STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal Case No. 2017AP002272-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

vs.

ROBERT BILLINGS,

Defendant-Respondent.

ON NOTICE OF APPEAL FROM ORDERS REQUIRING THE STATE TO DISCLOSE THE IDENTITY OF A CONFIDENTIAL INFORMANT AND DISMISSING THE CASE, ENTERED ON OCTOBER 16, 2017, IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HONORABLE HANNAH DUGAN, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

John Chisholm
District Attorney
Milwaukee County

Karen A. Loebel
Deputy District Attorney
State Bar No. 1009740
Attorneys for Plaintiff-Appellant

District Attorney's Office
821 West State Street, Room 405
Milwaukee, WI 53233-1485
(414) 278-4646

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C O U R T OF A P P E A L S

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STATEMENT OF THE ISSUES

1. Did the trial court err in finding that the confidential informant whose information was relied on in an affidavit in support of a search warrant was a transactional witness, when the criminal charge arose from an incident a day after the affidavit was executed?

   Trial court answered: The trial court found that the informant was a transactional witness and ordered the State to disclose his/her identity, without holding an *in camera* hearing.

2. Did the trial court err in dismissing the case, when the State asked for a brief adjournment, to consider whether to disclose the identity, dismiss the case, or appeal the trial court's ruling?

   Trial Court Answered: In response to Billings's motion, the trial court dismissed the case.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on those issues. *See* Wis. Stat. (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not meet the criteria for publication. *See* Wis. Stat. (Rule) 809.23(1)(b)4.

STATEMENT OF THE CASE

On June 28, 2017, Milwaukee police Officer Paul Martinez applied for a warrant to search a residence at 4819 W. Hampton, Apt. 3, in Milwaukee. (R1:1, 3; App. 101-103) In support of the application, Martinez submitted a nine page affidavit to which he had been sworn that day. (R1:11; App. 111) In the affidavit, Martinez stated, *inter alia,* that he (Martinez) had worked with, and received information from, a confidential informant ("CI"). Martinez recited that the CI had advised Martinez,

- That he/she knew a person as "Rob" who lived at 4819 W. Hampton, Apt. 3; (R1:4; App. 104)

- That within the ten days preceding the affidavit's execution, he/she had been inside "Rob's" apartment at 4819 W. Hampton, Apt. 3., at which time he/she saw a firearm and what the CI believed was cocaine in the apartment; (R1:5; App. 105)

- That he/she was willing to attempt a controlled buy of a controlled substance from "Rob" at that residence. (R1:4; App. 104)[1]

Martinez further recounted probable cause to believe that within the 72 hours preceding the affidavit's execution, the CI bought cocaine from "Rob" at 4819 W. Hampton under Martinez's direction (R1:4-6; App. 104-106): an officer searched the CI to ensure he/she had no money or drugs; Martinez gave the CI money with which to make the purchase, watched as the CI approached the front door of the target apartment building, watched as a person identified as "Rob" answered the door as the CI approached, watched as the CI entered the building, and watched as he/she left the building a few minutes later and returned to Martinez. When the CI met with Martinez again, he/she gave Martinez a quantity of cocaine which he/she advised he/she had purchased from "Rob," inside apartment 3, using the money Martinez had provided. (*Id*.)

Commissioner Barry Phillips issued a search warrant for 4819 W. Hampton, Apt. 3, on June 28, at 4:35 PM. (R1:1; App. 101) The warrant was executed the next day. (R2; App. 112)

As a result of the items found when the warrant was executed, Robert Billings was charged with possession of controlled substance, cocaine, contrary to Wis. Stat. § 961.41.(3g)(c). (R2; App. 112) According to the complaint, when officers executed the search warrant at 4819 W. Hampton on June 29, they recovered 3 corner cuts containing material they believed to be cocaine, $294 in cash, and numerous baggies from with the corners had been removed. (*Id.*) Billings

