COURT OF APPEALS
DECISION
DATED AND FILED

July 3, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

Appeal No. 01-2645-CR

Cir. Ct. No. 00-CF-255

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROGER L. STANK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: DAVID C. RESHESKE, Judge. *Affirmed*.

Before Nettesheim, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Roger L. Stank appeals from a judgment of conviction of six counts of theft as a party to the crime. He challenges the search conducted of his rural property, the ruling that the prosecution was not required to disclose the identity of a confidential informant, and the trial court's refusal to

give a special jury instruction on the element of knowledge that property was stolen. We affirm the judgment.

¶2 Stank owns rural property in Washington county. In addition to a twenty-foot mobile home located on the property and used by his family for vacations, Stank placed a semi-trailer on the property which he used as a storage shed. A dirt driveway provided access to the property, but a cable was strung across the driveway and a no trespassing sign posted at the entrance. In June 2000, acting on information from a confidential informant, a Washington county sheriff's detective entered Stank's property. Next to the semi-trailer, the detective discovered an industrial air compressor underneath a tarp. At a later date the detective returned to the property and confirmed that the serial number on the compressor matched the number on a compressor reported stolen in Milwaukee. The detective removed the compressor as evidence. No warrant was obtained before either search was conducted. That same day, detectives obtained a search warrant to search the semi-trailer and discovered more stolen items. Items were chained and padlocked. Stank had the keys to the padlocks.

¶3 Stank moved to suppress evidence alleging that the detectives searched his property in violation of the Fourth Amendment of the United States Constitution. He asserted that the area in which the compressor was found was the "curtilage" of the mobile home in which he had an expectation of privacy. Although the court doubted that the mobile home was entitled to the same sanctity and protection as a home, it considered whether the area of the semi-trailer was part of the curtilage of a home. It determined it was not and denied Stank's motion to suppress the evidence obtained as a result of the warrantless entry and search of the property.

¶4 Whether a place forms a curtilage of a home, where a person has an actual and reasonable expectation of privacy, is a matter of constitutional fact. ***State v. Martwick***, 2000 WI 5, ¶16, 231 Wis. 2d 801, 604 N.W.2d 552. A two-step standard of review applies: the trial court's historical findings of fact are reviewed under a clearly erroneous standard, while the ultimate question of constitutional fact is reviewed de novo. ***Id.*** at ¶2. The relevant inquiry is "whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." ***United States v. Dunn***, 480 U.S. 294, 301 (1987). ***Dunn*** recognizes four factors that should be considered when determining whether an area is the curtilage of a home or merely an open field to which no expectation of privacy exists:

> the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.

Id.

¶5 The trial court found that the distance between the semi-trailer and mobile home was only forty to fifty feet. However, the mobile home was located in a wooded area of the property. The home was so obscured by the woods that the investigating officer did not observe the mobile home on his three visits to the property. The semi-trailer was located in a relatively open area of the back of the property and visible from the road and neighboring property. Significantly, the trial court found that the woods marked the boundaries of the area surrounding the mobile home and that there was no indication that the area was used for normal intimate activities of a home. A portable toilet was located in the area of the semi-trailer, indicating that the facilities in the mobile home were not being utilized. It

also found that there was no enclosure of the area surrounding the mobile home other than the tree line of the woods. The semi-trailer and stolen compressor were located outside of that tree line. The trial court further found that other than the chain across the driveway and two no trespassing signs, no steps had been taken to protect the semi-trailer area from observation. The semi-trailer and other items separated from the mobile home were in an open field.

¶6 Stank argues that the area containing the mobile home, semi-trailer and portable toilet created a yard-like area adjacent to a home. He characterizes the area as small in comparison to the size of the property in general and suggests that the semi-trailer served as a de facto fence. We agree with Stank that rural property is more dependent on "natural" fences. However, the trial court found that the wooded area constituted the natural boundary of the curtilage of the mobile home. Moreover, the finding that the entire area was not used for activities normally connected with the intimacies of a home is not clearly erroneous. There was no evidence that anyone had slept in the mobile home recently or on a regular basis. Stank's use of the semi-trailer for storage and the accumulation of building supplies in that area was not associated with use of the mobile home. It was associated with construction of the new permanent home on the property. The foundation for that home was quite a distance from the mobile home. There was no effort to shield the area of the semi-trailer from observation. We conclude that the area of the semi-trailer, where the air compressor was discovered, was not part of the curtilage of a home but an open field. Both the discovery of the air compressor and the subsequent search warrant based on that discovery were valid.

