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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0711**

State of Minnesota,
Respondent,

vs.

Steven Wayne Haney,
Appellant.

**Filed May 13, 2019
Affirmed
Smith, Tracy M., Judge**

Hennepin County District Court
File No. 27-CR-16-22955

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Nicole Cornale, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Mark D. Kelly, Law Offices of Mark D. Kelly, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Halbrooks, Judge;
and Larkin, Judge.

U N P U B L I S H E D O P I N I O N

SMITH, TRACY M., Judge

Appellant Steven Wayne Haney appeals his convictions on two counts of first-degree controlled-substance crime. He challenges the district court's denial of his motion to suppress evidence that was obtained during the execution of two search warrants,

arguing that warrants were invalid because they were based on a tip from a confidential reliable informant (CRI) who had performed a prior unconstitutional search. Haney also challenges the district court's denial of his motion to compel discovery of information regarding the CRI, and the court's limitation of questioning regarding the CRI at the suppression hearing, asserting a due-process right to the information. Because the district court did not clearly err in finding that the CRI was not acting as an agent of the government when the CRI saw the drug activity in Haney's house that was the substance of the tip, and because the district court did not abuse its discretion in limiting Haney's access to information regarding the CRI, we affirm.

FACTS

In July 2016, police received information from a CRI that Haney was selling methamphetamine out of his house. The police sought search warrants based on that information: one for Haney's house, the other for Haney himself. The affidavits supporting the warrant applications were identical and contained the following two paragraphs about the informant's tip:

Your affiant has been . . . conducting an investigation involving the address of 2735 Marshall St NE and [Haney] for the distribution of controlled substances to wit, methamphetamine. This investigation began after your affiant and assisting investigators received information from a confidential reliable informant (CRI hereinafter) who stated that [Haney] was possessing and distributing methamphetamine from the aforementioned address which is a single family dwelling located in northeast Minneapolis.

. . . .

Within the past 24hrs, the CRI that is assisting your affiant and Officer Collins with this investigation was at the residence of 2735 Marshall St NE where the CRI observed a large quantity of crystal methamphetamine at the location. The CRI indicated that there were several parties who were coming and going from the address, purchasing methamphetamine from [Haney]. The CRI indicated that while at the residence they observed several narcotic transactions between [Haney] and the buyers.

The affidavits also described the police's confirmation that Haney lived at the address and Haney's previous convictions for controlled-substance crimes.

Search warrants were issued and executed. Police searched Haney outside of his house, finding methamphetamine and cash. Based on this evidence, and certain statements that he made in an interview with police after his arrest, Haney was charged with two counts of first-degree controlled-substance crime.

Haney moved to suppress the evidence obtained by the search and interview. He contended that, when the CRI observed the drug activity, the CRI was acting as an agent of the state and thus had conducted a warrantless search in violation of Haney's Fourth Amendment rights. He argued that the search warrants were not properly issued and the evidence derived from the warranted searches—that is, both the physical evidence and his statements to the police—was inadmissible. Haney also moved to compel disclosure of the CRI's identity and details of the CRI's relationship with police in order to prove his contention that the CRI had engaged in an illegal search while acting as an agent of the government. The district court denied Haney's motion to compel discovery but granted his request for a hearing on the claimed warrantless entry of Haney's house by the CRI. The

court stated in its order that it deemed “it appropriate for there to be a hearing on the nature and facts surrounding the CRI’s entry into [Haney’s] residence.”

At the hearing, held before a different district court judge, Haney was permitted to question two police officers about the basis for the warrant. The district court interpreted the first judge’s order as limiting the scope of the hearing to “the day in question, the day that the CRI entered the home, [and] whether the CRI was working off potential charges or earning money to enter and provide information.” The court ruled that further, more specific questions could be asked depending on whether the initial inquiry suggested that the CRI’s relationship with police and the CRI’s identity could be relevant.

