

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

August 23, 1995

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. 94-3105-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

ARNULFO TORRES,

Defendant-Respondent.

APPEAL from an order of the circuit court for Sheboygan County:
JOHN B. MURPHY, Judge. *Affirmed.*

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

PER CURIAM. The State appeals from an order dismissing the criminal complaint against Arnulfo Torres because of the State's refusal to disclose a confidential informant's identity. The issue on appeal is whether the trial court erroneously exercised its discretion when it ordered the State to disclose the informant's identity. We conclude that the trial court properly exercised its discretion and affirm the order dismissing the prosecution.

Torres was charged with two counts of possession of marijuana with intent to deliver as a party to the crime and one count of a related tax stamp violation. The charges arose from the arrest of Walter Jacoby on July 3, 1994. Based on information provided by a confidential informant, the police searched a car driven by Jacoby and found a large quantity of marijuana. Jacoby's statement to the police implicated Torres by Jacoby's self-identification as a "drug runner" for Torres.

Torres moved for an order under § 905.10(3)(b), STATS., requiring the State to disclose the identity of the confidential informant who provided the information leading to Jacoby's arrest. Torres pointed out that the informant had told police about Jacoby's activities but never mentioned any involvement by Torres. He argued that the informant might testify that he or she knew nothing about Torres' involvement and that Jacoby acted alone. Torres claimed that such testimony could be used to impeach Jacoby at trial.

As an offer of proof of his theory of defense, Torres submitted statements he had given relative to his involvement with Jacoby. On July 5, 1994, Torres gave a statement to police through a Spanish interpreter. Torres admitted he had a source for marijuana in Chicago but indicated that the distribution of the drug was done solely by Jacoby. In a July 15, 1994, statement to his probation agent, Torres denied any involvement with Jacoby's drug dealing other than introducing Jacoby to the Chicago contact. Although he admitted that he assisted Jacoby with one "load" of marijuana, he maintained that he told Jacoby he did not want to get involved.

The trial court interviewed the informant in camera. It concluded that the informant had exculpatory information. The State moved for reconsideration and requested that the in camera interview be done on the record. The trial court reinterviewed the informant and the testimony was transcribed and sealed. The court again determined that the informant "has information available which would be extremely material to the defense in this case" and that the information "is clearly exculpatory." The State was ordered to disclose the informant's identity. It chose not to do so and the case was dismissed pursuant to § 905.10(3)(b), STATS.

Under § 905.10(1), STATS., the State has a privilege to refuse to disclose the identity of a person furnishing information which assists in a police investigation. If the trial court determines that there is a "reasonable probability" that the informant can give testimony that is "necessary to a fair determination" of the defendant's guilt or innocence, the State must disclose the informant's identity. Section 905.10(3)(b). Where disclosure is relevant and helpful to the defense, essential to a fair determination of the cause or necessary to support the theory of defense, the privilege must give way. See *State v. Lass*, Nos. 94-1335-CR, 94-2129-CR, slip op. (Wis. Ct. App. May 9, 1995, ordered published June 27, 1995).

The determination that the informant's testimony is relevant and material to the accused's defense requires the exercise of discretion by the trial judge. *State v. Outlaw*, 108 Wis.2d 112, 128, 321 N.W.2d 145, 154 (1982). We must sustain the determination when it is rationally arrived at in accordance with the facts and proper application of law. *Id.* at 137, 321 N.W.2d at 158.

The State first argues that the trial court misused its discretion because it failed to engage in any sort of reasoning process on the record.¹ It relies heavily on *State v. Larsen*, 141 Wis.2d 412, 419-20, 415 N.W.2d 535, 538 (Ct. App. 1987), as support for the proposition that the trial court must exercise its discretion sufficiently to provide a record upon which this court can adequately review the determination. This case is different from *Larsen* where the trial court denied the accused's motion for disclosure without stating its reasons.

Here, by conducting the in camera inquiry, the trial court determined that Torres had made the preliminary showing that the informant could supply testimony necessary to a fair determination. See *Outlaw*, 108 Wis.2d at 126, 321 N.W.2d at 153. We have the transcript of the in camera proceeding from which we can determine if the trial court's determination was a proper exercise of discretion. Further, the trial court proceeded according to

¹ The State's standing to raise this argument is somewhat tenuous given its request at the motion hearing that the trial court not go into detail about the reasons for its decision so as not to inadvertently reveal the informant's identity. See *State v. Michels*, 141 Wis.2d 81, 97-98, 414 N.W.2d 311, 317 (Ct. App. 1987) (when a trial court performs some act because of the position taken by a party, that party should not be heard to take a different position on appeal).

the law in conducting the in camera inquiry. Its ultimate conclusions were those necessary to an order requiring disclosure. We reject the claim that discretion was not adequately exercised.

We have reviewed the transcript of the in camera interview of the informant. There is no doubt that the trial court correctly determined that the informant had information which was exculpatory as to the charges against Torres for alleged drug activity around July 1994.² Nothing more need be said. Upon the determination that the informant's testimony is material to the accused's theory of defense, the balancing mechanism embodied in § 905.10(3)(b), STATS., is irretrievably tipped to the side of disclosure. See *Outlaw*, 108 Wis.2d at 128, 321 N.W.2d at 154. Because the trial court correctly concluded that the informant's testimony was relevant to Torres' theory of defense, it properly exercised its discretion.

By the Court. – Order affirmed.

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

² The State suggests that if the informant's testimony was exculpatory only as to the July 3, 1994, drug deal, the trial court should not have ordered dismissal of the count related to a June drug deal. The State did not make such a request in the trial court and we deem it waived.