STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
JAN 17 2017
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2016-000161

THE STATE, ...RESPONDENT

v.

OMAR SHARIFF GENTILE, ...APPELLANT.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General
S.C. Bar No. 8729

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

101 Meeting Street
Charleston, SC 29401
(843) 958-1900

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

Federal:

State:

RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

Whether the trial court properly denied Appellant's motion to require the State to disclose the identity of the confidential informant where that informant was only peripherally connected to Appellant's case through making a controlled purchase and giving information to the police that ultimately led to the issuance of a search warrant for the targeted residence, but otherwise was not connected to the heroin discovered during the search that resulted in the charges for which Appellant was on trial.

STATEMENT OF THE CASE

Appellant was indicted at the May 2012 term of the grand jury for Charleston County for possession with intent to distribute heroin within proximity of a school (2012-GS-10-2587). He was subsequently indicted at the September 2015 term for trafficking in heroin (2015-GS-10-5473). Appellant was represented by Assistant Public Defenders Jason T. King, Esquire, and Tamara M. Van Pala, Esquire, of the Ninth Circuit Public Defender's Office. The State was represented by Assistant Solicitors John Whitney Sowards, Esquire, and Stephanie B. Linder, Esquire, of the Ninth Circuit Solicitor's Office. On January 4-5, 2016, Appellant proceeded to trial by jury pursuant to which he was found guilty as indicted. He was sentenced by the Honorable Kristi Lea Harrington to a mandatory term of twenty-five (25) years' imprisonment and a $100,000 fine for trafficking, and a concurrent term of ten (10) years' imprisonment for possession with intent to distribute within proximity of a school. (R* Indictments and Sentencing Sheets; Tr.p.313-p.318). Appellant timely filed a notice of intent to appeal his convictions and sentence and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

In January of 2012, the City of Charleston Police Department received information from numerous intelligence sources that the sale of illegal drugs was being conducted at the address of 16 Grove Street in Charleston. One of these tips came from a confidential informant (CI) well known to the police, who was an ongoing informant in other cases and whose information had been consistently reliable. Additionally, officers had received tips from other sources corroborating the CI's information. Based upon this intelligence, members of the police anti-narcotics task force and agents from the State of South Carolina Law Enforcement Division (SLED) decided to attempt to conduct a controlled purchase of narcotics from the residence utilizing the CI. (Tr.p.68-p.89).

On or about January 31, 2012, a joint law enforcement task force initiated a controlled purchase with the CI, targeting 16 Grove Street. (Tr.p.75-p.78). The CI was sanitized per SLED controlled-buy procedures described by the CI's handler, Agent Jonathan Shealy. (Tr.p.72). SLED agents dropped off the CI several blocks away from the residence, and the CI walked to 16 Grove Street to conduct the controlled purchase. In addition to the audio/visual equipment wired to the CI, police had set up points around the residence from which they could have positive control and view the home. (Tr.p79-p.80). Upon arriving at the home, the CI purchased heroin from a man later identified as Maurice Gentile, Appellant's brother. Appellant was also identified as being inside the residence at the time of the transaction. (Tr.p.82-p.83).

Following the sale the CI left 16 Grove Street and returned to the drop-off point, where he met Agent Shealy. Upon meeting Agent Shealy the purchased narcotics were immediately surrendered, and the CI was again searched to ensure that none of the heroin was kept by the CI. The narcotics were field tested by Agent Shealy, which returned a preliminary positive result, and then were placed into evidence. Agent Shealy then reviewed the audio and visual recordings

from the purchase and confirmed the CI had gone to the residence, conducted the purchase, and immediately returned. Finally, the CI wrote a statement detailing the exact circumstances of his participation. (Tr.p.72).

Based upon this controlled buy, and supplemented with the intelligence received from the CI and other police officers, Agent Shealy applied to a magistrate judge for a search warrant for 16 Grove Street in Charleston. In his affidavit in support Agent Shealy averred probable cause for the warrant based upon the controlled buy, as well as the intelligence that had been received from the CI and other law enforcement officers prior to the purchase. When Agent Shealy submitted his affidavit, he met with the judge, detailed the totality of the evidence uncovered thus far, and advocated for the issuance of the warrant. The court issued a search warrant for 16 Grove Street on February 3, 2012. (Tr.p.70-p.73).

