

STATE OF MINNESOTA

IN SUPREME COURT

A18-0761

Court of Appeals

Chutich, J.

State of Minnesota,

Appellant,

vs.

Filed: April 8, 2020
Office of Appellate Courts

Tyler James Dexter,

Respondent.

Keith Ellison, Attorney General, Saint Paul, Minnesota; and

Anthony C. Palumbo, Anoka County Attorney, Robert I. Yount, Assistant Anoka County Attorney, Anoka, Minnesota, for appellant.

Mark D. Kelly, Mark D. Kelly Criminal Defense LLC, Saint Paul, Minnesota, for respondent.

Adam E. Petras, Assistant Hennepin County Attorney, Minneapolis, Minnesota, for amicus curiae Minnesota County Attorneys Association.

S Y L L A B U S

1. The State's common law privilege to protect the identity of an informant does not apply to a request for the disclosure of non-identifying information about the informant.

2. When a defendant makes a request, the State must disclose non-identifying information about an informant that satisfies the requirements of Minnesota Rule of Criminal Procedure 9.01.

3. If the State asserts that the requested information about an informant, when viewed as a whole, will tend to reveal the identity of the informant, the district court must review the information in camera and fashion an order that limits the disclosure to information that does not tend to reveal the identity of the informant.

Affirmed.

OPINION

CHUTICH, Justice.

This case considers when the State must disclose non-identifying information about a confidential reliable informant's relationship with police and the informant's information-gathering activities. Relying on the observations of a confidential reliable informant, appellant State of Minnesota obtained a warrant to search the home of respondent Tyler James Dexter. During the search, police found firearms and several pounds of marijuana. The State charged Dexter with drug possession and sale crimes.

Dexter filed discovery and suppression motions, seeking information about the informant's relationship with police and means of entry into Dexter's home. The district court denied Dexter's motions. Specifically, the court relied on the State's common law privilege to withhold the identity of an informant and concluded that Dexter was not entitled to discover the informant's identity or any other information about the informant.

The court ultimately convicted Dexter of fifth-degree sale of a controlled substance. *See* Minn. Stat. § 152.025, subd. 1(1) (2018).

On appeal, the court of appeals held that the State's privilege did not apply to non-identifying information and that Dexter's specific request satisfied the requirements of Minnesota Rule of Criminal Procedure 9.01. Accordingly, the court reversed the denial of Dexter's request for non-identifying information and remanded to the district court with instructions to carefully fashion an order that only discloses non-identifying information. Because the State's common law privilege does not protect non-identifying information, Dexter's specific request satisfies the requirements of Rule 9.01, and the court of appeals' remand instructions protect the informant's identity, we affirm.

FACTS

In February 2017, Officer Jesse Standal filed a search warrant application to search Dexter's home and person. We quote the pertinent part of the warrant application in detail:

Your affiant was recently contacted by a Confidential Reliable Informant, CRI hereinafter, who indicated having knowledge of a party by the name of TYLER DEXTER who is involved in the distribution of controlled substances. Specifically, the CRI indicated that TYLER DEXTER is involved in the distribution of large quantities of marijuana and is commonly in possession of several pounds of marijuana at a time and also has several firearms commonly stored near the marijuana. The CRI indicated having previously observed handguns and rifles at the address and in the possession of TYLER DEXTER. . . . [S]everal other adults may also reside at the address but . . . the CRI has only observed TYLER DEXTER to distribute marijuana and possess firearms at the address, most commonly within the garage. This CRI has previously provided your affiant with information that was found to be accurate and reliable which has resulted in the recovery of large quantities of controlled substances as well as firearms.

. . . .

Within the past 72 hours your affiant was contacted by the CRI. The CRI told your affiant that they (the CRI) had been at TYLER DEXTER'S home address and had observed several pounds of what the CRI believed to be marijuana and also observed what the CRI believed to be an assault rifle present at the address.

The district court issued a search warrant based on the facts alleged in the application. Upon searching Dexter's home, police found several pounds of marijuana, marijuana wax, narcotics, firearms, and other items. The State charged Dexter with fifth-degree sale of a controlled substance.¹ Minn. Stat. § 152.025, subd. 1(1).