[1] According to the affidavit, a controlled buy is an investigative technique in which a confidential informant works with law enforcement regarding the purchase of a controlled substance from person(s) at a known address: the informant is searched to make sure that he/she has no controlled substances or money and then is given money to make the purchase; an officer watches as the informant enters the target address and then leaves the target address a short time later, returning directly to the officer(s); the informant surrenders any purchased controlled substances to the officer(s) and recounts the details of the transaction. The officers then search the informant again, to ensure he/she has no additional controlled substances or money on his/her person or in his/her clothing. (R1:4; App. 104)

was interviewed and admitted the cocaine was his, for personal use. (*Id*.)

Billings made his initial appearance in Milwaukee County Circuit Court on July 3; he was released on a personal recognizance bond (R5); and the matter was assigned to Milwaukee County Circuit Court, Branch 31, the Honorable Hannah Dugan, presiding. (R22:4).

Represented by attorney Angel Johnson, Billings initially set the case for a guilty plea, but later requested a jury trial date. (R24:2-3; R25:2) Johnson later withdrew (R26) and was replaced by attorney Joe Domask. (R27) After several different scheduling dates (R27, R28, R29), the matter was set for a final pre-trial/motion date, with a jury trial to follow. (R30:2, 9)

On April 7, 2017, Billings filed a motion to compel disclosure of the identity of the confidential informant whose information and buy underpinned the June 28 search warrant. [2] (R12; App. 113-116) Relying on Wis. Stat. § 905.10(3)(b), and *State v. Outlaw*, 108 Wis. 2d 112, 321 N.W.2d 145 (1982), Billings contended that the CI was transactional to the June 29 charge, because he/she had engaged in the transaction on which the warrant was, in part, based. (R12; App. 113-116) He contended, in essence, that the CI's observations of Billings' conduct during the controlled buy would be probative of whether Billings exercised control over the cocaine that was recovered during the warrant's execution some days later. (R12:2-3; App. 113-116) On May 16, 2017, the State filed a response which cited, *inter alia*, the procedural framework established by Wis. Stats. § 905.10(3)(b) which must be followed before disclosure can be ordered and the condition precedent to disclosure that the informer's testimony be necessary to the defense.

When the matter was in court for argument on the motion on June 20, 2017, Billings, still relying on Wis. Stats. § 905.10(3)(b) and *Outlaw*, asserted that the CI's testimony was necessary to the defense, for two reasons. His primary argument was that the CI's identity was necessary to determine

[2] In this brief, the informant will be referred to as "the CI," as he/she was in Martinez's affidavit.

whether there was a basis to challenge the search warrant; second, he asserted that the CI was transactional, in that he/she saw Billings in control of contraband within the three days preceding the execution of the affidavit (R32; App. 117-147):

> ATTORNEY DOMASK: …. The affidavit of the police officer leads me to believe that that informant would testify that he was in that house within three days of the offense, three days prior of the offense. That he either participated in or witnessed a hand-to-hand transaction or -- and/or was a transactional witness to Mr. Billings allegedly conducting a cocaine transaction. That in and of itself is the main reason that the officers used to obtain a search warrant. We cannot determine whether or not there's reason to challenge that search warrant unless we hear the testimony of the confidential informant.
>
> The state in its response – response refers to those laws essentially stating that the testimony of the informant is necessary to the defense. Our defense is that we would potentially be challenging the search warrant and therefore a suppression of any evidence obtained in that search warrant. So it is necessary to our defense to determine whether or not the confidential informant, number one, exists. Number two, is credible. And number three, if their testimony would be credible as to Mr. Billings allegedly selling cocaine within the 72 hours prior of this search warrant being obtained.
>
> Additionally, Your Honor, the information obtained from the confidential informant would support our theory. Again, our theory would be that there was an illegal search because the search warrant was obtained without proper basis and we wouldn't know that without the disclosure of the identity of the informant. Although, as the state notes in its position number five, the defendant has absolute – no absolute right to the disclosure of the identity of the informer.
>
> The issue is whether or not it's material to the case, which it is. Whether or not it would assist in the defense, which it would by allowing us to see if there is a challenge to the search warrant. And whether or not the witness or the informant in this case is a transactional witness which is defined as a witness who can give testimony relevant to the guilt or innocence of Mr. Billings and that he witnessed some sort of transaction. The informant is the only one that

witnessed an alleged transaction. The officers cannot testify to that.

