

A22-1073

**STATE OF MINNESOTA
IN SUPREME COURT**

STATE OF MINNESOTA,

Appellant,

vs.

MARK MICHAEL MOSLEY,

Respondent.

**AMICUS BRIEF ON BEHALF OF THE MINNESOTA ASSOCIATION OF
CRIMINAL DEFENSE ATTORNEYS**

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INTRODUCTION

The Minnesota Association of Criminal Defense Lawyers¹ (“MACDL”) submits this brief in favor of Respondent. The Minnesota Association of Criminal Defense Lawyers is a non-profit state-wide organization of defense lawyers seeking to uphold Constitutional rights and ensure justice for all, particularly from unchecked power of the government against the rights of individuals.

MACDL supports the continued use of judicial discretion when evaluating the *Ross* factors and the reliability of information provided by confidential reliable informants (“CRIs”). *State v. Ross*, 676 N.W.2d 301 (Minn. App. 2004). Corroboration is the most important factor in evaluating whether an informant is reliable because it is verifiable. Law enforcement wields great power in how they choose to work with informants and present a case. With great power comes great responsibility, which is best achieved through transparency and accountability. MACDL supports the lower courts’ decisions upholding longstanding case law; finding the information provided by the informant lacking when evaluating totality of the circumstances, correctly suppressing the gun evidence as fruit of the poisonous tree.

¹ Undersigned counsel are the sole authors of this brief and received no monetary contributions to the preparation or submission of this brief.

ARGUMENT

I. PRIOR RELIABLE INFORMATION PROVING THE VERACITY OF A CRI DOES NOT DEMONSTRATE A BASIS OF KNOWLEDGE FOR ALL FUTURE TIPS OF CRIMINAL ACTIVITY; CORROBORATION IS REQUIRED.

In 2020, Minnesota and our nation faced a great racial reckoning following the murder of George Floyd. The easiest way to rebuild trust in our country's law enforcement and governance continues to be transparency. It comes at no financial cost and instantly bolsters the legitimacy and authority of law enforcement to effectively serve our communities. Corroboration of facts reported by informants is the sole mechanism to ensure the veracity of what law enforcement presents as fact.

Corroboration does not require that the name or identifying information of an informant; it does require something more than easily obtainable facts as a safeguard before someone's person, home, or vehicle is searched by law enforcement without a warrant. Harvard professor Alexandra Natapoff recently discussed reforms on working with informants and establishing more transparency and accountability with law enforcement:

The most important is a general rejection of the culture of secrecy that we have permitted the informant world to take advantage of. For so long, law enforcement has told us without proof, without demonstration, that they need utmost secrecy to create and reward and run informants, and that this is the only way that they'll be able to use informants to catch the big fish. And we know that not to be true. We know that more transparency, supervision, regulation, accountability does not defeat the government's ability to use informants. Indeed, for all its flaws, the FBI has quite substantial internal and external regulations, and they run informants just fine. So, once we let go of the mythology of secrecy, then we can make sensible decisions about the kinds of data that the public and legislators and courts need to know.

Neal, Jeff. Interviewing Natapoff, Alexandra, on her book: *Falling in Love with Your Rat: The Criminal Informant System in the US*. (Nov. 18, 2022). Accessed at: <https://hls.harvard.edu/today/falling-in-love-with-your-rat-the-criminal-informant-system-in-the-u-s/>

Here, where the information provided by the informant was readily obtainable or observable (that a person was at a public location, in a vehicle make/model anyone in the general public could observe) the District Court was correct in finding that information lacking.² This would be akin to an informant saying, “I see a guy I know as Bob Smith-he’s in his blue truck at Holiday gas station at this address, and I saw him do something illegal.” Any information on how the informant knew Bob, how long he knew Bob, or even if he could give an address of where Bob lived or if he had kids or a dog would give some credibility to support law enforcement’s reliance on the informant to stop and search without revealing the informant’s identity.

When an informant’s identity is kept secret, the need for corroborating facts to support the information provided is necessary because there is no other way for a judge to establish the truthfulness of the source. *Wiley* was cited by the state in support of its argument that the lower courts should have given greater weight to the track record of a CRI in a totality of circumstances test. *State v. Wiley*, 366 N.W.2d 265 (Minn. 1985). The search conducted in *Wiley* was not upheld on the track record of the CRI alone, but contained corroborating details that are lacking here. In *Wiley*, the informant stated that the suspect lived with a woman named Claire, and before executing a warrant, police

² Respondent and Appellant have briefed the facts extensively. MACDL supports the facts articulated by Respondent and will not unnecessarily recite them again.

corroborated that detail by running the plates on a vehicle parked at the target home finding it to be registered to Claire. *Wiley* at 268. More importantly, the cases³ the State relies on to posit that the track record of a CRI carries the most weight when analyzing the totality of the circumstances of a stop and search pre-date *Ross*, and the recent events of our evolving society working towards more transparency between law enforcement and the communities they serve. 676 N.W.2d 301 (Minn. App. 2004).