In order to protect the anonymity of the CI and to prevent any compromise to other ongoing investigations, law enforcement waited six days to serve the warrant. Law enforcement executed the search warrant for the residence on February 9, 2012. (Tr.p.73). Officers making entry to secure the home found Appellant in the living room downstairs sitting on a couch, while Appellant's uncle, John Davis, was found in a back bedroom. (Tr.p.135-p.136). Both individuals were detained and placed into handcuffs for officer safety. Appellant was verbally *Mirandized*, and a *Miranda* warning card was signed by Appellant and Agent Shealy and Officer Charles Grill. Officer Grill also testified that Appellant verbally indicated that he understood his rights and did not appear impaired or incapable of making an informed *Miranda* waiver. (Tr.p.41-p.43; p.139).

Appellant consented to an interview with Officer Grill and Agent Shealy. He told law enforcement that he came to the residence daily to help take care of Mr. Davis, an amputee.

Additionally, Appellant maintained his domicile at the residence, and had a personal room with independent locks and keys. He considered 16 Grove Street to be his place of residence. Appellant requested that officers retrieve pants and a shirt for him to wear from his room, as he was found in shorts and an undershirt by officers making entry serving the warrant. Appellant pointed out his room in the home. As law enforcement carried out this request, they found Appellant's keys in the lock to the door that he had indicated was his bedroom. Appellant also told law enforcement that he had over $1,000 in cash in his bedroom. (Tr.p.140-p.141; p.149).

When conducting the search of Appellant's bedroom, officers discovered sixteen grams of a substance presumed to be heroin. Officers also found drug paraphernalia—specifically digital scales with the residue of heroin on them—glassine baggies, and rubber bands. According to law enforcement these items are used in the measuring and packaging of illegal narcotics. (Tr.p.156). Based upon the evidence obtained in the search, Appellant was charged and subsequently indicted as noted.

Motion to Disclose Identity of CI

The case was called for trial on January 4, 2016. Following jury qualification, jury selection, and a hearing on several other pretrial motions, Appellant renewed a pretrial motion he had previously made to require the State to disclose the identity of the CI who had been used for the controlled buy. First, he explained the procedural history of the motion, noting that on June 20, 2014, a hearing was convened before Judge Young to consider Appellant's motion to compel discovery from the State. Specifically, he had requested a copy of the audio/video recording made by the police of the CI's controlled buy, a recording which the State believed would have revealed the CI's identity. This request for the recording was denied by Judge Young. Next, Appellant explained that on September 18, 2015, a hearing was convened before the trial judge,

Judge Harrington, to consider a specific motion to require the State to reveal the identity of the CI. That motion was also denied.[1] As noted, when the case was called for trial in January of 2016, Appellant renewed his motion to reveal the identity of the CI. (Tr.p.63-p.66).

During the ensuing evidentiary hearing on Appellant's motion to suppress the evidence discovered pursuant to the search warrant, a police witness described the use of the CI to make the controlled purchase that ultimately led to securing the search warrant. Following the presentation of testimony, the parties reargued their respective positions on disclosure of the identity of the CI and the motion was again denied. (Tr.p.67-p.100).

At the September 18, 2015 pretrial hearing, Appellant articulated why he believed the trial court should require the State to disclose the identity of the CI. He argued he should be allowed to know the identity of the CI, be able to interview the CI, and possibly subpoena the CI for trial on the merits of the case. Appellant referenced case law about the trial court balancing the public interest of protecting the flow of criminal activities against the individual's right to prepare his defense, and he argued the CI was a material witness who would be both relevant and helpful to his defense. (September 18, 2015, Hearing Tr.p.1-p.6).

