

State of Wisconsin,

Plaintiff,

v.

Case No. 2008CF000488

Walter Missouri

Defendant.

Notice of Motion and Motion to Identify Confidential Informant

Please take notice that on the 22nd day of April , 2008, at 8:30 a.m. , or as soon thereafter as counsel may be heard, the above-named defendant will appear before that branch of the Milwaukee County Circuit Court presided over by the Honorable Jeffrey Kremers, and will then and there move 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.

As grounds, Missouri shows to the court that the allegations in the affidavit establish that the informant is a transactional witness. As such, the court must compel the state to disclose his or her identity.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2008:

Law Offices of Jeffrey W. Jensen
Attorneys for the Defendant

By: _____
Jeffrey W. Jensen
State Bar No. 01012529

633 W. Wisconsin Ave.
Suite 1515
Milwaukee, WI 53203

414.224.9484
www.jensendefense.com

State of Wisconsin,

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Memorandum in Support of Motion to Identify Confidential Informant

Introduction

The police obtained a a warrant to search a residence where both the defendant, Walter Missouri ("Missouri") and a firearm were located. In the affidavit filed in support of the warrant application the police detective testified that he obtained information from a confidential informant who claimed to have seen Missouri "in possession" of a firearm within seven days prior to the application. The affidavit is not a shining moment of clarity. The affiant alleges that some sort of a marijuana transaction occurred in the residence but, try as the reader might, one cannot discern who is delivering what to whom. Nonetheless, the CI appears to have been in the residence during a time when Missouri could have exercised dominion and control over the firearm that police later found in the home. As such, the CI is a transactional witness in that he or she could tell us what he or she saw while in the home- particularly with reference to Missouri's control (or lack thereof) over the firearm.

Discussion

I. Because the informant is a transactional witness the state must be compelled to identify him or her.

Additionally, Sec. 905.10(3)(b), STATS, provides:

(b) 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 or of a material issue on the merits in a civil case to which the federal government or a state or subdivision thereof is a party, 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 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.

Finally, if the informant is a transactional witness the court's discretion is severely limited. In, *State v. Outlaw* 108 Wis.2d 112, 321 N.W.2d 145, 158 (Wis. 1982) the Supreme Court explained:

. . . . [T]he failure upon request to produce evidence or witnesses, whether an informer or not, that may be favorable to an accused where the evidence is relevant to guilt or innocence violates due process. *Brady v. Maryland*, supra 373 U.S. at 86, 83 S.Ct. at 1196. Outlaw, therefore, upon demand, had the right, upon the mere showing that the informer was present at the transaction--especially because identity was the defense--to have a determination of whether or not the informer "may be able to give testimony necessary to a fair determination of the issue of guilt or innocence."

The reader should note that if the informant is a transactional witness and could give testimony that is relevant to *guilt* or to innocence he must be identified. Missouri need not demonstrate, as is often suggested by the prosecutors, that the CI's testimony would be helpful to the defense.

The criminal complaint alleges that the pistol in question was found in the residence but not on Missouri's person. Thus, the state is left with the task of proving that Missouri knew of the weapon's presence and that he intentionally exercise some degree of dominion and control over it. See Wis. JI-920 Possession.

With respect to materiality and relevance, in, *State v. Becker*, 51 Wis. 2d 659, 667 (Wis. 1971) the Wisconsin Supreme Court quoted Professor McCormick who wrote:

In the courtroom the terms relevancy and materiality are often used interchangeably, but materiality in its more precise meaning looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to prove a proposition which is not a matter in issue nor probative of a matter in issue, the evidence is properly said to be immaterial. . . . Relevancy in logic is the tendency of evidence to establish a proposition which it is offered to prove. Relevancy, as employed by judges and lawyers, is the tendency of the evidence to establish a material proposition.

Had the police found the pistol in Missouri's hand one might be hard-pressed to persuade the court that the informant's testimony is relevant. However, because the pistol *was not* found on Missouri's person the totality of the circumstances surrounding the pistol now make it more or less likely that Missouri exercised dominion and control

over the the weapon (i.e. that he legally *possessed* it).

A material proposition of fact might be that Walter Missouri did not know that the pistol was present in the residence until the police discovered it on the day of the search. Any individual (including the informant) who observed Missouri's behavior in the residence in the days immediately before the police discovered the pistol would certainly provide testimony that makes it more or less likely that the material proposition of fact is true. In other words, the informant's observations concerning Missouri's behavior in the residence is about as relevant to this case as one could possibly imagine.

As such, the court has little discretion. The confidential informant must be identified.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2008:

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