

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 20, 2007

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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

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. 2006AP797-CR

Cir. Ct. No. 2004CF30

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT W. WILCOXSON, III,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Ashland County: ROBERT E. EATON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Robert W. Wilcoxson, III, appeals a judgment convicting him of possessing THC with intent to deliver as a party to a crime.¹ He argues that the trial court improperly exercised its discretion when it refused to require the State to disclose the identity of a confidential informant. We reject that argument and affirm the judgment and order.

¶2 Based on a confidential informant's statement, police secured and executed a search warrant at a residence occupied by Jeremy Warren and Nicole Schneeberger, finding a large quantity of marijuana and Wilcoxson's fingerprint on a large bag. Warren and Schneeberger testified against Wilcoxson. They stated that approximately five trips were made to southern Wisconsin to purchase marijuana for resale in Ashland. Even though the drugs seized were acquired on the fifth trip, Wilcoxson's cross-examination of his accomplices focused on the details of the fourth trip in which they described staying in the car while Wilcoxson went into a house in Milwaukee to purchase the marijuana. Wilcoxson called his fiancée, Stephanie Joleen, as an alibi witness. She testified that Wilcoxson was with her at medical appointments on the dates Wilcoxson's accomplices said the fourth transaction might have occurred. On cross-examination, Joleen admitted that the drugs seized pursuant to the search warrant belonged to Wilcoxson.

¶3 Wilcoxson later interrupted the proceedings, demanding to know whether Joleen was the confidential informant. He indicated that he needed to know the identity of the informant in order to decide whether to continue to be

¹ The notice of appeal also purports to appeal an order denying Wilcoxson's postconviction motion. However, the only issue raised on appeal does not relate to that order.

represented by his trial attorney, Sam Filippo. After discussing the matter with Filippo, Wilcoxson decided to continue to have Filippo represent him, and Filippo requested that the court disclose the informant's identity or conduct an in-camera review to determine whether Joleen was the informant. Filippo indicated that he would attempt to discredit Joleen's testimony if she were the informant, noting that she and Wilcoxson had a "falling out" before the warrant was executed. The trial court denied the request because it was untimely and Wilcoxson failed to establish that identifying the informant was necessary to his defense.

¶4 Wilcoxson's motion was untimely because it was not filed within ten days of his arraignment as required by WIS. STAT. § 971.31(5)(a) (2005-06).² Wilcoxson attempts to utilize § 971.31(2), which allows certain issues to be raised at trial. Wilcoxson characterizes his motion to disclose the informant's identity as a motion to suppress evidence. However, he does not establish any basis for characterizing the motion in that manner. Identification of the informant, regardless of whether it was Joleen, would not have resulted in suppression of any evidence. In addition, § 971.31(2) allows the trial court in its discretion to entertain a motion at trial. The trial court found that the State was prejudiced by Wilcoxson's failure to file his motion before trial because the State lost its right to dismiss the complaint rather than disclose the informant's identity. Because Wilcoxson only sought to determine whether Joleen was the informant, dismissal of the charge would have in effect confirmed that Joleen was the informant. Because the motion was not timely filed and the court gave a valid reason for its

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

discretionary decision, the trial court was not required to disclose the informant's identity or conduct an in-camera review.

¶5 Wilcoxson also failed to establish that identifying the confidential informant was necessary to his defense. *See State v. Vanmanivong*, 203 WI 41, ¶32, 261 Wis. 2d 202, 661 N.W.2d 76. “Necessary” in this context means the evidence must support an asserted defense to the degree that the evidence would create reasonable doubt. *Id.*, ¶24. Wilcoxson's initial assertion that he needed to identify the informant in order to determine whether to replace his trial attorney is a non sequitur. He provided no relationship between the two matters. He also has not identified any way in which he could discredit Joleen by establishing that she was the confidential informant or that discrediting his own witness could have created a reasonable doubt. It was not necessary to determine whether Joleen was the confidential informant in order to determine whether her “falling out” with Wilcoxson showed bias.

By the Court.—Judgment and order affirmed.

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

