

**IN THE COURT OF APPEALS OF IOWA**

No. 9-977 / 09-0676  
Filed March 10, 2010

**STATE OF IOWA,**  
Plaintiff-Appellant,

**vs.**

**THERESA CHASCOIN HOOVER and  
ERIC LEE WOLKEN,**  
Defendants-Appellees.

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Appeal from the Iowa District Court for Marshall County, Carl D. Baker,  
Judge.

The State appeals the district court ruling requiring the State to disclose  
the identity of a confidential informant. **REVERSED AND REMANDED.**

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney  
General, Jennifer Miller, County Attorney, and James S. Scheetz, Assistant  
County Attorney, for appellant.

Chad R. Frese of Kaplan, Frese & Nine, L.L.P., Marshalltown, for appellee  
Eric Lee Wolken.

Theodore R. Hoglan of Condon & Hoglan Law Firm, Marshalltown, and  
Joanie Grife of Steffens & Grife, Marshalltown, for appellee Theresa Chascoin  
Hoover.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ.

**VOGEL, P.J.**

The State appeals from the district court ruling requiring the State to disclose the identity of a confidential informant on the application for a search warrant. Our review is de novo. *State v. Robertson*, 494 N.W.2d 718, 722 (Iowa 1993).

**I. Background Facts and Proceedings**

On December 24, 2008, Deputy Sheriff Joel Phillips applied for a search warrant for the home of Eric Wolken and Theresa Hoover, based on information provided by a confidential informant. On the application, the confidential informant was identified as a person who had purchased marijuana from Wolken and Hoover over the course of the year. The confidential informant informed Deputy Phillips that Wolken and Hoover had a steady supply of marijuana and pharmaceutical drugs available for purchase in their home. The informant provided Deputy Phillips with a detailed drawing of Wolken and Hoover's home, the specific location of drugs, the location and description of cars on the property, the names of Hoover's two minor children living at the residence and the name of a home health nurse, Robin Zitzow, as a supplier of Oxycontin also for sale at the residence.

Prior to applying for a search warrant, Deputy Phillips verified much of the information received, including Wolken and Hoover's address with the Marshall County Assessor's office; the description of their cars with the Iowa Department of Transportation; Wolken's criminal history; and Zitzow's employment and criminal history. Deputy Phillips conducted surveillance of the Wolken/Hoover home on December 22, 2008, where he observed several vehicles arriving and

leaving within a short period of time, which based on his experience with the Mid-Iowa Drug Task Force, he believed was indicative of drug activity. On Deputy Phillips's application, a magistrate issued a search warrant on December 24. Deputy Phillips, with the assistance of other law enforcement officers, executed the search warrant on December 30. The officers found oxycodone tablets, empty pill bottles, and more than 100 grams of marijuana. According to the minutes of testimony, Wolken made several inculpatory statements including that the officers could find "weed" and the scale on the steps to the basement, admitting that he had some "oxy," and that he had sold "some pot" and predicting he was "going to prison for a long time."

Wolken and Hoover were charged with several drug offenses, child endangerment, and neglect of a dependent person. Wolken filed a motion to suppress, and both he and Hoover filed a motion to disclose the identity of a confidential informant.<sup>1</sup> Following a hearing, on April 2, 2009, the district court ordered the State to disclose the identity of the confidential informant within ten days. Our supreme court granted the State's application for discretionary review.

## **II. Confidential Informant**

The State asserts the district court erred in requiring the disclosure of the identity of the confidential informant. The State is privileged to withhold the identity of a person who furnishes information relating to violations of the law. *Robertson*, 494 N.W.2d at 722. This privilege is premised upon the public interest in maintaining the flow of information essential to law enforcement. *Id.* It encourages communication with law enforcement by those who condition

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<sup>1</sup> Hoover captioned her filing as "Motion to Compel Discovery."

cooperation on an assurance of anonymity. *Id.* To be weighed against the informer's privilege, however, is the defendant's right to prepare and present a meaningful defense. *Id.*; *State v. Byrd*, 448 N.W.2d 29, 31 (Iowa 1989). The defendant bears the burden of showing the necessity for disclosure of the informant's identity. *Robertson*, 494 N.W.2d at 722.

