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 1, 2017, IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HONORABLE HANNAH DUGAN, PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT

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ARGUMENT

I. BILLINGS DID NOT ESTABLISH THAT THE INFORMANT HAD INFORMATION NECESSARY TO HIS THEORY OF DEFENSE

On appeal, Billings argues that his theory of defense was that he did not know of the cocaine which was found in his apartment when the warrant was executed and that he did not exercise control over it. (Brief of Defendant–Respondent, p. 11) He argues that knowledge the confidential informant (CI) had of events which took place several days before the charged offense, would make it "either more likely or less likely"

that Billings was in possession of cocaine during the charged offense. (Brief of Defendant–Respondent, p. 10, citing R32:17-17) The problem with this position is several-fold.

First, Billings never offered that theory of defense in the trial court. To the contrary, he told the court,

> 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.

(R32: 7-8)

Second, while Billings now asserts that the informer "may know of other people who may have been present during the original transaction who may be alternate sources of cocaine," (Brief of Defendant-Respondent, p. 10), he did not raise that claim in the trial court. That alone should be fatal to his argument. *State v. Vanmanivong*, 2003 WI 41, ¶ 24, 261 Wis. 2d 202, 222, 661 N.W.2d 76, 86.

Moreover, Billings offers nothing to support the notion that the CI had any on-going information about Billings's activities. The affidavit in support of the search warrant reflects only that the CI was in the target apartment twice: once, within 10 days of the affidavit's execution and, once, within 72 hours of its execution. (R1:5-6) The speculative nature of Billings's claim should also prove fatal. *See*, *State* v. *Nellessen*, 2014 WI 84, ¶¶ 23, 24, 360 Wis. 2d 493, 500, 502 N.W.2d 654, 657.

Finally, Billings does not explain how the CI's information would be exculpatory. He asserts,

> The informer claims to have seen a quantity of cocaine in Mr. Billings' apartment, but the affidavit does not say where the cocaine was or how much cocaine he saw. All of this information could make Mr. Billings' defense of lack of knowledge or possession of the cocaine more likely.

(Brief of Defendant-Respondent, p. 11)

The question Billings fails to answer is, how does it do that? How does the fact that the CI saw cocaine in Billings's apartment on one occasion in the period of June 18-28, and purchased cocaine there in the period of June 25-28, (R1:4-5),[1] make it more likely that Billings was unaware of cocaine found in his apartment on June 29, cocaine of which he admitted ownership? (R2)

The proper answer is that it does not. To the extent that the prior acts are relevant to the charged offense, they make it more likely he is guilty. As trial counsel conceded, the information the CI could provide is wholly inculpatory:

> That confidential informant, if we take it piece by piece, is basically stating that he was witness to Mr. Billings in possession of cocaine. That's the exact same charge. I understand Mr. Sitzberger's point about transact – whether there was a transaction or dealing or not. That is immaterial. But this witness would be – did testify (sic) that he saw Mr. Billings have control or possession of cocaine.

(R32:11)

To the extent that the trial court's reasoning may resemble that in *Rovario v. U.S.*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639, as Billings asserts, (Brief of Defendant-

[1] The person who sold the CI the cocaine is identified as "Rob," a man approximately 45 years old who lives at 4819 W. Hampton, Apt. 3. (R1:5,6) Given Billings's full name, his address, his age at the time of the offense, and his admission to owning the cocaine recovered from 4819 W. Hampton, Apt. 3. (R2), the reasonable inference is that "Rob" is Billings.

Respondent, p. 12), the trial court's reasoning is in error. The facts of the two cases differ greatly, and Billings's reliance on *Rovario* is misplaced.

In *Rovario,* officers were working with an informant whose name the government withheld. On the date of the offenses, the informant met with officers. He and his car were searched, then he drove to meet Rovario, with a federal agent concealed in his trunk and other officers conducting surveillance. While the informant drove Rovario around at Rovario's instruction, the agent in the truck listened to their conversation. At one point, the informant pulled over, and a surveilling agent saw Rovario get out and walk to a nearby tree, where he picked up a package. Rovario returned to the car and made a motion as if putting the package inside; he then waved to the informant and walked away. The agent immediately recovered the package from the informant's car: it contained heroin. *Rovario,* 353 U.S. at 55-58, 77 S.Ct. at 625-626. As a result, Rovario was charged with two counts: first, that Rovario sold that heroin to the informant, and second, that Rovario knowingly transported that heroin.[2] *Rovario,* 353 U.S. at 55, 59, 77 S.Ct. at 625, 627.

Pre-trial, Rovario moved for disclosure of the informant. The court denied the motion. *Rovario,* 353 U.S. at 55, 77 S.Ct. at 625. At trial, the government called the officers as witness; it did not call the informant. *Id*. Rovario was convicted and appealed.