Dexter then filed two discovery motions in which he sought to know the actual identity of the informant, the contours of the relationship between the police officers and the informant, and the informant's information-gathering activities. According to Dexter, the non-identifying information was relevant to whether the informant was acting as an agent of the police and if so, whether the informant entered Dexter's home in violation of the Fourth Amendment of the United States Constitution. The State asserted its common law privilege to withhold the identity of an informant. Concluding that Dexter failed to establish the prima facie showing required to overcome the State's privilege, the district court denied Dexter's requests for disclosure.

Dexter then moved to suppress the evidence obtained during the search of his home, relying upon the same grounds as in his first two discovery motions. The district court also

¹ The State also charged Dexter with fifth-degree possession of a controlled substance. Minn. Stat. § 152.025, subd. 2(1) (2018). This additional charge does not impact the issue on appeal.

denied this motion, finding that the issues that Dexter raised had already been decided by the court's first order denying his discovery motions.

The parties then agreed to a stipulated-facts trial under Minnesota Rule of Criminal Procedure 26.01, subdivision 3. The court found Dexter guilty of fifth-degree sale of a controlled substance. *See* Minn. Stat. § 152.025, subd. 1(1).

Dexter appealed, arguing that the district court committed reversible error when it denied his pretrial requests for disclosure. The court of appeals acknowledged the State's common law privilege to withhold the identity of an informant. *State v. Dexter*, 929 N.W.2d 455, 460 (Minn. App. 2019) (citing *State v. Rambahal*, 751 N.W.2d 84, 90 (Minn. 2008)). Because Dexter failed to establish the prima facie showing required to overcome the State's common law privilege, the court of appeals concluded that the district court properly denied Dexter's request for disclosure of *the identity* of the informant. *Id.* But regarding Dexter's request for disclosure of non-identifying information, the court of appeals concluded that the district court's reliance on the common law privilege to withhold *the identity* of an informant was misplaced because the privilege did not apply to *non-identifying* information. *Id.* at 461.

The court of appeals also concluded that, under the unique facts of this case, the non-identifying information that Dexter requested "relate[d] to the case" under Minnesota Rule of Criminal Procedure 9.01. *Id.* at 460; *see also* Minn. R. Crim. P. 9.01, subd. 1 ("The prosecutor must, at the defense's request . . . allow access . . . to all matters within the prosecutor's possession or control that relate to the case, except as provided in Rule 9.01, subd. 3 . . ."). The court observed that the warrant application alleged that the informant

provided the police reliable information in past cases and had witnessed the criminal conduct while inside Dexter’s home, without describing the precise nature of the informant’s relationship with police or the manner in which the informant entered Dexter’s home.² *Dexter*, 929 N.W.2d at 461.

Accordingly, the court of appeals reversed and remanded to the district court to carefully “fashion the appropriate, limited order for disclosure.” *Id.* The court also instructed the district court “to allow Dexter the opportunity to file a new motion to suppress, if he chooses to do so, after the state complies with the disclosure order.” *Id.*

We granted the State’s petition for review.

ANALYSIS

The State makes three main arguments on appeal. First, it argues that the court of appeals erred when it concluded that the common law privilege to withhold the identity of an informant does not apply to disclosure of non-identifying information. Second, it claims that Dexter’s request to disclose non-identifying information was properly denied because it was based on mere speculation. Third, the State asserts that, even if individual items of non-identifying information are unprotected by the privilege, requiring disclosure of this information risks enabling a defendant to piece together the informant’s actual identity,

² One judge dissented from this part of the opinion on the grounds that Dexter failed to preserve the question of whether the informant entered Dexter’s home without consent and that disclosing the manner in which the informant entered the home would allow Dexter to identify the informant. *Dexter*, 929 N.W.2d at 462–66 (Johnson, J., concurring in part, dissenting in part).

thereby completely undermining the purpose of the privilege. We consider each argument in turn.

I.

The applicability of a privilege is a question of law that we review de novo. *State v. Expose*, 872 N.W.2d 252, 257 (Minn. 2015). Here, we must determine whether the State’s common law privilege to withhold the identity of an informant extends to withholding non-identifying information about the informant.

