No. 21-7240

ORIGINAL

FILED
JAN 13 2022
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT CARR, JR — PETITIONER
(Your Name)

vs.

STATE OF WISCONSIN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

COURT OF APPEAL
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ROBERT CARR, JR
(Your Name)

2925 Columbia Drive
(Address)

Portage, WI 53901-900
(City, State, Zip Code)

N/A
(Phone Number)

## QUESTION(S) PRESENTED

(1) Did the lower courts erroneously employed the wrong legal standard

(2) Was the Court Of Appeal decision in conflict with controlling opinion of the United States Supreme Court or the Supreme Court or other Court Of Appeals decision?

**LIST OF ALL PARTIES**

- Hon. Janet C. Protasiewicz

Circuit Court Judge

901 N. 9th St.

Milwaukee, WI 53233-1425

- John Barrett

Clerk of Circuit Court

Room 114 821 W. State Street

Milwaukee, WI 53233

- John D. Flynn

Milwaukee County District Attorney Office

821 W. State St Rm 405

Milwaukee, WI 53233-1427

- Anne Christenson Murphy

Winn S. Collins

Assistant Attorney General

P.O. Box 7857

Madison, WI 53707-7857

## TABLE OF AUTHORITIES CITED

CASES PAGE NUMBER



## STATUTES AND RULES



## Constitutional and statutory provisions involved

RELATED CASES

McLawhorn v. State of N.C 484 F.2d 1 (1973)

Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957)

State v. McCallum 208, Wis. 2d 463, 468, 561 N.W. 2d 707 (1997)

State v. McAlister, 2018 WI 34, 11-12, 380 Wis. 2d 684, 696-97, 911 N.W. 2d 77, 83

## TABLE OF CONTENTS



## INDEX TO APPENDICES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

## OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the Circuit court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

## JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[X] For cases from **state courts:**

The date on which the highest state court decided my case was October 18, 2021. A copy of that decision appears at Appendix C.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## STATEMENT OF THE CASE

My case concise with the McLawhorn v. State of N.C 484 F.2d 1 (1973), in the current case in this court, both officers admitted to not putting the female informant in their reports. On February 23, 2017 my trial attorney Ann T. Bowe filed a motion to compel the state to come forward with all Informants, names, address, and numbers, who participated and who information was relied on, for preparation of trial. The Milwaukee DA Daniel Murphy gave the trial attorney one name, no address, or number. Ms. Bowe withdrew and I was appointed counsel named Joseph Kennedy, upon Mr. Kennedy, and I listening to the recordings of the controlled buys, we heard a female voice. During trial Mr. Kennedy question the two officers about the female, and "why she wasn't in any of the report", both officers explained "how the informants came as a pair, and work together", but couldn't explain why she wasn't in any of their reports. Trial attorney ask "who search the female", both officers stated "they did", trial attorney go on to question Officer Schmidt about writing reports and making sure the report is accurate. Officer Schmidt explain "how important it is to include every detail when writing a report", but in yet still; he fail to include the female informant. The female informant went through protocol preparing to do a controlled buy, she knew the calls were being recorded, she agree to wear a wire, and had an eye toward the prosecutor when she was participating in these drug buys.

In McLawhorn v. State of N.C 484 F.2d 1 (1973), In *Roviaro* it was held error for the trial court to deny, prior to trial, an accused's demand for a bill of particulars as to a participating informant's identity and address where the accused was charged with illegal transportation and sale of heroin. The Court noted

that the informant "helped to set up the criminal occurrence and had played a prominent part in it." 353 U.S. at 64, 77 S.Ct. at 629. The Court concluded that when the informant's name and address were thus requested, the prosecution should have been required to supply the information or suffer dismissal of that count. Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957); Miller v. United States, 273 F.2d 279 (5 Cir. 1959); Gilmore v. United States, 256 F.2d 565 (5 Cir. 1958). This is not to say that the informant's mere physical presence at the scene of the alleged crime would be sufficient to hold him a participant and thus affect the non disclosure privilege. Miller v. United States, *supra.*

