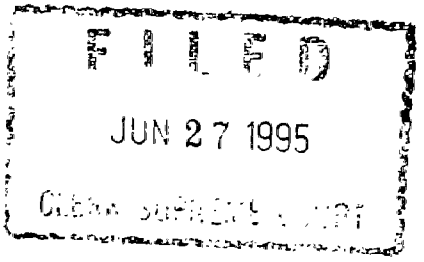
IN THE COURT OF APPEALS OF IOWA

No. 5-173 / 94-1065



STATE OF IOWA,

Plaintiff-Appellant,

vs.

RANDY ALAN McKEE,

Defendant-Appellee.

Appeal from the Iowa District Court for Mahaska County, Michael R. Stewart, District Associate Judge.

The State seeks discretionary review from a district court order granting in part the defendant's motion to disclose the identities of confidential informants used to obtain a warrant for the search of his property. **AFFIRMED.**

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Charles A. Stream, County Attorney, and Victoria R. Siegel, Assistant County Attorney, for appellant.

Scott Campbell, Oskaloosa, for appellee.

Heard by Donielson, C.J., and Hayden and Sackett, JJ.

SACKETT, J.

The State of Iowa seeks discretionary review of a district court order granting defendant-appellee Randy Alan McKee's motion to disclose the identity of a confidential informant. We affirm.

The State contends (1) defendant did not show disclosure of the informant's identity was needed to challenge the veracity of the affiant and the informant, and (2) disclosure of the identity of the informant who was not a witness to the crime but whose information was used to obtain a search warrant cannot be compelled at trial.

Because this is a challenge on constitutional grounds, our scope of review is de novo. *State v. Robertson*, 494 N.W.2d 718, 722 (Iowa 1993); *State v. Todd*, 468 N.W.2d 462, 466 (Iowa 1991). We review for an abuse of discretion. *State v. Nelson*, 395 N.W.2d 649, 652 (Iowa App. 1986).

On October 3, 1993, Lt. Kevin Johnson got information defendant had possession of controlled substances. Johnson prepared the affidavit for the search warrant on October 7, 1993. The affidavit included information provided to the Oskaloosa Police Department by three unnamed informants.

The first informant had a proven track record as an informant and made eight buys that led to three convictions as well as two search warrants and the seizure of controlled substances. This informant wore a wire during a drug purchase from Noah Iseton. Iseton talked about getting hash from defendant and about defendant making hash. The trial court did not require the disclosure of the name of this informant.

The second informant, now known to defendant, made various buys with reference to defendant selling coke and crystal and going to defendant's house to get drugs. On one occasion, no one was home and on another occasion, the seller said she would go back when defendant was home to get drugs.

The questioned informant and the only one who the trial court ordered his name be revealed said he was, at different times in September 1993, in defendant's home and saw $700 cash. He related he saw a female living there who got ADC and she still had her money. The informant said he observed considerable short-term traffic at defendant's home and knew and named some known drug users. The informant also told of observing defendant and his live-in girlfriend each with a quarter ounce of coke or crystal in defendant's home two years earlier. Additionally, the informant related at that time defendant was making hash out of marijuana and the process included heating and using rubbing alcohol. The informant further said defendant used an orange toolbox in which to store dope both then and in September.

With the warrant, officers seized a small quantity of controlled substances, drug paraphernalia, and weapons. The State then filed charges against defendant for possession of a schedule I controlled substance (marijuana) in violation of Iowa Code section 124.401(3).

Defendant subsequently filed a motion to disclose the identities of the confidential informants who supplied the information the State used to obtain the warrant. The trial court ordered disclosure of the third informant, holding:

> [T]he present search warrant application is the first time the third informant had been used, and the third informant had not provided reliable information in the past . . . . In the present case, the current information provided by the third informant was corroborated to some extent with subsequent police investigation. This consisted of Officer Boston going to the house, a telephone call by Officer Johnson to the unidentified neighbors, and a telephone call to probation officer Mike Schakel . . . . [T]he confidential informant whose reliability was being corroborated in the present case was, in the eyes of Officer Johnson, a convicted felon, with no track record of reliability . . . . The third informant stated that he observed the defendant with $700 in cash, and that he personally observed coke or crystal in the home. In addition, the informant stated that he observed the defendant using an orange toolbox to store dope.
>
> In executing the search warrant, the officer did not find the drugs that the informant claimed to have seen. No scales or packaging devices were found. The orange toolbox in which the third confidential informant claimed drugs were kept was actually a gun cleaning kit that had solvent and brushes in it. The cash the informant claimed to have seen was not found. The record establishes that the information given by the third confidential informant proved to be untrue.
>
> The Court finds that the third confidential informant had not provided reliable information in the past, the informant's information was minimally corroborated with subsequent police investigation, and that the information given by the informant proved to be false.
>
> The Court further finds that the defendant has established that disclosure of the identity of the third confidential informant is needed to ensure a fair hearing on the issue of probable cause to issue search warrant.

The State contends the trial court should not have required disclosure of the third confidential informant.

The State is privileged to withhold the identity of a person who furnishes information relating to violations of the law. *State v. Luter*, 346 N.W.2d 802, 810 (Iowa 1984). Weighed against the informer's privilege is defendant's right to prepare

and present a meaningful defense. *Robertson*, 494 N.W.2d at 723. Defendant bears the burden of showing the necessity for disclosure of the informant's identity. *Id.*

Important in the considerations is whether the informant was a witness or participant in the crime for which defendant is charged. *State v. Kantaris*, 280 N.W.2d 389, 391 (Iowa 1979). There is a distinction between participation in the events giving rise to the current criminal charges and participation in actions that constitute incidents recited in the information provided for search warrants. *Robertson*, 494 N.W.2d at 723; *see also McCray v. Illinois*, 386 U.S. 300, 307, 87 S. Ct. 1056, 1060, 18 L. Ed. 2d 62, 68, *reh'g denied*, 386 U.S. 1042, 87 S. Ct. 1474, 18 L. Ed. 2d 616 (1967).

There is no claim the informant was a witness or participant in the crime with which defendant is charged.

The burden on defendant to establish he needs disclosure to ensure a fair hearing on the probable cause issue is greater here than when a motion for disclosure is made at trial or at a suppression hearing for evidence obtained from a warrantless seizure. *Robertson*, 494 N.W.2d at 723-24.

The State and defendant look to *Robertson* to support their positions.

In *Robertson*, the magistrate found the informant reliable and determined the informant had provided reliable information. *Id.* at 724. The court said it saw no reason to find the information given by the informant untrue and informant's affidavit was either corroborated with subsequent police investigation before the search

warrant was granted or was consistent with evidence actually seized under the warrant. *Id.* Thus, the case at bar distinguishes *Robertson* from this case where the trial court found the officer making the affidavit gave the informant no track record of reliability. There was corroboration to some extent that the informant's evidence was not consistent with what was actually seized under the warrant.

The informant's identity may be disclosed when information from the informant is necessary to confirm police perjury but some quantum of evidence of possible police perjury must be shown before disclosure can be required. *Id.* Courts generally require some preliminary showing of falsity of the officer's statements in the affidavit before disclosure will be required to establish the elements necessary to obtain an evidentiary hearing. *United States v. Schauble*, 647 F. 2d 113, 117 (10 Cir. 1981).

In the event that at the hearing the allegation of perjury or reckless disregard is established by defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit. *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 2676, 57 L. Ed. 2d 667, 672 (1978).

In this case, the trial court found the informant, in the eyes of the officer, a convicted felon with no track record of reliability.

The court further found, in executing the warrant, the officer did not find the drugs the informant claimed to have seen in the orange toolbox but, rather, found it a gun cleaning kit; the cash the informant claimed to have seen was not found; the third informant's information was not true and was minimally corroborated.

The informant had not established reliability; none of the items he identified as allegedly being in the house were there. His testimony was necessary to establish the probable cause needed to issue the warrant. We find no reason to disturb the trial court's findings. The court found defendant needed to know the identity of the third confidential informant to have a fair hearing on the probable cause issue. Defendant met his burden on this issue.

AFFIRMED.