

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Kristi Lea Harrington, Circuit Court Judge

RECEIVED
AUG 31 2016
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

OMAR SHARIFF GENTILE

APPELLANT

APPELLATE CASE NO. 2016-000161

INITIAL BRIEF OF APPELLANT

TIFFANY L. BUTLER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTSi

TABLE OF AUTHORITIESii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

STATEMENT OF FACTS3

ARGUMENT5

CONCLUSION7

TABLE OF AUTHORITIES

Cases

State v. Bultron, 318 S.C. 323, 457 S.E.2d 616 (Ct. App. 1995) 5, 6

State v. Burney, 294 S.C. 61, 362 S.E.2d 635 (1987)..... 6

State v. Diamond, 280 S.C. 296, 312 S.E.2d 550 (1984) 5, 6

State v. Humphries, 354 S.C. 87, 579 S.E.2d 613 (2003)..... 5

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred by denying Appellant's motion to compel the State to reveal the identity of the confidential informant where the informant allegedly made a controlled drug buy at the residence only three days before a search warrant was signed by a magistrate, police obtained the search warrant because of the informant's statement that two people – one of whom was allegedly Appellant – were selling drugs inside the house, and the informant had worked with police "multiple times" on prior cases?

STATEMENT OF THE CASE

On September 14, 2015, the Charleston County Grand Jury indicted Appellant for trafficking in more than four grams of heroin and possession with intent to distribute heroin within proximity of a school. R.*. Appellant's case proceeded to a jury trial before the Honorable Kristi L. Harrington. Tr. 1, Jan. 4, 2016. Jason T. King and Tamara M. Van Pala represented Appellant. John Whitney Sowards and Stephanie B. Linder represented the State. Tr. 1, Jan. 4, 2016.

Appellant was found guilty as charged. Tr. 306, ll. 11 – 25, Jan. 5, 2016. Judge Harrington sentence Appellant to twenty-five years' imprisonment for the trafficking charge and ten years' imprisonment for the proximity charge, to run concurrently. Tr. 318, ll. 2 – 23, Jan. 5, 2016.

Appellant appealed his conviction and sentence. This appeal follows.

STATEMENT OF FACTS

On or about January 31, 2012, a confidential informant working for the City of Charleston Police Department made a controlled drug buy at 16 Grove Street in Charleston County. Tr. 245, ll. 2 – 16, Jan. 5, 2016. Fitted with audio surveillance equipment, the confidential informant purchased heroin from Maurice Gentile, Appellant's brother, who was inside the residence. Tr. 71, ll. 5 – 24, Jan. 4, 2016. After the drug buy, the informant told police that heroin and crack cocaine was being sold from the home. Tr. 77, l. 16 – Tr. 78, l. 22, Jan. 4, 2016.

On February 3, 2012, the police obtained a search warrant based on the confidential informant's statement to police describing the alleged drug activity in the Grove Street home. Tr. 73, ll. 1 – 24, Jan. 4, 2016. The police asserted, however, that there were other reports of drugs being sold from the residence. Tr. 75, ll. 10 – 24, Jan. 4, 2016.

On February 9, 2012, officers executed the search warrant at 16 Grove Street. Tr. 131, ll. 1 – 13, Jan. 5, 2016. Upon entering the home, officers detained and handcuffed Appellant, who was sitting on the couch in the living room. Tr. 135, ll. 17 – 24, Jan. 5, 2016. Officers also detained and handcuffed Appellant's uncle, John Davis, who owned the home and was inside the back bedroom. Tr. 136, ll. 15 – 23, Jan. 5, 2016.

According to officers, Appellant asked them to grab a pair of his pants and a shirt to put on from the bedroom upstairs where he slept. Tr. 140, l. 8 – Tr. 141, l. 4, Jan. 5, 2016. Appellant told officers that he came to the residence every day to take care of Davis, who was handicapped. Tr. 148, l. 20 – Tr. 149, l. 1, Jan. 5, 2016. Appellant allegedly told officers that the set of keys inside the lock of the bedroom door belonged to him. He also stated that he had over one thousand dollars located inside the bedroom. Tr. 140, l. 8 – Tr. 141, l. 4, Jan. 5, 2016.

While searching the bedroom where Appellant indicated he slept, officers located 13.84 grams of heroin, glassine baggies, rubber bands, a digital scale, and a bank card inside a dresser drawer. Tr. 156, ll. 4 – 25, Jan. 5, 2016.

Motion to Compel Disclosure of the Confidential Informant's Identity

On September 18, 2015, three months before Appellant's jury trial, defense counsel made a motion to compel the State to reveal the identity of confidential informant used to make the controlled drug buy which led to the search warrant for 16 Grove Street. Tr. 4, l. 5 – Tr. 6, l. 6, Sept. 18, 2015. Counsel explained that the search warrant was signed by the magistrate within seventy-two hours of the controlled drug buy. Tr. 4, l. 5 – Tr. 6, l. 6, Sept. 18, 2015.

Counsel contended that the State's entire case was based on the informant who provided information relevant to Appellant's defense. Tr. 4, l. 5 – Tr. 6, l. 6, Sept. 18, 2015. Specifically, the informant told officers that he purchased drugs from Maurice Gentile, Appellant's brother. The informant also said that two people, named "Scope" and "Juice," were selling drugs in the residence. Tr. 77, l. 22 – Tr. 78, l. 1, Jan. 4, 2016. Counsel argued that Appellant should be able to interview, investigate, and cross-examine the confidential informant since the informant is a material witness in Appellant's case. Tr. 4, l. 5 – Tr. 6, l. 6, Sept. 18, 2015.