The solicitor responded that Appellant had raised nearly the exact same issue a year earlier before Judge Young; however, Appellant argued it was a slightly different motion because in the previous proceeding he had only asked Judge Young to compel disclosure of the DVD recording of the controlled buy. Appellant acknowledged Judge Young denied the motion. The solicitor explained there was a point on the video where you could see the CI and that law enforcement had a genuine concern about the CI's safety in this case and what watching the video of the controlled buy might reveal. In regard to Appellant's continuing attempt to learn

[1] A review of the transcript reveals that at the conclusion of the hearing Judge Harrington took the matter under advisement to conduct further research; however, it appears she advised the parties before the close of business for the day that the motion was denied. (September 18, 2015, Tr.p.12).

the CI's identity, the solicitor noted that the cases referenced by Appellant involved distributions for which the defendant was being tried whereas here, Appellant was not charged with the distribution/sale that was made to the CI. (September 18, 2015, Hearing Tr.p.6-p.8).

Appellant argued that now that they were on the brink of trial, the privilege of the informant should give way to his due process right to present a full and fair defense, particularly since the controlled buy was so close in time to the execution of the search warrant. He further argued there was another person selling drugs out of the residence, Maurice Gentile [his brother], who made the sale to the CI, and that the CI and other people present during the sale could help prove his innocence by showing he was not guilty of actually trafficking the drugs that were found in the house. Appellant continued to argue the CI's identity was relevant because he could have information that could help Appellant's defense. The solicitor agreed that if this were a distribution case based on the controlled buy Appellant would be entitled to know the CI's identity, but here the CI's identity was not important. The trial court took the motion under advisement but made a ruling later that day denying the request to reveal the identity of the CI. (September 18, 2015, Hearing Tr.p.8-p.12).

On January 4, 2016, when Appellant renewed his motion to require the State to disclose the identity of the CI, he made essentially the same argument, that the CI could be a witness in regard to whether there was an ongoing operation by other individuals to sell drugs from the residence. He said his defense was that the heroin discovered in the search was not his heroin and that the CI's knowledge could help that defense. (Tr.p.63-p.65; p.96-p.100). Ultimately, the trial court ruled as follows: "Based upon my reading of the case law and the testimony as I understand it here today, I again deny your motion to reveal the C.I. based upon the case law as I interpret it." (Tr.p.100).

The case then proceeded to trial with both parties making opening statements (Tr.p.123-p.127) and the State calling the following witnesses: Charleston Police Department Detective Charles Jacob Grill (Tr.p.128-p.151); Charleston Police Department Detective John Marn (Tr.p.153-p.180); Charleston Police Department Investigator Alexander Keith Sumner (Tr.p.181-p.191); Charleston Police Department evidence handler Brian Hinton (Tr.p.193-p.198); Charleston Police Department evidence handler Linda Wilson (Tr.p.200-p.202); Charleston Police Department Evidence Custodian Susan Payne (Tr.p.203-p.206); Charleston Police Department Laboratory Manager Renee Hilton (Tr.p.211-p.219); and SLED Agent and former Charleston Police Department Detective Jonathan Shealy (Tr.p.221-p.249). In regard to the use of the CI, Agent Shealy's testimony was consistent with the testimony offered at the pretrial hearing.

After the State rested, Appellant moved for a directed verdict and renewed all of his previous objections. The trial court denied the directed verdict motion and stood by all of its earlier rulings. (Tr.p.249-p.255). Appellant elected not to testify or offer evidence in his defense. Following a brief charge conference, the defense rested and the parties made closing arguments. (Tr.p.255-p.276). The trial court charged the jury on the law and after several notes from the jury, recharges on portions of the law, and an Allen charge, the jury reached guilty verdicts on both charges. (Tr.p.277-p.307). The trial court sentenced Appellant to a mandatory term of twenty-five (25) years' imprisonment and a $100,000 fine for trafficking, and a concurrent term of ten (10) years' imprisonment for possession with intent to distribute within proximity of a school. (Indictments and Sentencing Sheets; Tr.p.313-p.318).

ARGUMENT

I.