Appellant argues that the CRI's track record of prior reliable information was met simply by the sergeant stating prior reliable information had been provided, and the District Court agreed, but found that the totality of the circumstances of the case, using the *Ross* factors was lacking. *Id.* Where there was no way for the Court to know the reliability of the informant, other than the officer's personal vouching of the informant, reliability should not be considered met:

Sgt. Schroeder: This specific informant has always been a paid informant.

Matthew Elsen: Okay. And do-well, you said before that they were reliable. Do you keep track of like hits and misses with these informants, like a batting average so to speak?

Sgt. Schroeder: Certainly.

Matthew Elsen: Do you ever release that information?

Sgt. Schroeder: No, sir.

³ *State v. Maldonado*, 322 N.W.2d 349, 351 (Minn. 1982) (which also relied on controlled buys); *State v. Wiley*, 366 N.W.2d 265, 269 (Minn. 1985); *Adams v. Williams*, 407 U.S. 143, 146 (1972).

Matthew Elsen: Okay. So the Court doesn't actually have a way to know this, right?

Sgt. Schroeder: Not here in open court.

T.⁴ at 40.

No evidence was received outside of open court, either, to support the reliability of the alleged informant. Sgt. Schroeder conceded that he did not put anything in his report “as to how this person had personal knowledge.” T. at 40. If the state had wanted to bolster the credibility of the informant, it could have offered Sgt. Schroeder’s documentation of working with the informant through redacted materials with dates and what that information led to generally, or even in an in-camera review of the work or an in-camera questioning of the sergeant to meet this prong.

Informants who have provided good information in the past may have also provided bad information, and the informant here had an incentive to provide any information they could, true or false, because they were paid. Sgt. Schroeder also testified that cases could not be charged or be resolved more favorably depending on the work of informants. T. at 39.

Informants in Minneapolis have also been given immigration status, even when they were here without status, and were known to be criminal gang members. See, for example, Unpublished Order, 27-CR-11- 38026, *State v. Erick Larios-Ramirez*. Hennepin County District Court (November 22, 2013). Informants working with law enforcement

⁴ “T” herein refers to the transcript of the evidentiary hearing on July 13, and 15, 2022.

are unlike concerned citizen informants; they may be criminals themselves and have other incentives to give information or lie. This is another reason corroboration of their information to support its veracity is so important.

The District Court analyzed the facts and found that Sgt. Schroeder did not include any information in his report about how the CRI would have the knowledge the CRI presented to him, and that corroboration was lacking. T. at 76.

II. WHEN THE LAW IS APPLIED CORRECTLY, AS HERE, THE COURT SHOULD GIVE CONSIDERABLE DEFERENCE TO A TRIAL COURT’S FACT-SPECIFIC RESOLUTION OF AN ISSUE.

In 2021, the same officer, Sgt. Andrew Schroeder made national news as possibly having fabricated having ever worked with an informant at all.⁵ That same year, the Court of Appeals found information provided by an informant through Sgt. Schroeder lacking. *State v. de Sala de la Rosa*, No. A20-0360, 2021 WL 318035, at *8 (Minn. Ct. App. Feb. 1, 2021).

District court judges see the same officers in their communities and courtrooms and become familiar with their reputations for truthfulness or their lack thereof. District court judges are in the best position to analyze the facts before them and apply the law outlined in the *Ross* factors. 676 N.W.2d 301 (Minn. App. 2004). The *Ross* factors were

⁵ Mannix, Andy. *Minneapolis drug case falls apart, raising questions about existence of secret informant*. Frontline, PBS in partnership with The Star Tribune. May 15, 2021. “In a Hennepin County case last year, a judge ordered prosecutors to disclose details of an informant in a sealed affidavit, following allegations that Minneapolis officer Andrew Schroeder fabricated where he got a tip that led to drug charges for a man named Cedric Shepherd. Instead, prosecutors dropped the charges.”

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Certificate of Brief Length

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Michael Mark Mosely,

Respondent.

I hereby certify that this brief conforms to the requirements of Minn. R. App. P. 132.01, subd. 1 and 3, for a brief produced with proportional or monospaced font. The length of this brief is 1,795 words. This brief was prepared using Microsoft Word version 2301.

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