In the current case, the female informant did participate in the drug buy knew the transaction was being recorded and the officers used the recorded information at my trial, in which I was convicted, and her identity should have been disclosed to defense, for she was a transactional witness to the events that took place, and to bring to the court's attention, the informant the DA exposed to the defense, came to my post-conviction counsel Diane C. Lowe with a sign sworn Affidavit stating I am not the person who he dealt with. Also see; in Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957) it states;

The seemingly impossible task of balancing these interests without being aware of the relevancy of the information possessed by the informant, be he merely a tipster or a participant, can be obviated by utilizing an in camera hearing. The Third Circuit has approved such hearings in informant cases and has described the procedure in the following language:

"[T]he trial judge conducted an in camera confrontation with the informer, who was made to take the oath and testify as to any relevant knowledge he had pertaining to the crime. A record of that in camera

session was transcribed and sealed so that only an appellate court would have access to its contents. The advantage of the procedure is that it enables the court to view with a keener perspective the factual circumstances upon which it must rule and attaches to the court's ruling a more abiding sense of fairness than could otherwise have been realized."

United States v. Jackson, 384 F.2d 825, 827 (3 Cir. 1967). Under this procedure the defendant is not compelled to show need and the trial court is not left to mere speculation as to the materiality of the informant's testimony. In the current case, either CI was put in front of any judge to take an oath, and testify as to any relevant knowledge he, or she had pertaining to the crime. "The state argues that my claim is conclusory and meritless, and I speculates about what this person might have said, (*Appendix B Court Of Appeals Decision).* This unidentified female informant told police I dealt drugs, made confidential telephone calls, attempt to arrange sale, engaged in negotiation for sale, took delivery drug, pass it to officer, and gave their account of the event to the investigating Officers; so I was entitled to disclosure of identity of informant, *U.S.C.A. Const. Amend. 14; G.S.N.C. 90-88,* plus my trial attorney Ms. Bowe filed a motion to compel. In McLawhorn v. state of N.C. 484 F 2d 1 (1973), the judgement of the district court was reversed and the case was remanded with directions that petitioner be released and discharge from custody unless the state of North Carolina shall elect to retry him with a reasonable period of time to be fixed by the court. In the leading case has the same issues as Mr. McLawhorn,

- (1) was there an unidentified informant "yes"

- (2) did this informant partake in the controlled buys, by setting up the buy, agreeing to wear a wire, that she knew was recording, make a statement to officers about the event of the buy "yes"
- (3) did the state refuse/withheld the identity of the female informant "yes"
- (4) did my attorney compel the state to reveal all informants who participated in the controlled buys for preparation of trial "yes"
- (5) did the informant negotiation price for drugs, took the drugs and pass it to law enforcement officers " yes",
- (6) was I convicted "yes".

In the McLawhorn case, same issue the court refused to reveal identity of informant, who arrange the sale, made face-to-face contact, negotiation for sale, took the drugs and pass it to law enforcement officers, and was convicted. The refusal to reveal the identity of a participant in the offenses charged constitutes a denial of fundamental fairness required by the Fourteenth Amendment.

In *Roviaro* it was held error for the trial court to deny, prior to trial, an accused's demand for a bill of particulars as to a participating informant's identity and address where the accused was charged with illegal transportation and sale of heroin. The Court noted that the informant "helped to set up the criminal occurrence and had played a prominent part in it." 353 U.S. at 64, 77 S.Ct. at 629. The Court concluded that when the informant's name and address were thus requested, the prosecution should have been required to supply the information or suffer dismissal of that count.

*Roviaro* indicates that if the participation of the informant in the transaction was such as to make him a relevant and material witness to the sale then his testimony should be available to the accused on all charges arising from that criminal occurrence. 353 U.S. at 63, 77 S.Ct. 623.