The State has a common law privilege³ that allows it “to withhold from disclosure the identity of persons who furnish information” to law enforcement officers. *Roviaro v. United States*, 353 U.S. 53, 59 (1957). The purpose of the privilege is to protect “the public interest in effective law enforcement.” *Id.* The privilege recognizes that, by preserving the anonymity of citizens who report crimes to police, these persons are encouraged to perform the duty of reporting. *Id.*

When defendants seek to discover the *actual* identity of an informant, the privilege applies, and they must “establish that such disclosure is necessary to complete [an] evidentiary attack on the supporting affidavit.” *State v. Luciw*, 240 N.W.2d 833, 839 (Minn. 1976). In those cases, we balance “the defendant’s right to prepare a defense and the public’s interest in effective law enforcement.” *State v. Rambahal*, 751 N.W.2d 84, 90 (Minn. 2008).

³ Some decisions refer to this privilege as the “informer’s privilege.” As the United States Supreme Court clarified in *Roviaro v. United States*, however, this privilege is best described as one that is granted to the government. 353 U.S. 53, 59 (1957).

Unlike our prior decisions on this privilege, however, Dexter seeks information *other* than the actual identity of the informant.⁴ This request therefore requires us to consider the scope of the privilege as it relates to non-identifying information.

The scope of the privilege is “limited by its underlying purpose.” *Roviaro*, 353 U.S. at 60. That is, when “the disclosure of the contents of a communication will not *tend to reveal* the identity of an informer, the contents are not privileged.” *Id.* (emphasis added). Because the privilege does not apply to information that does not “tend to reveal” the identity of an informant, *id.*, we hold that the court of appeals properly concluded that the State’s common law privilege does not apply to non-identifying information.⁵

II.

Next, we consider whether the court of appeals erred in concluding that the non-identifying information that Dexter requests “relate[s] to the case” as required by Minnesota Rule of Criminal Procedure 9.01. The State argues that Dexter’s request was

⁴ Dexter argues that the district court erred in denying his motion for disclosure of the actual identity of the informant. But the district court denied this request, the court of appeals affirmed that decision, and Dexter did not file a cross-petition for review of this issue. Accordingly, Dexter has forfeited this argument, and we need not consider it here. *See State v. Hunn*, 911 N.W.2d 816, 821 (Minn. 2018).

⁵ The State asserts that “[t]he appropriate time to disclose informant information, both identifying and non-identifying, is after a defendant has met his threshold burden” and the court has offered procedural protections, citing to *McCray v. Illinois*, 386 U.S. 303 (1967) and *State v. Luciow*, 240 N.W.2d 833 (Minn. 1976). But those cases discussed disclosure of the *actual* identity of an informant.

Because we conclude that the privilege does not apply to non-identifying information, it follows that the prima facie showing required for the disclosure of the identity of an informant, *see Luciow*, 240 N.W.2d at 839, does not apply to a request for disclosure of non-identifying information about the informant.

based on mere speculation and that Dexter failed to “create any record showing a need for the information.” We disagree.

Rule 9.01 serves as a broad disclosure rule for prosecutors. Upon the request of a defendant, the rule requires a prosecutor to disclose information that “relate[s] to the case” and is within the possession and control of the prosecutor. Minn. R. Crim. P. 9.01, subd. 1. We must therefore consider whether the non-identifying information requested by Dexter satisfied this requirement of Rule 9.01.

Specifically, Dexter sought the following information:

(1) how long . . . the [informant] has work[ed] for law enforcement
(2) whether or not a written contract to cooperate was signed by the government and the informant (3) what kind of consideration was received by the [informant] (4) whether or not *any* law enforcement officer communicated with and encouraged the [informant] to conduct surveillance of [Dexter] or others (5) the manner in which the [informant] was alleged to have made observations in the residence of [Dexter].

For the reasons that follow, we conclude that this information “relate[s] to the case” under Rule 9.01.

The Fourth Amendment prohibits unreasonable searches. U.S. Const. amend. IV. But the Fourth Amendment applies *only* to state action; it does not apply to searches by private persons. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). The State may therefore use evidence obtained through a private search. *See Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

But if a private person acts as an agent of the State when conducting a search, then the Fourth Amendment applies. *State v. Buswell*, 460 N.W.2d 614, 618 (Minn. 1990). A search conducted without a warrant is *per se* unreasonable and “subject to only a few

specifically established and well delineated exceptions,” one of which is consent. *State v. Hanley*, 363 N.W.2d 735, 738 (Minn. 1985) (citations omitted) (internal quotation marks omitted). When information obtained through an illegal search serves as probable cause for a search warrant, the evidence gathered in executing the search warrant is inadmissible under the exclusionary rule. *Cf. Segura v. United States*, 468 U.S. 796, 815 (1984) (stating that suppression of evidence is justified if the evidence is “the product of illegal government activity”) (citation omitted) (internal quotation marks omitted).

