

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 31, 1996

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. 95-2051-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LYNETTE K. FELBER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Monroe County:
JAMES W. RICE, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

PER CURIAM. Lynette Felber appeals from a judgment convicting her of possession of less than 500 grams of marijuana with intent to deliver. Section 161.41(1m)(h)1, STATS. Felber pled guilty to the charge. The issue is whether, at two separate times during the proceedings, the trial court should have disclosed the identity of a confidential police informant. We

conclude that the trial court properly denied disclosure, and we therefore affirm.

Police searched Felber's home pursuant to a warrant, and discovered inculpatory evidence. To obtain the warrant, they offered information provided by a secret informant that Felber was selling marijuana from her house. After her preliminary hearing, Felber moved to compel disclosure of the informant, in order to attack the search warrant in a suppression motion. She alleged that the informant was a person whom the police could not have reasonably believed or relied on as a credible witness. In support of the motion, she submitted an affidavit pointing out inaccurate information attributed to the informant in the application for the search warrant. The court denied the motion, finding that Felber could not benefit from knowing the informant's identity.

At sentencing, after Felber entered her guilty plea, she again asked for the informant's identity for sentencing purposes. She based this request on the fact that the presentence investigation report contained a description of the informant's allegedly false statements in the search warrant affidavit. The trial court denied this motion as well and sentenced Felber to probation, with a six-month jail term as a condition of probation.

Felber failed to present substantial grounds for obtaining the informant's identity in order to attack the search warrant. To challenge the legality of a search warrant obtained on false statements made by a confidential informant, a defendant must make a substantial preliminary showing that the person executing the search warrant affidavit knowingly or with reckless disregard for the truth included a false statement essential to the probable cause finding. *State v. Fischer*, 147 Wis.2d 694, 699-700, 433 N.W.2d 647, 649 (Ct. App. 1988). Here, Felber introduced no evidence that the police officer executing the affidavit knew of any false statements by the informant, or recklessly disregarded that possibility.

Additionally, Felber did not show that the informant's false statements were essential to the probable cause determination. According to Felber, the informant falsely stated that Felber and her husband, Len, had sold marijuana and cocaine for seven years, although they had lived together for

only four years, and that another individual lived with the Felbers, although that person had moved out of the Felber home over two years before. However, the informant provided a substantial amount of other information that Felber did not challenge, including an accurate description of the premises, an accurate description of Lynette Felber's current employment and Len Felber's involvement in another criminal proceeding, and the fact that many vehicles came and went from the home, stopping for only a few minutes. Those assertions were independently verified by police department surveillance and investigation. As a result, the warrant application contained sufficient information to establish probable cause, without considering the allegedly false statements in it.

Felber also failed to demonstrate that she needed the informant's identity for sentencing purposes. Triggering her request was the description of the offense in the presentence investigation, which summarized the informant's statements, including the alleged inaccuracies, as reported in the warrant application. However, the report plainly identified those statements as the informant's version of Felber's dealings. The report also gave Felber's contrasting version, and the recommendation in the report does not refer to the informant's statements or rely on them. There was much other evidence of Felber's drug-selling activities, including her own admissions. Additionally, the sentencing transcript contains no indication that the trial court relied on the informant's description of Felber's activities when it imposed the sentence. Section 905.10(3)(b), STATS., authorizes the trial court to disclose an informant's identity if that person's testimony might be necessary to a fair determination of the issue of guilt or innocence. We accept the premise that the court may also allow disclosure to fairly determine sentencing, but Felber failed to show that disclosure was necessary for that purpose.

By the Court. – Judgment affirmed.

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