The officers testified that they had not told the CRI to search Haney’s house or to investigate Haney, that they were not aware that the CRI planned to investigate Haney, that they did not know how the CRI observed what the CRI reported, that the CRI was likely to be paid if the information was “reliable and relevant and . . . [led] to recovery of evidence,” and that the CRI was in fact compensated in this case. Additionally, while the police had “known about the address,” the officers’ testimony indicated that there had not been an investigation into Haney’s address until after the CRI provided the information. While Haney was not permitted to inquire into the length and nature of the prior relationship between the CRI and the police during the first day of the hearing, the district court permitted some questions on the topic in the second day. Through his questioning of the officers, Haney learned that the CRI had previously been paid based on entries of residences and had worked with other officers. He also learned that the officers did not

know how many times the CRI had provided information. Haney did not ask whether the officers knew details about the CRI's past entries of residences.

Based on the testimony at the hearing, the district court found that the CRI was not acting as an agent of the state because the evidence did not show that the officers knew of or acquiesced in the CRI's conduct with respect to Haney's residence and did not show that the police were "in a state of 'ongoing acquiescence.'" Because the district court concluded that information from the CRI did not need to be excluded from the affidavit, it ruled that the warrant was supported by probable cause and that the fruits of the warrant were therefore admissible. Haney's motion to suppress was denied.

Following a court trial, Haney was convicted on both counts, and this appeal follows.

D E C I S I O N

I. The district court did not clearly err in finding that the CRI was acting in private capacity.

Haney argues that the district court clearly erred in finding that the CRI acted as a private citizen when obtaining the information that he or she then reported to the police.

The Fourth Amendment prohibits unreasonable searches. U.S. Const. amend. IV; *see also* Minn. Const. art. 1, § 10 (prohibiting unreasonable searches and seizures). But the Fourth Amendment restricts only state action; it does not prohibit unreasonable searches by private individuals. *U.S. v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652, 1656 (1984). The exclusionary rule therefore does not prohibit the state from using evidence obtained through a private search. *See Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 1691 (1961)

(applying the exclusionary rule, which makes evidence obtained in violation of the Fourth Amendment inadmissible, to the states). However, if a seemingly private person performs a search while acting as an agent of the government, the Fourth Amendment and exclusionary rule then apply. *State v. Buswell*, 460 N.W.2d 614, 618 (Minn. 1990). If probable cause for a search warrant depends on information obtained through an illegal search, the evidence obtained through the search warrant is inadmissible unless an exception to the exclusionary rule applies. *See Murray v. United States*, 487 U.S. 533, 542, 108 S. Ct. 2529, 2536 (1988) (stating that evidence based on a warrant would not be admissible if law enforcement sought the warrant because of a prior illegal entry or “if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant”); *State v. Lieberg*, 553 N.W.2d 51, 55 (Minn. App. 1996) (“The exclusionary rule generally requires the suppression of evidence acquired as a direct or indirect result of an unlawful search.”).

Whether a private person acted as an agent of the government is a question of fact for the district court. *State v. Jorgensen*, 660 N.W.2d 127, 131 (Minn. 2003). The question is to be resolved “on a case-by-case basis after consideration of all the facts and circumstances relative to the search.” *Buswell*, 460 N.W.2d at 618. But two factors are critical. The first is “whether the government knew of and acquiesced in the search.” *Id.* The second is “whether the search was conducted to assist law enforcement efforts or to further the private party’s own ends.” *Id.* Both factors must be satisfied for a search by a private person to be government search. If the government did not know of or acquiesce in a search, it will be considered a private search, regardless of the person’s motive. *See id.* at

620 (holding that a search was private because there was “no significant government involvement in [the] searches,” without analyzing the second factor). A district court’s finding as to whether a search was private is reviewed for clear error. *Id.* at 618.

Here, the district court found that law enforcement did not send the CRI to search Haney’s house, was not aware that the CRI was going to be in Haney’s residence, and had no prior financial agreement with the CRI with respect to Haney’s residence. Based on these facts, the district court found that “law enforcement did not know of or acquiesce to the entry of the CRI into [Haney’s] residence.”