Roviaro v. United States, supra; Portomene v. United States, 221 F.2d 582 (5 Cir. 1955). In both of these cases the informant was the unidentified party who was charged in the indictment as the buyer of drugs. Hence, "it was evident from the face of the indictment that . . . [the informant] was a participant in and a material witness to that sale." Roviaro v. United States, 353 U.S. at 65 n. 15, 77 S.Ct. at 630. The Court in *Roviaro,* however, noted that the disclosure of the informant's identity is appropriate even when he "is not expressly mentioned . . . [in the indictment, if the] charge, when viewed in connection with the evidence introduced at the trial is so closely related to . . . [the informant] as to make his identity and testimony highly material." 353 U.S. at 63, 77 S.Ct. at 629.

leading case involving the right of an accused to require disclosure of the identity of an informant is Roviaro v. United States, 353 U.S. 53, 77 S. Ct. 623, 1 L.Ed.2d 639 (1957). There the Court characterized the problem as one calling for the balancing of the public interest in protecting the flow of information respecting criminal activities against the individual's right to prepare his defense. No fixed rule with respect to disclosure was established by the Court. Whether nondisclosure is warranted must depend upon the particular circumstances of each case, taking into consideration the crime charged and the possible defenses, the possible relevance and significance of the informant's testimony, and other related

factors. Roviaro v. United States, supra, 353 U.S. at 62, 77 S.Ct. 623; Miller v. United States, 273 F.2d 279, 281 (5 Cir. 1959); Gilmore v. United States, 256 F.2d 565, 566 (5 Cir. 1958).

The privilege of nondisclosure must give way where disclosure is essential or relevant and helpful *5 to the defense of the accused, lessens the risk of false testimony, is necessary to secure useful testimony, or is essential to a fair determination of the case. Roviaro v. United States, supra; Miller v. United States, *supra;* Gilmore v. United States, *supra*; Portomene v. United States, 221 F.2d 582 (5 Cir. 1955); Sorrentino v. United States, 163 F.2d 627 (9 Cir. 1947). Limitations on the privilege of nondisclosure arise from the Fourteenth Amendment's requirement of fundamental fairness to the accused. Roviaro v. United States, *supra;* Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056, 23 L.Ed.2d 707 (1969).

## STATEMENT OF CASE

April 11, 2018 the Jury found me guilty of 2 counts of delivery of heroin (P.T.A.C), and gun charge, May 1, 2018 I was sentence. On March 30, 2019, my appeal attorney Diane C. Lowe receive a call from the state's star witness saying he want to recant his statement against me. Nacarreonta Carr had made the following recantation to Investigator Kevin Mathewson "On July 14, 2016 my father Robert Carr Jr did not have any involvement in the delivery of heroin on the above date. I went alone, and met the CI, he did not direct me to sell or delivery heroin to the CI, I lied in the courtroom to get a lesser sentence. My father was sleeping when I did the deal. On July 29, 2016 I gotten a couple calls that day from the CI asking me to deliver 3 grams heroin for 255, I told him to meet me on 20th Layton, at the time I went to do the deal my father was at home in bed". This recant statement is consistence with Nacarreonte first 2 interviews with the lead detective Jason Baranek, both interviews was recorded, and done at the Oak Creek police department. The DVD is label Nacarreonta Interview Dated 10/17/2016 case #10-008864 883 OCPD, and in this interview the following was stated: Mr. Baranek ask "You run dope for your dad" and Nacarreonte reply "no I don't I swear to you". Throughout the entire interview Mr. Baranek kept asking Nacarreonte do I sell drugs and Nacarreote kept denying I do. The second interview was done on August 2, 2016, right after Mr. Baranek had serve a search warrant and taking us down to OCPD to be interviewed. In this interview Mr. Baranek told Nacarronte I got you delivering heroin, and Tay said "no I don't deliver any heroin for nobody, I be with my cousin JW, that's who I be with, and I don't be with my pops".