¶7 Information leading to Stank's arrest came from a citizen informant who wished to remain anonymous. Stank moved the trial court under WIS. STAT. § 905.10(3) (1999-2000),[1] to reveal the identity of the informant. Disclosure is necessary when the informer's testimony is necessary to the defense. ***State v. Dowe***, 120 Wis. 2d 192, 194, 352 N.W.2d 660 (1984). The trial court conducted an in camera hearing of the informant's testimony to make the required determination of whether the informer could give testimony necessary to the fair determination of guilt or innocence.[2] *See* ***State v. Vanmanivong***, 2001 WI App 299, ¶13, 249 Wis. 2d 350, 638 N.W.2d 348 (Ct. App. 2001), *review granted*, 2002 WI 23, 250 Wis. 2d 555, 643 N.W.2d 93 (Wis. Jan. 29, 2002) (No. 00-3257-CR). When reviewing the trial court's determination after an in camera review under § 905.10(3)(b), we determine whether the trial court erroneously exercised its discretion. ***Vanmanivong***, 2001 WI App 299 at ¶10. The trial court's duty in the exercise of discretion is not to determine whether the informant's testimony would be helpful to the defense but "that the testimony the informer could give is relevant and admissible in respect to an issue material to the accused's defense and hence is reasonably necessary to a fair determination of guilt or innocence." ***Id.*** at ¶14.

¶8 Stank argues that the trial court employed an improper standard and merely determined that the informant's testimony would not be helpful to the defense. This claim is based solely on the wording used by the trial court when

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[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] The transcript of the in camera hearing was sealed. The trial court found that it could not provide Stank with the transcript because the informant's identity would have been revealed even in a redacted copy.

the issue was discussed.[3] What matters is not the words used by the trial court but the actual consideration of the potential relevance of the informant's testimony to the theory of defense.

¶9 Stank's theory of defense was that he did not know that the air compressor was on his property and that he did not know it was stolen. He believed this made the timing of the informant's observation of the air compressor on the property highly relevant. The trial court indicated that the informant did not see the air compressor being brought to the property and could not pinpoint when he or she first observed it on the property. The exact date that the air compressor was first observed was not a fact necessary to Stank's defense. Other witnesses placed Stank on the property after the date that the air compressor was stolen. Stank himself indicated he was on the property after that date. Stank makes much of the fact that the informant told the court that he or she may have observed the air compressor about two months before the information was given to the police and that this would mean it was observed before it was actually stolen.[4] However, this potential inconsistency only serves to impeach the informant as a witness. It does not directly bear on the issue of Stank's knowledge of the air compressor's presence on his property because of evidence that he was at the property after the date the air compressor was stolen. It does not bear on his knowledge of whether the compressor was stolen. Additionally, whether or not

[3] The trial court remarked, "[I]n my judgment, there was no evidence that would be exculpatory or favorable to the defense or would lead to further discoverable evidence." Later the court wrote, "[T]here appears to be nothing from the testimony that is exculpatory or that may lead to discoverable information favorable to the defense."

[4] The air compressor was stolen between May 12-15, 2000. The informant's tip came to the sheriff's department in early June 2000. The air compressor was seized by police on July 7, 2000.

the informant had observed Stank on the property after that date was cumulative to other evidence. Finally, our review of the in camera testimony reveals that the informant's import was only to start the investigation. Thus, the informant's testimony and identity were not necessary to the defense and the trial court properly exercised its discretion is denying Stank's motion to compel identification of the informant.[5]

¶10 Stank requested a jury instruction which would define the word "intentionally" as used in the substantive theft instruction to mean that he acted with knowledge that the property in question was stolen.[6] The trial court refused to give the additional instruction, concluding that the substantive instruction was adequate. Stank argues that because the trial court had not completely read the replacement instruction, it erroneously believed that the language he proposed was no longer approved by the Jury Instruction Committee. He claims he was prejudiced because the jury was not informed that his theory of defense that he did not know the property was stolen was cognizable.

¶11 "Our review of a request for a jury instruction is limited to whether the trial court acted within its discretion when it refused to give the requested instruction." ***State v. Randall***, 222 Wis. 2d 53, 59, 586 N.W.2d 318 (Ct. App. 1998). Reversal is required only when the jury instructions, taken as a whole,

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[5] In his reply brief, Stank questions whether the informant is a bona fide informant entitled to confidentiality or simply a citizen who does not wish to become involved. It is a distinction without a difference for informants of all types, regardless of their motivation, are entitled to the privilege of nondisclosure. *See* ***Mayfair Chrysler-Plymouth, Inc. v. Baldarotta***, 162 Wis. 2d 142, 165-66, 469 N.W.2d 638 (1991).

[6] The request was based on WIS JI—CRIMINAL 923.1 which has been replaced by WIS JI—CRIMINAL 923A.

misled the jury or communicated an incorrect statement of the law. ***Id.*** at 59-60. In other words, if the instructions given adequately cover the law applied to the facts, it is not error to refuse to give other acceptable instructions. ***State v. Amos***, 153 Wis. 2d 257, 278, 450 N.W.2d 503 (Ct. App. 1989).

¶12 Under the theft instruction the jury was told that the prosecution had to prove that Stank "intentionally retained possession of movable property of another," that "[t]he owner of the property did not consent to taking and carrying away the property," and that Stank "knew the owner did not consent." We agree with the trial court's rationale that if Stank did not know the property was stolen, then he could not know that the owner did not consent to his possession of the property. Stank could only be found guilty if he knew that the owner did not consent to his possession of the property, that is, that the property was stolen. The jury was correctly and adequately instructed on the element of intent and knowledge so as to permit consideration of Stank's theory of defense that he did not know the property was stolen. The trial court properly exercised its discretion in denying Stank's request for the additional intent instruction.

By the Court.—Judgment affirmed.

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