### **III. Disclosure to Defend Criminal Charges**

Wolken asserts disclosure of the confidential informant's identity was necessary because the informant was involved in or observed the criminal activity as it related to several of the pending charges. In determining whether disclosure is required to ensure a fair trial, paramount among the considerations is whether the informant was a witness or participant in the crime for which the defendant is charged; if a participant, generally, the identity must be disclosed. *State v. Sheffey*, 243 N.W.2d 555, 557 (Iowa 1976). But even if the informant is a witness or participant, mere speculation that the informant may be helpful in preparing the defendant's defense is not enough to overcome the public interest in protection of the informant. *Robertson*, 494 N.W.2d at 723. The district court reviewed the facts and circumstances Deputy Phillips used to support the application for search warrant. It found that the identity of the confidential informant should be disclosed, concluding that while "the informant was not acting as an agent of law enforcement when he or she purchased drugs . . . [the confidential informant] voluntarily informed on the defendants" and was "a witness to or participant in the drug transactions."

We note the distinction between an informant who participates in the events giving rise to a search warrant, and an informant who participates in the

underlying crime. *Robertson*, 494 N.W.2d at 723 (affirming that “there is a significant distinction between participation in the events giving rise to the current criminal charges and, on the other hand, participation in actions that constitute incidents recited in the informations provided for search warrants.”). Here, the confidential informant was involved in the purchase of drugs for the year prior to Wolken and Hoover’s arrest. He (or she) also observed the presence of the two minor children in the residence at times during these drug transactions. The State filed charges against both Wolken and Hoover which included ongoing criminal activity and child endangerment allegations, beginning January 1, 2008, through December 30, 2008. These facts would weigh in support of disclosing the identity of the informant.

At the hearing, the State argued that if it pursued the charges that could only be proved by testimony of the confidential informant, and that informant was not disclosed as a witness ten days prior to trial, the court would necessarily sustain a motion for judgment of acquittal on those charges. See Iowa R. Civ. P. 2.19(3) and (8)(a). However, if none of the crimes charged required proof supplied by the confidential informant, the defendants would not be hindered in preparing their defense. *State v. Byrd*, 448 N.W.2d 29, 31 (Iowa 1989) (“A defendant has no right, however, to confront an informant who does not, directly or indirectly, give any evidence at trial.” (citing *Cooper v. California*, 386 U.S. 58, 62 n.2, 87 S. Ct. 788, 799 n.2, 17 L. Ed. 2d 730, 734 n.2 (1967))). The thrust of the State’s argument was that it was simply premature to assume that this confidential informant was the only avenue for the State to be able to prove certain charges, and to require disclosure of the identity of the confidential

informant at this stage was purely a “fishing expedition.” We agree. The *Robertson* case provides,

In the context of a motion to suppress evidence seized pursuant to a warrant, the burden upon the defendant to establish that disclosure is needed to ensure a fair hearing on the probable cause issue is *even greater* than when a motion for disclosure is made at trial or at a suppression hearing for evidence obtained from a warrantless seizure.

*Robertson*, 494 N.W.2d at 723 (*emphasis added*). At this pretrial stage, neither defendant carried their burden of proof to show their need to prepare for an eventual trial outweighed the State’s need to protect the free flow of information from this confidential informant.

#### **IV. Disclosure to Test the Veracity of the Informant**

Hoover also asserts, and Wolken adopts her argument, that disclosure of the confidential informant’s identity was necessary for purposes of search warrant impeachment; specifically that Deputy Phillips improperly represented the reliability of the information because it was provided by a first-time informant. Although Hoover cites no authority that a first-time informant is per se unreliable, this argument fails because Deputy Phillips pursued surveillance of the property and corroborated the informant’s information prior to application of the search warrant. See *State v. Weir*, 414 N.W.2d 327, 332 (Iowa 1987) (explaining when courts make informant credibility determinations for the issuance of a search warrant of a first-time informant, corroboration of the informant’s information is an important factor).

The confidential informant gave Deputy Phillips specific information not available to the public, including the exact location and type of drugs available

within the residence, a detailed floor plan drawing of the home, and the description and location of the cars. See *State v. Gogg*, 561 N.W.2d 360, 365 (Iowa 1997) (stating that a court may consider numerous factors reflecting on the informant's credibility, including "whether the information was public knowledge"). Deputy Phillips confirmed the information supplied to him by verifying addresses, vehicles, criminal histories, and personally observing traffic in and out of the residence. There is no evidence any facts were incorrect in Deputy Phillips's search warrant application. Moreover, the information given by the informant was consistent with the evidence actually seized pursuant to the warrant. *Robertson*, 494 N.W.2d at 724. The details of the interior of the home as well as the drugs seized were as reported. We find neither defendant met their burden of showing the necessity for disclosure of the informant's identity based on any inaccuracies within the warrant application which would undermine the informant's veracity.

Having found the district court should not have ordered the disclosure of the confidential informant at this pretrial stage, we reverse and remand for further proceedings.

**REVERSED AND REMANDED.**