Haney argues that the district court clearly erred in not finding that law enforcement acquiesced in the search, notwithstanding law enforcement’s lack of advance knowledge, because the CRI had “an active relationship” with law enforcement, had informed for the police in the past, and had been financially rewarded for that information. He contends that, by paying the CRI in the past and by not telling the CRI not to search houses, law enforcement effectively acquiesced in the CRI’s search of Haney’s house. He also contends that the district court clearly erred by not recognizing that fact.

Haney relies on *U.S. v. Walther*, 652 F.2d 788, 792 (9th Cir. 1981). The Minnesota Supreme Court drew from *Walther* the two critical criteria that help inform whether a search by a private person is a government search. See *Buswell*, 460 N.W.2d at 618 (finding the *Walther* criteria “helpful” in that they direct the trial court to focus on the significance and impact of the government involvement in the search). In *Walther*, the district court found that an airline employee was a government agent when opening a package called a “Speed Pak” because the employee had previously been a Drug Enforcement Agency

(DEA) informant, had received rewards for other searches in the past, had a known pattern of opening Speed Paks without being discouraged from doing so, and reasonably expected a reward if the search turned up evidence. *Walther*, 652 F.2d at 792-93. The Ninth Circuit affirmed both the district court’s finding that the DEA acquiesced in and encouraged the informant to search Speed Paks and its conclusion that the search at issue was therefore not a private search. *Id.* at 793.

Assuming, without deciding, that *Walther*’s theory of constructive knowledge and acquiescence applies,¹ *Walther* does not compel the finding demanded by Haney on this record. In *Walther*, the Ninth Circuit upheld a district court’s finding of acquiescence based on the government’s knowledge of a “particular pattern of search activity dealing with a specific category of cargo” and its implicit encouragement of that activity. *Walther*, 652 F.2d at 793. The court “emphasize[d] the narrowness” of its holding, *id.*, and specifically distinguished the outcome in *Walther* from cases where an informant had merely been paid for providing information in the past, without a specific pattern of searches, *id.* at 793 n.2. Here, while there was evidence that the CRI had, in the past, provided information related

¹ This court is not bound by the decisions of any federal court other than the United States Supreme Court, even on questions of federal constitutional interpretation. *Citizens for a Balanced City v. Plymouth Congregational Church*, 672 N.W.2d 13, 20 (Minn. App. 2003) (“We are not, however, bound by any other federal courts’ opinion”); *Northpointe Plaza v. City of Rochester*, 457 N.W.2d 398, 403 (Minn. App. 1990) (holding that this court was not bound by a federal district court’s interpretation of the United States Constitution), *aff’d*, 465 N.W.2d 686 (Minn. 1991). *Walther* therefore does not bind this court—*Buswell* and *Jorgensen* do. And neither of those cases describes the sort of constructive knowledge and acquiescence that was determinative in *Walther*. See generally *Jorgensen*, 660 N.W.2d 127; *Buswell*, 460 N.W.2d 614.

to “entries of residences,” that single line of testimony did not clearly establish that the CRI’s conduct was part of a specific pattern. Thus, the district court did not clearly err by finding that the state did not know of or acquiesce in this search. Because the first critical factor was not found to exist, the district court did not clearly err in finding that the CRI was a private actor. The district court therefore did not err by denying appellant’s suppression motion.

II. The district court did not abuse its discretion by limiting the scope of Haney’s inquiry into the CRI’s identity and relationship to law enforcement.

Haney argues that the district court abused its discretion by limiting his discovery of information that may have demonstrated the government’s acquiescence in the CRI’s search. Haney contends that he should have been permitted to learn the CRI’s identity and should have been allowed to learn more about the CRI’s relationship with police. He challenges both the denial of his motion to compel discovery and the limits placed on his questioning of the officers at the hearing. Both issues are reviewed under an abuse-of-discretion standard. *State v. Underdahl*, 767 N.W.2d 677, 684 (Minn. 2009) (“A district court judge has wide discretion to issue discovery orders, and normally an order will not be overturned without clear abuse of that discretion.” (quotation omitted)); *State v. Rambahal*, 751 N.W.2d 84, 90 (Minn. 2008) (“[Appellate courts] review a district court order regarding disclosure of a confidential informant’s identity for an abuse of discretion.”).

