information; it permits disclosure of the informant's identity if the court is not convinced the information was reasonably relied upon. In any event, the only reason Conners seeks to have anything reviewed under para. (3)(c) is that the informant's information relating to the gun and marijuana was uncorroborated. However, uncorroborated information is not the same thing as unreliable information, and Conners asserts no basis for the trial court to have been anything but satisfied "that information was received from an informer reasonably believed to be reliable or credible[.]"

[5] This argument was not specifically addressed in the State's brief and, therefore, not specifically addressed when the trial court adopted the State's reasoning. However, the postconviction order denied the WIS. STAT. § 905.10 motion and, therefore, we search the record for a basis to sustain the court's rejection of the motion. *See* ***State v. Thiel***, 2004 WI App 225, ¶26, 277 Wis. 2d 698, 691 N.W.2d 388.

¶17 According to the search warrant application, completed by Officer Osowski, the informant advised police that Conners was in possession of a large rifle, which the informant had observed in Conners' possession, and that Conners used the weapon while distributing marijuana from a white van behind the residence. The informant also provided the van's license plate number.

¶18 Officer Osowski averred that the informant was believed to be credible for at least two reasons. First, Officer Osowski personally observed a white van, with the license plate identified by the informant, parked at the specified residence. Further, the informant had previously provided information to police, resulting in six warrants, four arrests leading to convictions, two additional arrests of individuals sought on arrest warrants, and recovery of three "crime guns." In other words, the affidavit accompanying the warrant application set forth a basis for evaluating the informant's reliability—namely, the previous provision of information to police. Conners has thus failed to establish a basis for WIS. STAT. § 905.10(3)(c) disclosure.[6]

¶19 We also reject Conners' alternate claim for a ***Machner*** hearing. Neither WIS. STAT. § 905.10 disclosure claim would have been successful. Counsel is not ineffective for failing to pursue meritless challenges. *See* ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987).

[6] The State asserts the WIS. STAT. § 905.10(3)(c) claim is waived because, under WIS. STAT. § 971.31(2), "defenses and objections based on … use of illegal means to secure evidence shall be raised before trial by motion or be deemed waived." The State's invocation of waiver, however, appears to neglect Conners' alternate basis for postconviction relief: applying waiver, without further comment on the merits of the § 905.10(3)(c) motion, would tend to support Conners' basis for a requesting a ***Machner*** hearing.

III. Sufficiency of the Evidence.

¶20 Conners' final challenge is to the sufficiency of the evidence to support his felon-in-possession conviction.[7] He points out that neither DNA evidence nor fingerprints were recovered from the rifle, no ammunition was recovered from him or his room, no one actually saw him with the gun during the execution of the warrant, and the location of the gun in the common area meant others had access to it.

¶21 When we review the sufficiency of the evidence to support a jury's verdict, the test is not whether this court is convinced of the defendant's guilt beyond a reasonable doubt, but whether a jury, acting reasonably, could be so convinced by evidence that it had a right to believe and accept as true. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 503-04, 451 N.W.2d 752 (1990). The credibility of the witnesses and the weight of the evidence is for the jury. ***Id.*** at 504.

¶22 We view the evidence in the light most favorable to the verdict and, if more than one reasonable inference can be drawn from the evidence, we must accept the inference drawn by the jury. ***Id.*** The jury's verdict will be reversed "only if, viewing the evidence most favorably to the [S]tate and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt." ***State v. Alles***, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982) (citation and emphasis omitted).

¶23 Convictions may be supported solely by circumstantial evidence. ***Poellinger***, 153 Wis. 2d at 501. In some cases, circumstantial evidence may be

[7] Conners disputes only the possession element, not his prior felony record.

"stronger and more satisfactory than direct evidence." ***Id.*** at 501-02. The standard of review is the same whether the conviction relies upon direct or circumstantial evidence. ***Id.*** at 503.

¶24 Here, various pieces of evidence, like a wallet and photo identification card from his employer, were collected from the searched bedroom, indicating that Conners occupied it. Conners was observed discarding marijuana from the attic window. A digital scale with marijuana residue was recovered from the bedroom window. Marijuana was found at the door of Conners' bedroom, leading to the common attic area. Marijuana was also recovered in the area above the bedroom, along with the rifle.

¶25 Given the proximity of the weapon to Conners' room, the fact that marijuana was found with the weapon, and that marijuana was recovered from the private area Conners controlled, the jury could reasonably infer that the rifle belonged to and was in the possession of Conners. The jury could also make this inference based on common, everyday observations or experiences that drugs and weapons are often found together. Further, because possession can be shared with others, *see* WIS JI—CRIMINAL 1343, a jury could infer that even if the gun did not belong to Conners, its location in the common area did not mean that someone else with exclusive possession put the gun above his bedroom but, instead, that he exercised joint possession of the rifle with the others in his home. The inference that Conners possessed the gun is easily sustained on this record.

By the Court.—Judgment and order affirmed.

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