The Supreme Court reversed. It found, that non-disclosure was reversible error where the informant was,

> an undercover employee who had taken a material part in bringing about the possession of certain drugs by the accused, had been present with the accused at the occurrence of the alleged crime, and might be a material witness as to whether the accused knowingly transported the drugs as charged(.)

Rovario, 353 U.S. at 55, 77 S.Ct. at 625.

[2] More specifically, that he "did then and there fraudulently and knowingly receive, conceal, buy and facilitate the transportation and concealment after importation of . . . heroin, knowing the same to be imported into the United States contrary to law…" *Rovario,* 353 U.S. at 55, 77 S.Ct. at 625.

Those circumstances are not present here. In *Rovario,* the informant was a participant in the offense: he set up the deal, was present when it occurred, and was a witness to the charged criminal conduct. *Rovario*, 353 U.S. at 64, 77 S.Ct. at 629. Here, the CI was not a participant in the charged conduct; he/she was not present when it occurred, and nothing suggests he/she would be a material witness as to Billings's possession of cocaine.

II. THE STATE DID NOT FORFEIT ITS RIGHT TO AN *IN CAMERA* HEARING

Billings argues that the State forfeited its right to an *in camera* review by not asserting its right to a hearing. (Brief of Defendant-Respondent, p. 14) Billings's argument imposes a burden on the State that Wis. Stat. § 905.10(3)(b) and relevant case law do not.

The standard in Wisconsin is clear: if the defense makes the appropriate showing under § 905.10(3)(b), the court **shall** give the state the opportunity to make an *in camera* offer of proof. This is not a procedure the State must invoke; instead, it is a right which it can decline to exercise, should it choose. *State v. Outlaw*, 108 Wis. 2d 112, 126, 321 N.W.2d 145 (1982), citing Wis. Stat. § 905.10(3)(b).

Here, Judge Dugan never offered the State that opportunity. The court found that the CI could provide relevant testimony before affording the State the chance to supply information *in camera*. In short, the court missed a step: it made a determination that the CI could give necessary information from the moving papers alone, and granted the defense's motion to disclose his/her identity without giving an opportunity for an *in camera* hearing.

Moreover, although the court granted the State a brief adjournment following her ruling, it was Billings's position below that that subsequent court date was *only* to allow the State to decide whether it would disclose the identity or dismiss the case. (R34:3-4) Trial counsel stated,

> Previously defense (sic) had filed a motion compelling the state to reveal the confidential informant. You granted our motion. Today was -- you gave the state some time to decide whether they would disclose whom that confidential informant is or alternatively dismiss the case.

(R34:3) Billings should be foreclosed from taking the inconsistent position now, that the State had the opportunity to request an *in camera* hearing subsequent to the court's ruling

Similarly, Billings now asserts that Judge Dugan did not order the State to disclose the informant's identity. The motion Billings filed was titled, "Defendant's Notice of Motion and Motion to Compel Disclosure of Confidential Informant." (R12) In it, moved the court to,

> … compel the State to identify the confidential informant mentioned in the affidavit filed in support of the application for a warrant to search the residence at issue in this case.

Specifically, he asked the court,

> … for an order compelling the prosecution to disclose the identity and location of all unnamed or confidential informants relied upon or otherwise employed by the state or any of its agents in this case.

(Id.)

Judge Dugan granted this relief at the July 10 hearing:

> 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. (sic)

(R33:4)

Clearly, the trial court, at that point and without benefit of an *in camera* hearing, had granted Billings's request for an order to disclose the identity of the CI. Even Billing's trial counsel characterized the court's decision that way. (R34:5) While it is not clear what burden Judge Dugan thought she was shifting to the State, (R33:4), Billings took the position that the only options available to the State were to disclose or to dismiss.

Relying on *State v. Norfleet*, 2002 WI App 140, 254 Wis. 2d 569, 647 N.W.2d 341, Billings argues that even without an *in camera* hearing, Judge Dugan had a sufficient basis to determine that the CI had information probative of guilt or innocence. (Brief of Defendant-Respondent, pp. 16-17) While *Norfleet* permits a court to make that finding in certain circumstances, those circumstances do not exist here.

In *Norfleet*, officers received information from an informant that Norfleet was dealing drugs which he kept in a corner of the parking lot outside of his residence. Investigating officers recovered baggies of cocaine in that parking lot; Norfleet's fingerprints were found on two of the bags and on a bindle inside one of the bags. *Norfleet*, 254 Wis. 2d 569 ¶2. Norfleet was charged with possession of cocaine with intent to deliver within 1000 feet of a school.