(R32:7-8; App. 123-124)

ATTORNEY DOMASK: Now, in regards to the search warrant, the reason that it's necessary to find the identity of the confidential informant is because that informant is stating that he or she was within the residence of Mr. Billings within the three days prior to the application for the search warrant. If we find out that John Smith is the confidential informant, then Mr. Billings will have the ability to know whether or not John Smith, if he knows at all, or whether or not John Smith was in his apartment within those 72 hours prior to the application. If he determines, yes. That I know that person, and yes, that person was in my apartment and had the ability to see these things, then I don't know that there's gonna be a challenge to the search warrant. Then it would just be the -- the credibility of that informant as to what they're saying they observed.

However, if it's determined that I have no idea who John Smith is or that I know John Smith but he hasn't been in my apartment for a month, maybe John Smith observed that a month ago in his apartment but certainly not in the three days that the testimony in the affidavit reflects. So there's no way for us to know whether or not we can challenge the search warrant and the validity of it and the facts that the officer relied upon in that search warrant without knowing who that informant was.

(R32:21-22; App. 137-138)

ATTORNEY DOMASK: ….Additionally, we would not even get to the point of the arrest had the search warrant not been issued. So the search warrant is the basis of our defense, and the suppression of evidence is definitely material to the defense's case. And that's all we have to show at this point. The evidence that the confidential informant would provide is necessary to the defense and that's why the disclosure of the confidential informant should be granted

It's not -- it's not a large bridge -- burden that the defense needs to meet. There is a burden. We can't just ask for the disclosure of the confidential

> informant without a reason. But we've provided that reason. We provided the basis of Mr. Billings' defense. the only witness that can testify as to the validity of that search warrant is the confidential informant. And in State verse (sic) Outlaw, we've met our burden. And that – this is an Outlaw motion and we've met the burden set forth in that case.

(R32:11-12; App. 127-128)

Billings also asserted that the CI "did testify that he (sic) saw Mr. Billings in control or possession of cocaine."[3] (R32:11; App. 127) He argued that the identity should be disclosed because the CI could establish that there had been cocaine in the residence on the earlier date, which he asserted would be probative of the fact that Billings possessed additional cocaine two to three days later:

> ATTORNEY DOMASK: No. The confidential informant testified that there was -- Mr. Billings was in the presence of cocaine, okay? On the date of his arrest for this case, Mr. Billings didn't have it in his pocket or on his person. It was located in his apartment. And that's the course I described.
>
> I mean, I'm not gonna reread my argument that I listed in the motion, but essentially the cocaine possession was found in the residence. Mister -- The confidential informant would be able to testify that there was this cocaine also present within the residence. Because that cocaine was not found on his person, the totality of the circumstances surrounding the cocaine makes it, I guess, either more likely or less likely that Mr. Billings exercised possession of it on three days later or two days later.

(R32:16-17; App. 132-133)

The court set the matter over for a decision on the motion. When the case was called on July 10, 2017,

[3] Counsel made several references to the fact that the officer or the CI testified. *See*., e.g. R32:3, 11, 21; App. 119, 127, 137. There was no such testimony. Officer Martinez applied for the warrant by affidavit. (R1:3-11; App. 103-111) The affidavit contained statements made under oath by Martinez about information he received from the CI. However, the CI never executed an affidavit or testified.

Judge Dugan found that the informant was a transactional witness and ordered the State to disclose his/her identity.