The State informed the court that the confidential informant would not be testifying at trial. Tr. 7, ll. 16 – 18, Sept. 18, 2015. The State contended that the informant did not have to be revealed since Appellant was charged with trafficking heroin, not distribution. Further, law enforcement had a "genuine concern" about the informant's safety. Tr. 7, ll. 10 – 12, Sept. 18, 2015.

The court denied counsel's motion. The confidential informant was not called as a witness at trial. Tr. 99, l. 8 – Tr. 100, l. 18.

ARGUMENT

The trial court erred by denying Appellant's motion to compel the State to reveal the identity of the confidential informant where the informant allegedly made a controlled drug buy at the residence only three days before a search warrant was signed by a magistrate, police obtained the search warrant because of the informant's statement that two people – one of whom was allegedly Appellant – were selling drugs inside the house, and the informant had worked with police "multiple times" on prior cases.

Appellant was entitled to know the identity of the confidential informant in his case. Police obtained the search warrant for 16 Grove Street, where Appellant was arrested, based on information given by the informant who had allegedly purchased drugs there only three days before. The informant told police how many people were allegedly selling drugs from the home and their nicknames. The informant was a *de facto* participant and, therefore, a material witness in Appellant's case.

While the State "is generally privileged from revealing the name of a confidential informant, disclosure may be required when the informant's identity is relevant and helpful to the defense or is essential for a fair determination of the State's case against the accused." State v. Humphries, 354 S.C. 87, 90, 579 S.E.2d 613, 614 – 15 (2003). "In determining whether disclosure of an informant's identity is essential to the defense, the trial court must consider whether the informant is a mere 'tipster' who has only peripheral knowledge of the crime or . . . a material witness on the issue of guilt or innocence." State v. Bultron, 318 S.C. 323, 457 S.E.2d 616 (Ct. App. 1995) citing State v. Diamond, 280 S.C. 296, 312 S.E.2d 550 (1984) (finding the trial judge erred in refusing to require the State to disclose the identity of the informant who was clearly a participant in the underlying drug transaction, and not a mere "tipster."). See State v.

Burney, 294 S.C. 61, 362 S.E.2d 635 (1987) (finding the State was not required to disclose the identity of the confidential informant in the trafficking in cocaine case where the informant was a “tipster” whose identity was not important to the issue of guilt or innocence).

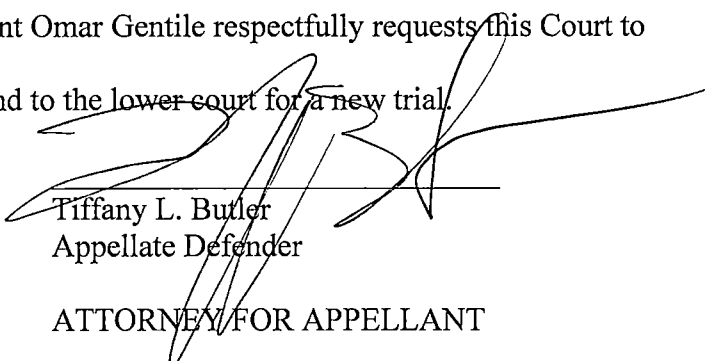
Here, Appellant was entitled to know the identity of the State’s confidential informant. The controlled drug buy was completed at 16 Grove Street on January 31, 2016. Police obtained the search warrant for the residence on February 3, 2016 and executed the search on February 9, 2012, six days later. Only nine days passed between the time of the controlled buy and the search. Further, officers stated that the search warrant was signed because of the information provided by the confidential informant. Specifically, that two people were selling drugs in the home. The informant went so far as to give officers the nicknames of the individuals he claimed to see selling drugs. See Tr. 77, l. 22 – Tr. 78, l. 1, Jan. 4, 2016.

In addition to providing police with probable cause to search the Grove Street house, the confidential informant had also worked with police “multiple times” on other cases. Tr. 78, ll. 11 – 24, Jan. 4, 2016. In fact, at trial the informant was deemed “reliable.” Tr. 78, ll. 11 – 24, Jan. 4, 2016. The informant was clearly more than a “mere tipster” and had more than “periphery” knowledge of what occurred inside the house. Bultron, 318 S.C. at 330, 457 S.E.2d at 620. The informant was a *de facto* “participant.” Diamond, 280 S.C. at 298, 312 S.E.2d at 551.

Because of the minimal amount of time between the controlled drug buy and the signing of the search warrant, and the detailed information the informant provided to police, the informant was clearly a “material witness” in Appellant’s case.

CONCLUSION

For the reasons argued above, Appellant Omar Gentile respectfully requests this Court to reverse his convictions and sentence and remand to the lower court for a new trial.



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of August, 2016.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

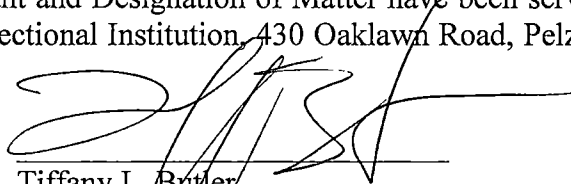
V.

OMAR SHARIFF GENTILE

APPELLANT

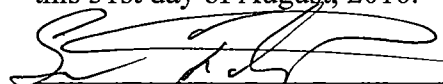
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Omar Shariff Gentile, #289079, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 31st day of August, 2016.



Tiffany L. Butler
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 31st day of August, 2016.

 (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

RECEIVED
AUG 31 2016
SC Court of Appeals