On August 1, 2018 the CI saw me at a prison (Fox Lake Correctional Institution), he approach me and said "I hear what happen, and the police lied, I never told them anything about you". I brought this to my lawyer and she sent the same Investigator KM to interview the CI and he gave the following affidavit: "I NN had never done any deals with Robert Carr, by phone or in person, on both dates of July 14, 2016 and July 29 2016 I did not meet with Robert Carr, I never spoken to him over the phone, on both dates I set up the transactions with Nacarreonte Carr, who was with another person, but it wasn't Robert Carr, I only dealt with Nacarreonte on both deals none involve Robert Carr" this statement is consistence with the statement the CI gave to Police Officer Schmidt of the Wauwatosa Police Department right after the July 29th control buy Report #16-16681, the CI said "he gotten the drugs from Tay and in return he gave him the money", and also on the recordings of the July 29th drug buy, you hear Nacarreonte telling the CI, " I got that work n*** give me my money, and the CI reply, well pass it to me" (CCR_001.wav 39:54 of 46:39). This statement is not a recant, the CI never testified, and it is corroborating with N.CARR recantation and the 2 interviews he gave to lead detective Baranek, N.Carr saying I wasn't there and he dealt with the CI by himself, and he was with somebody else, the CI saying the same thing, N. CARR was with somebody else at the time he gotten the drugs from him, on July 29th and by himself on July 14th.

For a new trial base on newly discovered evidence, the defendant must prove, by clear and convincing evidence, that; 1) the evidence was discovered after conviction: 2) the defendant was not negligent in seeking evidence: 3) the evidence is material to an issue in the case; and 4) the evidence is not merely cumulative. If the defendant meets this burden, the circuit court must determine whether a reasonable

probability exists that a different result would be reach in a trial, State v. Armstrong, 2005 WI 119, 283 Wis. 2d 639, 700 N.W. 2d 42, reasonable doubt as to the defendant's guilt.

The newly discovered evidence was discovered after my conviction, I was not negligent in discovering the evidence, it is certainly material to the issues in the case, and it is not merely cumulative, there was no way I could have known about the recantation or the CI affidavit during trial, the DA had him on the state's witness list but decided not to call him. Under the State v. McAlister,2018 WI 34, 11-12, 380 Wis. 2d 684, 696-97, 911 N.W. 2d 77,83,corroboration requires newly discovered evidence that (1) there is a feasible motive for the initial false statement; The state star witness admitted he lied to get a lighter sentence, and (2) there are circumstantial guarantees of the trustworthiness of the recantation; The Court Of Appeal brought State v. Ferguson, 2014 WI App 48,31,354 Wis. 2d 253, 847 N.W.2d 900 (Appendix B page16 line36) for the circumstantial guarantee of trustworthiness, ; There's recordings N.Carr made that's consistence with the recant statement, also the CI affidavit, who never testified, confirming of the events that took place on the July 14 and 29 control buys, clearing me of the 2 drug deals. The Court Of Appeals states, "We conclude that Carr has fail to undermine the testimony presented at trial (Appendix B page 18 line39); The state's case was built on Nacarreonte trial testimony and the CI statements, the officers in the case never ID me as the driver, or showed me directing people to do drug deals through the phone, or in person. Trial transcripts dated April 10th Jason Baranek (Page 53, line 6- 7) DA Murphy ask "can you see the driver" J.Baranek reply, "Not a positively ID". Surveillance team officer Mendola who was monitoring the house on south 6 street in Milwaukee on July 29th control buy said "I didn't know who

they were, I just knew it was two different, people" (Trial Transcripts page 53, line1, and 2). Officer Schmidt was ask by DA Murphy "have you had personal contact with Robert Carr through the investigation", Mr. Schmidt reply "No" (TTR page76 line 14-16). My attorney Mr. Kennedy ask Mr. Baranek on cross-ex, "your basis of knowledge for how this would be Robert Carr voice on the phone was from the confidential informant; correct, officer Baranek reply "yes". (TTR page65, line 14).

