COURT OF APPEALS
DECISION
DATED AND RELEASED

January 9, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0192-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WILLIE E. WILLIS,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Rock County: EDWIN C. DAHLBERG, Judge. *Affirmed*.

Before Eich, C.J., Roggensack and Deininger, JJ.

PER CURIAM. Willie E. Willis appeals from a judgment of conviction after a trial to the court, whereby Willis was found guilty of possessing cocaine with intent to deliver within 1,000 feet of a school or park, contrary to § 161.41(1m)(c)2, STATS.[1], as well as possessing an untaxed

[1] Chapter 161 was renumbered in part and repealed in part by 1995 Act 448, §§ 243 to 266, effective July 9, 1996. The applicable provision is now § 961.41(1m)(cm)2.

controlled substance, contrary to § 139.95(2), STATS. Willis specifically argues that he received ineffective assistance of trial counsel. Alternatively, if trial counsel was not ineffective, Willis urges us to find the circuit court erred in denying his motion to disclose the identity of the State's confidential informer. We reject both arguments and affirm.

BACKGROUND

Willis was arrested as the result of a telephone tip from a confidential informant. The informant correctly predicted Willis would possess cocaine in a certain type of container, and that he would appear at a certain address at a certain time in a certain type of car. Following the tip, police apprehended Willis with cocaine in his possession. One of Willis' theories was that a passenger in his car, one Rufus Miller, had been the informant. Two minutes before the trial to the court was set to begin, defense counsel filed a motion to compel disclosure of the confidential informant, as well as a motion to suppress evidence. The court denied the motion to compel disclosure as untimely, and denied the suppression motion without prejudice to be reconsidered as it arose at trial. The suppression motion was not renewed at trial, however.

Nevertheless, Willis pursued at trial his theory that Miller had been the informant. This was denied by both the police and Miller, however. After Willis was found guilty, he brought a postconviction *Machner*[2] motion, alleging ineffective assistance of trial counsel. Concerning the motion to compel disclosure, the circuit court denied the motion in part because

> ... if the Court had been presented with an in camera affidavit by the informant that he had been in the company of the defendant, or had observed the defendant earlier some minutes before, and that he knew of the fact that the cocaine was in the possession of the defendant, that he was going to his girlfriend's house at the end of the lane, and all of those facts had been

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

> in the affidavit, the Court would not have found anything that was necessary to the defense of the defendant, and that's what the test is; not whether it might be nice to know and have the informant there to cross-examine him whether or not he had any information that was necessary to the Defense.

And based upon what was given here, I conclude that he did not.

Concerning the suppression motion, the court held

> ... one of the remedies, when it is alleged that an attorney fails to bring a motion to suppress, is to actually hold a motion to suppress and find out what the result would do.... [However,] ... to hold a further motion to suppress on the state of this record would be an exercise in futility, because the defendant was alone in the car, and I am satisfied that there was no ineffective assistance of Counsel by bringing the -- failing to bring the motion to suppress, or to request that the Court, during the course of the trial to bring that motion.

Thus, the court found no ineffective assistance regarding the motion to compel on the grounds that, regardless of when the motion had been brought, under the facts of the case, the motion would not have been granted. Similarly, the court found no ineffective assistance concerning the suppression motion because it held that under the facts, the motion would have been futile, whenever brought.

STANDARD OF REVIEW

Whether ineffective assistance of counsel occurred is a mixed question of law and fact. ***State v. Pitsch***, 124 Wis.2d 628, 633-34, 369 N.W.2d 711, 714 (1985). We do not reverse factual findings unless clearly erroneous. ***Id***. at 634, 369 N.W.2d at 714-15. *See also*, § 805.17(2), STATS. We consider legal

issues *de novo*. ***Ball v. District No. 4 Area Bd.***, 117 Wis.2d 529, 537, 345 N.W.2d 389, 394 (1984).

ANALYSIS

The circuit court's holding was based on its conclusion that Willis failed to make the requisite factual showing that the informant's identity was "necessary" to his defense. *See* ***State v. Outlaw***, 108 Wis.2d 112, 140-41, 321 N.W.2d 145, 156 (1982) (Callow, J., concurring) (proposed testimony of informant must be "necessary to support" the theory of the defense). *See also* RULE 905.10(3)(b), STATS. (if the State refuses to disclose an informant's identity, judicial review determines whether reasonable probability exists that an informant may be able to give testimony "necessary" to a fair resolution of the criminal case).

Having reviewed the record, we agree. Even in his brief to this court, Willis identifies no theory under which the informant's identity was "necessary" to his defense. Rather, he chains speculations together to argue that, had counsel filed timely, the informant's identity could have become known, which could somehow have helped his case. This does not comply with ***Outlaw*** or RULE 905.10(3)(b), STATS. Further, because the suppression motion was related to the motion to compel, both motions were properly denied.

It is not ineffective assistance of counsel to fail to bring futile motions. ***Quinn v. State***, 53 Wis.2d 821, 827, 193 N.W.2d 665, 668 (1972). Therefore, no ineffective assistance of counsel occurred here, despite the last-minute timing of the motions.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.