> THE COURT: The burden is on the movant, or the defendant in this case, to establish the need for this information. And then the burden – once established, the burden shifts to the state. I've gone over the briefs. Paid particular attention to Outlaw that was -- State versus Outlaw. Also Rivearo (phonetic), McCray (phonetic), and then the arguments -- and then also review the statute itself in light of interpretation pursuant to that case law.
>
> And the -- the core issue is whether or not the informant is a transactional witness and necessary to the defense. Outlaw -- Outlaw – Outlaw State v. Outlaw establishes that the prosecution wanting to withhold the identity of an informant is has to be balanced against the public interest in protecting the flow of information so that an individual can prepare for his own defense.
>
> The defense has already established that it would be hampered without being provided with that confidential informant because of the nature of the -- the question of where the cocaine was found and why they even had a basis, whether or not the person was present for transactional purposes, whether the ID was the same
>
> There's all sorts of information that would require that informant -- Because this was an entry into the house, based on information provided to the informant and the seizure, as the defense points out, nothing was found on Mr. Billings at the time. It was in the location and that does change. If something had been found on him, there would not necessarily need to be this relation. Now the burden shifts to the state to determine what it wants to do.
>
> ATTORNEY PITZO: So to be clear, you're granting the defense motion?
>
> THE COURT: To identify the confidential informant, mention the affidavit pursuant to Outlaw. Outlaw has You know, it's not nothing's ever on point. But there's a lot of consistency with the fact pattern in Outlaw. And on balance -- in balancing the interest of the state with the right to prepare a defense, and the defense has established

> distinguishing features here that makes this a transaction -- it could make it a transactional, and therefore I'm granting their motion.

(R33:2-4; App. 149-151)

The State requested a brief adjournment, and the matter was set for July 21, 2017. (R33:5; App. 152)

On July 21, the prosecutor advised that the State had ordered the transcript of the previous hearing and asked for a 30 day adjournment to review the transcripts to determine how it would proceed. (R34:3; App. 156) The prosecutor indicated that the State was evaluating whether it would disclose the CI's identity, dismiss the action, or appeal the court's ruling. (R34:3-5; App. 156-158) The prosecutor asserted that to reach that decision, the State needed to review the transcript to see the status of the record. (R34:4; App. 157) Billings objected to the adjournment and moved to dismiss the case, on the grounds that the State was "blatantly disregarding" the trial court's order to disclose the identity of the CI. (R34:3-4; App. 156-157) Judge Dugan denied the State's request and granted Billings's motion to dismiss. (R34:6; App. 159)

On October 16, 2017, the trial court entered a written order which both ordered the State to disclose the identity of the CI and dismissed the case. (R:34:6; App. 159) This appeal follows.

The State's position is two-fold. First, the trial court erroneously exercised its discretion when it found that the CI could give information necessary to a fair determination of guilt or innocence. Second, the trial court, having ordered disclosure of the CI's identity, erred in dismissing the case, when the State had not declined to so disclose, but was awaiting the transcript so it could evaluate how to proceed.

STANDARD OF REVIEW

Whether a defendant submitted a preliminary evidentiary showing which was sufficient for an *in camera* review implicates a defendant's constitutional right to a fair

trial and raises a question of law that the appellate court reviews *de novo*. *State v. Nellessen*, 2014 WI 84, ¶¶ 14, 360 Wis. 2d 493, 500, 502 N.W.2d 654, 657, citing *State v. Green*, 2002 WI 68, ¶ 20, 253 Wis. 2d 356, 646 N.W.2d 298. The circuit court's factual findings as to whether an in *camera hearing* is warranted are reviewed under a clearly erroneous standard: an appellate will uphold the trial court's decision as long as it did not erroneously exercise its discretion. *Id*. A trial court's determination as to whether to order disclosure of the informer's identity is also reviewed under the erroneous exercise of discretion standard. *Outlaw*, 108 Wis. 2d at 128–29, 321 N.W.2d at 154-55.