To determine whether a person acted as a government agent, the court must, on a case-by-case basis, consider “all the facts and circumstances relative to the search.” *Buswell*, 460 N.W.2d at 618. “It is only when the government takes some type of initiative or steps to promote the search, that a private citizen is deemed to be an agent or instrument of the government.” *Id.* at 619. This determination is a question of fact for the district court. *State v. Jorgensen*, 660 N.W.2d 127, 131 (Minn. 2003).

The warrant application here alleged that the informant had provided the police reliable information in past cases and that the informant witnessed the criminal conduct while inside Dexter’s home. Notably, the application did not describe the precise nature of the informant’s relationship with the police or the manner in which the informant entered Dexter’s home.

Because the Fourth Amendment applies to a search when a private person acts as an instrument or agent of the police, Dexter’s request for non-identifying information was not based on mere speculation. Instead, it was based on a warrant application that alleged a “past relationship” and “home entry,” but failed to describe the nature of the relationship

or the form of entry. And, of course, a home is a place where Fourth Amendment rights are at their zenith. See, e.g., *State v. deLottinville*, 890 N.W.2d 116, 120 (Minn. 2017). Under the unique facts of this case, we conclude that the non-identifying information that Dexter requests “relate[s] to the case”⁶ under Rule 9.01 because it is necessary to resolve a material issue: whether the informant acted as a police agent and, if so, whether the informant entered Dexter’s home in violation of the Fourth Amendment.

III.

Finally, we consider the State’s concerns about the scope of the court of appeals’ remand instructions. The State warns that the seemingly straightforward remand instructions will create “a slippery slope with no end in sight.” According to the State, if it must disclose various items of non-identifying information, a defendant may be able to piece together the informant’s identity, creating a “threatening and dangerous” scenario for confidential informants. It also cautions that information that might be non-identifying in one case might be identifying in another. Because the remand instructions fail to explain how, and by whom, the line between identifying and non-identifying information is drawn, the State contends that the instructions are flawed.

⁶ We recognize that not all cases will concern information about the informant that “relate[s] to the case.” Our conclusion is limited to the facts presented here: a warrant application that alleged that the informant provided the police reliable information in past cases and had witnessed the criminal conduct while inside the defendant’s home, without describing the precise nature of the informant’s relationship with police or the manner in which the informant entered the defendant’s home.

The State's legitimate concerns are alleviated by available procedural protections that can prevent disclosure of an informant's actual identity.⁷ In cases when the State contends that the identity of an informant may become apparent through disclosure of certain non-identifying information, a district court should conduct an in camera review of the information and fashion a limited order for disclosure that protects the identity of the informant. This procedure is currently used to determine whether the *actual* identity of an informant must be disclosed. *See, e.g., State v. Ford*, 322 N.W.2d 611, 614 (Minn. 1982). We believe that this in camera review would be effective in enabling the court to craft an order allowing disclosure of non-identifying information in a way that protects an informant's identity.

On remand, if the State asserts that the individual pieces of non-identifying information requested by Dexter, when viewed as a whole, will tend to reveal the identity of the informant, the district court should conduct an in camera review of the information to determine whether and how it should be disclosed to Dexter. But if the State does not so contend, the district court should order disclosure by whatever process is reasonable under the specific facts of the case. This process might include a contested omnibus hearing at which the police officer testifies about the nature of any agency relationship between the informant and police. Given the procedural protections that exist to prevent

⁷ We also note that certain disclosure concerns may be entirely avoided if the police include in the warrant application information about whether the police had knowledge of the informant's actions or whether the defendant consented to the informant's entry into the home. Moreover, police investigative work corroborating the informant's tip before officers seek a warrant may further diminish the need for disclosure.

disclosures that may tend to reveal an informant's identity, we conclude that the court of appeals' remand instructions are adequate and appropriate.

CONCLUSION

For the foregoing reasons, we affirm the decision of the court of appeals.

Affirmed.