In State v. McCallum 208, Wis. 2d 463, 468, 561 N.W. 2d 707 (1997), the court concluded that the circuit court "employed the wrong legal standard when determining that there was not a reasonable probability of a different outcome. The courts explained that the proper standard asked whether there was a reasonable probability that a jury, looking at both the accusation and the recantation, would have a reasonable doubt respecting the defendant's guilt. The McCallum concurrence suggested that, when face with a recantation and an accusation, the circuit court does not determine which of the two statements is more credible the circuit court is not to act as a thirteenth juror. State v. McCallum,*208 Wis. 2d 463,490,561 N.W. 2d 707* (1997) (Abrahamson, L.J.,concurring) In State v. Guerard 2004 WI 85, 49, 273 Wis, 2d 250, 682 N.W. 2d 12 (explained that it was the proper role of the jury to determine the weight and credibility), also Ramonez v. Berghuis, 490 F.3d 482, 490 (6th cir 2007) stating "Our Constitution leagues it to the jury, not the judge to evaluate the credibility of witness in deciding a criminal defendant's guilt or innocence.

In State v. McCallum, 208 Wis. 2d 463, 468, 561 N.W. 2d 707 (1997) ¶ 33 SHIRLEY S. ABRAHAMSON, Chief Justice (concurring).

*487 I discuss below the standard of review of the fifth element of the test, whether a reasonable probability exists of a different result in a new trial.

¶ 59 The prejudicial error test states, in language similar to that used in manifest injustice cases, that an error is prejudicial and reversal of a conviction is required if "there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable *490 doubt respecting guilt." Strickland v. Washington, 466 U.S. 668, 694–95, 104 S.Ct. 2052, 2068–69, 80 L.Ed.2d 674 (1984), discussed in State v. Dyess, 124 Wis.2d 525, 543, 370 N.W.2d 222 (1985). Reasonable probability for purposes of prejudicial error is not strictly outcome determinative. Reasonable probability does not mean that it is more likely than not that a new trial would produce a different result.11 The circuit court does not determine which of the two statements is more credible; the circuit court is not to act as a thirteenth juror.12 "[A] reasonable probability of a different outcome is one that raises a reasonable doubt about guilt, a 'probability sufficient to undermine confidence in the outcome' of the proceeding." Dyess, 124 Wis.2d at 544–545, 370 N.W.2d 222, quoting Strickland, 466 U.S. at 694, 104 S.Ct. at 2068.

¶ 60 I conclude that a circuit court may usefully apply the prejudicial error inquiry to the fifth element of our recantation test. Thus when a witness' recantation and other new evidence undermine the circuit court's confidence in the correctness of the outcome at the original trial or hearing, a new trial should be ordered.

As the court of appeals explained in the present case: "It is the jury's role to determine which of the two contradictory statements it believes." State v. McCallum, 198 Wis.2d 149, 159, 542 N.W.2d 184 (Ct.App.1995). See also Terrance J.W., 202 Wis.2d at 502, 550 N.W.2d 445.

## REASON FOR GRANTING THE PETITION

*Supreme Court Rule 10(b)*

- A state court of last resort has decided an important federal question in a way that conflicts with the decision of another State Court of last resort or of a United States Court Of Appeals.

- A state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this court.

## CONCLUSION

I asserts my representation, trial, sentencing, and conviction, violated my right guaranteed under the 4th, 5th, 6th, 8th, and 14th Amendment to the United State Constitution; Article I, sections, 1, 2, 7, 8, 9, and 11 of the Wisconsin Constitution, and ask for a Reversal, for the real controversy has not been tried, - and necessitates remedy in the interest of justice. There for the petition for writ of certiorari should be granted.

Respectfully Submitted, Robert Carr jr.

DATE 1-12-22

1-12-22

DANA I. GORNEY
NOTARY PUBLIC
STATE OF WISCONSIN

Dana I Gorney
1/12/2022