The decision whether to grant or deny an adjournment request is also vested in the trial court's discretion and will not be reversed on appeal absent an erroneous exercise of discretion. *See State v. Wollman*, 86 Wis. 2d 459, 468, 273 N.W.2d 225 (1979).

A circuit court properly exercises its discretion if it "employs a logical rationale based on the appropriate legal principles and facts of record." *Village of Shorewood v. Steinberg*, 174 Wis. 2d 191, 204, 496 N.W.2d 57 (1993) (citation omitted). "A decision which on its face demonstrates no consideration of any of the factors upon which the decision should be properly based constitutes an abuse of discretion as a matter of law." *State v. Outlaw*, 104 Wis. 2d 231, 243–44, 311 N.W.2d 235, 241 (Ct. App. 1981), *aff'd,* 108 Wis. 2d 112, 321 N.W.2d 145 (1982).

ARGUMENT

I. THE TRIAL COURT ERRED IN ORDERING DISCLOSURE OF THE CI'S IDENTITY

A. Scope of the Informer Privilege

Wisconsin Statutes § 905.10(1) Stats. creates an informant's privilege, which provides that a law enforcement officer may refuse to disclose the identity of a person who has furnished information relating to a possible violation of the

law.[4] The privilege is not absolute: § 905.10(3) contemplates three exceptions:

(a) When there is voluntary disclosure or when the informant is a witness. Wis. Stat. § 905.10(3)(a);

(b) When it appears from some showing by a party that an informant may be able to give testimony necessary to a fair determination of guilt or innocence. Wis. Stat. § 905.10(3)(b); and

(c) When information from an informant is relied upon to establish the legality of the means by which the evidence was acquired and the judge is not satisfied that the information received was reliable or credible. Wis. Stat. § 905.10(3)(c).

B. Procedure to be Followed when a Defendant alleges an Informer has Information necessary to a Fair Determination of Guilt or Innocence

The procedure to be followed when a defendant alleges that an informer has information on the merits of the case—that is, that he/she has information which is necessary to a fair determination of guilt or innocence—is set forth in Wis. Stat. § 905.10(3)(b). That statute reads,

> 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 federal government or a state or subdivision thereof invokes the privilege, the judge shall give the federal government or a state or subdivision thereof 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

[4] Wis. Stats. § 905.10(1) reads, RULE OF PRIVILEGE. The federal government or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

> a reasonable probability that the informer can give the testimony, and the federal government or a state or subdivision thereof 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. In civil cases, the judge may make an order that justice requires. Evidence submitted to the judge shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the federal government, state or subdivision thereof. All counsel and parties shall be permitted to be present at every stage of proceedings under this subdivision except a showing in camera at which no counsel or party shall be permitted to be present.

The statute creates a two-step process:

> First, the defendant must make an initial showing that the "informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence...." Wis. Stat. § 905.10(3)(b). Next, if the defendant satisfies this step and the State continues to invoke the privilege, the circuit court must conduct an in camera review to determine if the informer can in fact provide such testimony. *Id*

Nellessen, 360 Wis.2d 493, ¶¶ 30–32.

The primary case in Wisconsin regarding §905.10(3)(b) is *State v. Outlaw*, *supra*. The lead opinion of *Outlaw* is controlling as to the State's burden and to the court's use of discretion; the concurring opinions control as to the test to be applied when a motion to disclose is brought under Wis. Stat. § 905.10(3)(b). *State v. Dowe*, 120 Wis. 2d 192, 194-95, 352 N.W.2d 660 (1984). Thus,

> a defendant must show that an informer's testimony is necessary to the defense before a court may require disclosure. *See Outlaw*, 108 Wis.2d at 139 (Callow, J., concurring). "Necessary" in this context means that the evidence must support an asserted defense to the degree that the evidence could create reasonable doubt. *See id*. at 141-42.

State v. Vanmanivong, 2003 WI 41, ¶ 24, 261 Wis. 2d 202, 222, 661 N.W.2d 76, 86.