An “established evidentiary privilege” protects against the disclosure of the identity of confidential informants. *State v. Luciow*, 240 N.W.2d 833, 839 (Minn. 1976). This

privilege protects “the public interest in effective law enforcement” by encouraging citizens to provide information to police with some reassurance that they will not be identified to the perpetrators of the reported crime. *Roviaro v. United States*, 353 U.S. 53, 59, 77 S. Ct. 623, 627 (1957). The privilege extends not only to the identity of the informant but also to information that will tend to reveal the identity of the informant. *Id.* at 60, 77 S. Ct. at 627.

The privilege, however, must give way if “there is a reasonable probability that the informant’s testimony [is] necessary to a fair trial.” *Syrovatka v. State*, 278 N.W.2d 558, 562 (Minn. 1979). Thus, where a defendant is challenging the validity of a search warrant, “he is entitled to some form of disclosure of an informant’s identity if he can establish that such disclosure is necessary to complete his evidentiary attack on the supporting affidavit.” *Luciow*, 240 N.W.2d at 839. To establish that disclosure is necessary, the defendant must make a prima facie factual showing of need, more than mere speculation. *Id.* (requiring a prima facie showing); see *State v. Ford*, 322 N.W.2d 611, 614 (Minn. 1982) (holding that disclosure of the informant’s identity was not necessary where the defendant’s theory of why disclosure was necessary depended on “mere speculation”); *Syrovatka*, 278 N.W.2d at 562 (“[C]ourts should not require in camera disclosure solely on the basis of speculation by the defendant that the informant’s testimony might be helpful.”).

Haney sought disclosure of the identity of the CRI and information that might tend to reveal the identity of the CRI (for example, a signed contract, if one existed). Haney could have been entitled to identifying information if he had made a prima facie factual showing that the evidence was necessary to ensure a fair trial. See *Luciow*, 240 N.W.2d at

839. Haney does not argue that he made such a showing, instead contending that he had a due-process right to the information because of the possibility that it might tend to establish that the CRI was an agent of the government. But because Haney sought identifying information based on what he asserted it might show—rather than what a prima facie showing established that it was likely to show—his argument depended on “mere speculation.” *See Ford*, 322 N.W.2d at 614 (requiring more than “mere speculation” to compel disclosure of identifying information). Thus, Haney did not make the requisite showing and was not entitled to overcome the informant privilege. The district court did not abuse its discretion by denying him access to identifying information.

Haney also argues that he was improperly barred from acquiring information that would not tend to reveal the identity of the informant and was therefore not privileged. At the hearing, the district court initially allowed only a narrow inquiry, making further inquiry contingent on the initial answers. But, ultimately, Haney was allowed to ask about the substance of the agreement under which the CRI was working, learning that the CRI was working for financial compensation and was not working on a deal to avoid prosecution. The testifying police officer explained the terms of payment when a CRI is working for monetary reward. And, after learning that the CRI’s past information had involved “entries of residences”—the single line of testimony that most strongly supported his theory—Haney did not further attempt to clarify whether there was a pattern. Haney has not identified nonprivileged information that he was not allowed to ask about at the hearing. Thus, if Haney failed to discover nonprivileged information that could have shown

a violation of his Fourth Amendment rights, it was because Haney failed to ask about it and not because the court ruled it to be outside the scope of the hearing.

In sum, Haney did not make the necessary showing to overcome the state's informant privilege and he was not prevented from discovering nonprivileged information. He therefore has not shown that the district court abused its discretion by denying his motion to compel discovery or by limiting his inquiry at the hearing.

Affirmed.