Approximately six months later—five days before trial—Norfleet received a crime laboratory report disclosing that additional unidentified prints had also been recovered. *Norfleet*, 254 Wis. 2d 569 ¶3.

At trial, the State, through a detective, elicited the information the informant had provided, including particulars of the drug dealing. *Norfleet*, 254 Wis. 2d 569 ¶6. Norfleet's theory of defense was that he had been set up, and he contended that the fingerprint(s) belonged to whoever placed the contraband in the parking lot–potentially, the informant. *Norfleet*, 254 Wis. 2d 569 ¶¶14, 5. When Norfleet attempted to cross examine the officer as to the informer's identity, the State invoked the informer's privilege. *Norfleet*, 254 Wis.2d 569 ¶7. The judge found that the evidence submitted at trial demonstrated that the informant had information necessary for a fair trial and ordered disclosure; it denied the State's request

for disclosure *in camera* and dismissed the case when the State declined to disclose. (*Id*.)

The court of appeals upheld the trial court. In doing so, it noted that the detective's testimony had already established that the informant was a material witness; there was a late disclosure of an unidentified fingerprint; the defense was that Norfleet had been set up; and the informant may have planted the contraband. *Norfleet*, 254 Wis. 2d 569 ¶14. The appellate court found that—under those circumstances—nothing additional could be elicited during an *in camera* hearing other than an improper judicial determination of the informant's credibility. *Norfleet*, 254 Wis. 2d 569 ¶15.

In contrast, Judge Dugan did not know what information the CI could offer. An *in camera* hearing would have created a factual record, not merely a credibility determination. Without that factual record—without knowing what information the informant could provide—the court lacked a basis to conclude that his/her information was in anyway relevant or exculpatory to the charged offense, or that the information would support a theory of defense. Accordingly, *Norfleet* is inapplicable here.

III. THE TRIAL COURT ERRED IN REFUSING THE STATE'S REQUEST FOR A CONTINUANCE

Billings asserts that the trial court properly dismissed the case when the State refused to disclose the identity of the informer. (Brief of Defendant-Respondent, p. 16).

Billings mischaracterizes the State's position below: the State did not refuse to disclose the informant's identity. Instead, it asked for an opportunity to review the transcripts—which had been ordered, but not yet served—in order to determine how it would proceed. (R34:2) The prosecutor advised that the transcripts were necessary to make an appropriate assessment of the case, which would allow the State to decide if it would reveal the identity, appeal the court's decision, or dismiss the case. (R34:4). The State merely indicated that it could not reveal the identity "at that point," pending assessment of the case and the trial court's ruling. (R34:5)

The State offered a legitimate basis for the request: the transcript would allow the parties to review the status of record and the court's ruling, to determine whether additional litigation was warranted. (R34:4). Access to the transcript also would have given the State an opportunity to file a motion to reconsider in the trial court, in order to address the claim of error below and, potentially, to avoid appellate litigation.

Relying on *State v. Wollman*, 86 Wis. 2d 459, 273 N.W.2d 225 (1979), Billings asserts that the motion for a continuance required the trial court to balance the right of adequate representation against the efficient administration of justice. (Brief of Defendant-Respondent, p. 18) That was the holding in *Wollman*, but it is inapplicable here. In *Wollman*, defense counsel requested a continuance of trial because he had not had sufficient time to prepare. The court denied the request, the trial proceeded, and Wollman was convicted. He appealed, arguing that the denial of the continuance was an improper use of discretion. *Wollman*, 86 Wis. .2d at 467-468, 273 N.W.2d at 229-230. In that instance, the appellate court wrote that a denial of a continuance *potentially* implicates the Sixth Amendment right to counsel and the Fourteenth Amendment right to due process. *Wollman*, 86 Wis. 2d at 468, 273 N.W.2d at 230. (Emphasis added)

Here, however, where there was no issue regarding counsel's preparedness and the adjournment was requested by the State, there are no Sixth Amendment implications. Instead, this court must determine whether the trial examined the relevant facts, applied a proper standard of law, and, using a rational process, reached a reasonable conclusion. *See*, *Franz v. Brennan,* 150 Wis. 2d 1, 6, 440 N.W.2d 562 (1989). Given that the request for an adjournment was for a legitimate and reasonable purpose, and not for improper delay; that the State had acted promptly in ordering the transcripts; that the requested adjournment was relatively short (R34:3) and did not prejudice Billings, the court's decision to deny the State's request and to dismiss the case was not reasonable.

CONCLUSION

For these reasons, the State asks that this Court reverse the trial court's orders requiring the State to disclose the identity of the CI and dismissing the case.

Dated this _____ day of November, 2018.

Respectfully submitted,

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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 2,705.

_____ _____

Date Karen A. Loebel
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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:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

_____ _____

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