The test is not whether that the testimony would be relevant or helpful: the defendant must prove that the informer's testimony would support an ***asserted*** theory of the defense. *Id.* (Emphasis added.)

The defendant's burden to trigger an *in camera* review is light. *State v. Outlaw*, 108 Wis. 2d at 126, 321 N.W.2d 145. He or she need only establish a possibility the informer may have information necessary to the defendant's theory of defense. *Nellessen*, 360 Wis. 2d 493, ¶¶ 23, 25. However, the claim cannot rest on mere speculation; it must be grounded in the facts and circumstances of the case., and the "possibility" must be reasonable. *Id.*, 360 Wis. 2d 493 ¶¶ 23, 24. In determining whether to grant an in camera hearing, the trial court should consider *all* of the evidence in the case. *Id.*, 360 Wis.2d 493, ¶ 32.

Thus Wis. Stat. § 905.10(3)(b), *Outlaw*, *Dowe*, *Vanmanivong*, and *Nellessen*, establish the procedure to be followed where a defendant alleges that an informer can provide testimony on the merits of a criminal charge: the defendant must make a preliminary showing, based on the specific facts and circumstances of the case, that there is a reasonable possibility that the informer can give testimony which is necessary to support an asserted theory of defense. In determining whether the defendant has met that burden, the court must consider all the evidence in the case, not just those in the defendant's motion. If the court finds that the defendant has met his or her burden, the State has the opportunity to produce information—either by affidavit or testimony—that the informer's testimony would not support the theory of defense. Only if the judge finds that there is a reasonable probability that the informer can give testimony necessary to support the theory of the defense, shall the judge order disclosure. Then only if the State declines to disclose, will the case be dismissed. *See*, Wis. Stat. § 905.10(3)(b); *Outlaw*, supra; *Dowe*, supra; *Vanmanivong*, supra; and *Nellessen*, supra.

C. The Trial Court Erred In Ordering Disclosure Of The Ci's Identity

The trial court's determination here that the CI could provide information necessary to the defense the was not based on logical rationale; neither was it founded upon proper legal standards.

In order to make the preliminary showing sufficient to warrant an *in camera* hearing, Billings was required to establish that the CI had information which supported a stated theory of defense. He did not do so.

In his written motion, Billings basically asserted that disclosure was required because the informer possibly could give testimony probative of Billing's guilt. (R12:3) That standard is incorrect: to warrant an *in camera* hearing, Billings needed to establish a reasonable possibility the CI might have information necessary to support his theory of defense. *Nellessen*, 360 Wis.2d 493, ¶¶ 23, 25. He did not do so; neither did he assert what his theory of defense was. (R12)

At the hearing on the motion, Billings first asserted that his theory of defense,

> would be that there was an illegal search because the search warrant was obtained without proper basis and we wouldn't know that without the disclosure of the identity of the informant.

(R32:8; App. 124).

Billings also posited that the CI was a transactional witness, which is the claim cognizable under Wis. Stat. § 905.10(3)(b) and *Outlaw*. However, he asserted that the CI was "transactional" because "he (sic) witnessed some sort of transaction" which occurred within the three days before the warrant application was made. (R32:11, 21; App. 127, 137). He asserted that the CI's potential testimony that Billings possessed cocaine in the past "would make it either more likely or less likely that Mr. Billings exercised possession of it on (sic) three days later or two days later." (R32:16-17; App. 132-133) In this, he was partially correct: the fact that the CI saw

Billings with cocaine on two occasions within the ten days preceding the warrant application might well make it more likely that Billings possessed cocaine recovered from his home during the warrant's execution. However, that potential testimony would not be even remotely helpful to Billings, and the State was not seeking its admission. (R32:17-18; App. 133-134)

Billing's asserted that his theory of defense was that the search warrant application may have been flawed was not sufficient to justify disclosure of—or even inquiry into—the identity of the CI under § 905.10(3)(b). Wis. Stat. § 905.10(3)(b) and *Outlaw* and its progeny—which were the only basis for disclosure Billings cited—apply only when an informer may have information necessary at trial. See, Wis. Stat. §905.10(3)(b). A claim regarding an informer's role in the legality of obtaining evidence is governed by Wis. Stat. §905.10(3)(b). That statute contemplates a different standard and mandates a different procedure.

At no point did Billings assert what his trial defense would be. That alone should have doomed his motion. See, e.g., *Vanmanivong*, *supra*. Neither did he allege how potential testimony that he was in possession of cocaine on two previous occasions shortly before the charged incident made it less likely he was guilty of the charged offense. That, too, should have doomed his motion. See, e.g., *Nellessen*, *supra*.

In ordering disclosure, Judge Dugan made no findings of fact; she ignored the fact that Billings had confessed to possessing the cocaine recovered during the warrant execution (R2; R32:9, 14); and that the CI was neither present nor had any information about the charged June 29 event. (R32:14; App. 130) Judge Dugan applied an incorrect legal standard: she did not conclude that the identity of the CI was necessary to support a theory of defense as required by Wis. Stat. § 905.10(3)(b), but only that the defense had established it would be "hampered" without disclosure. (R33:2-4; App. 149-151) Moreover, Judge Dugan ignored the procedure in Wis. Stat. § 905.10(3)(b), which allows the State an opportunity to present evidence *in camera* before disclosure can be ordered. Judge Dugan's decision thus did not reflect a logical rationale founded upon proper legal standards, but, rather, constituted an

erroneous exercise of discretion.

II. THE TRIAL COURT ERRED IN DISMISSING THE CASE

After Judge Dugan ordered disclosure of the identity of the CI without an *in camera* hearing, the State requested a short adjournment so that the it could examine the case and determine how to proceed. (R33:4-5; App. 151-152) The case was reset for eleven days later. (R33:4; App. 151) When the matter was again before the court on July 21, the trial court denied the State's request for a brief adjournment to review the transcript of the previous hearing and granted Billings's motion to dismiss. (R34:4-6; App. 157-159)

It is the State's position that the trial court erred in doing so. A request for a continuance is addressed to the court's sound discretion. See, *Wollman*, s*upra.* However, the proper exercise of discretion requires a reasoning process, upon consideration of factors appropriate to the decision. See, *Village of Shorewood v. Steinberg*, *supra*.

Here, Judge Dugan did not evaluate any of the factors which would be relevant to a request for an adjournment. The case was a little over a year old (R22), but much of the delay in its progress was due to a change in trial posture by the defense and by a change in defense attorneys. (R24-R30). The State offered a legitimate reason for the continuance: it wanted to review the state of the record before determining how to proceed. (R34:3-5; App. 156-158) The transcript had already been ordered (*Id*.), and the requested adjournment was relatively short. (R34:3; App. 156) Billings was out of custody (R5) and voiced no prejudice that he would have suffered from the State's request. Under these facts and circumstances, the State's request for an adjournment was reasonable, and the trial court erred in granting Billings's motion to dismiss.

CONCLUSION

For the reasons herein, the State asks that this Court reverse the trial court's orders which required the State to disclose the identity of the CI and dismiss the case.

Dated this _____ day of March , 2018.

Respectfully submitted,

JOHN T. CHISHOLM
District Attorney
Milwaukee County

_____
Karen A. Loebel
Deputy District Attorney
State Bar No. 1009740

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 5,262.

_____ _____

Date Karen A. Loebel
Deputy District Attorney
State Bar No. 1009740

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that:

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

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_____ _____

Date Karen A. Loebel
Deputy District Attorney
State Bar No. 1009740

P.O. Address:
Milwaukee County District Attorney's Office
821 West State Street- Room 405
Milwaukee, Wisconsin 53233-1485
(414) 278-4646
Attorneys for Plaintiff-Appellant.