The trial court properly denied Appellant's motion to require the State to disclose the identity of the confidential informant where that informant was only peripherally connected to Appellant's case through making a controlled purchase and giving information to the police that ultimately led to the issuance of a search warrant for the targeted residence, but otherwise was not connected to the heroin discovered during the search that resulted in the charges for which Appellant was on trial.

Appellant argues the trial court erred by denying his motion to compel the State to reveal the identity of the CI where that CI made a controlled drug buy at the residence only three days before a search warrant was signed by a magistrate. He contends that because the CI told police how many people were allegedly selling drugs from the house as well as their nicknames, he was a *de facto* participant in the charged crimes and a material witness in Appellant's case, and therefore, his identity was necessary for Appellant's defense. (Brief of Appellant, p.5). The State disagrees and submits Appellant's argument is without merit. The trial judge properly exercised her discretion in declining to require the disclosure of the CI's identity because the informant was only peripherally connected to Appellant's case through his provision of the information to the police that ultimately led to the issuance of a search warrant for the targeted residence. The CI was not connected to the heroin discovered during the search that resulted in Appellant's trafficking and distribution within proximity of a school charges and, thus, the identity of the CI was not necessary or essential in regard to the preparation of Appellant's defense against those charges. Appellant failed at trial to provide a valid or compelling reason justifying the disclosure of the CI's identity; therefore, the trial judge did not abuse her discretion in refusing to require such disclosure. Appellant's conviction should be affirmed.

Standard of Review

In criminal cases, the appellate courts sit to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). On appeal, a trial judge's decision not to require disclosure of an informant's identity will not be reversed unless the defendant can demonstrate that disclosure was required and prejudice resulted from the lack of disclosure. *State v. Batson*, 261 S.C. 128, 135, 198 S.E.2d 517, 520 (1973).

Law / Analysis

"Generally, the State may not be compelled to disclose the names of its confidential informants." *State v. Bultron*, 318 S.C. 323, 330, 457 S.E.2d 616, 620 (Ct. App. 1995). "The purpose of the privilege [against disclosure] is the furtherance and protection of the public interest in effective law enforcement." *Roviaro v. United States*, 353 U.S. 53, 59 (1957). "The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform their obligation." *Id.*

However, the privilege against disclosure is limited to the extent necessary to ensure fundamental fairness for all parties to a case. *Id.* at 60. "Where the disclosure of an informant's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." *Id.* at 60-61. Significantly though, there is "no fixed rule with respect to disclosure[.]" *Id.* at 62. Instead, the public's interest in perpetuating the flow of vital information to law enforcement officials must be balanced against the criminal defendant's right to prepare his defense. *Bultron*, 318 S.C. at 330, 457 S.E.2d at 620. Therefore, whether disclosure is required necessarily depends on the particular circumstances of each individual case. *Roviaro*, 353 U.S. at 62.

Typically, "[a]n informant's identity need not be disclosed where either the informant possesses only a peripheral knowledge of the crime or is a mere tipster who supplies a lead to law enforcement authorities." *State v. Blyther*, 287 S.C. 31, 33, 336 S.E.2d 151, 152 (Ct. App. 1985) (citations omitted). "Where, however, the informant either is a material witness to the crime or directly participates in it, disclosure may be required, particularly where, in a drug related case, he is the only witness to the transaction other than the buyer and the defendant." *Id.* (citations omitted); *see State v. Diamond*, 280 S.C. 296, 299, 312 S.E.2d 550, 551 (1984) ("Public policy considerations for nondisclosure of an informant's identity are absent where the informant openly participates in the criminal transaction."). However, "[e]ven if the informant is an active participant in the criminal act and/or a material witness, the court may still sustain an invocation of the nondisclosure privilege if other factors and circumstances warrant doing so." *Bultron*, 318 S.C. at 330, 457 S.E.2d at 620; *see State v. Riggins*, 262 S.C. 466, 468, 205 S.E.2d 376, 377 (1974) (holding the trial judge properly declined to provide the name of a confidential informant who was present when Riggins sold marijuana to an undercover officer).

In seeking the disclosure of the identity of a confidential informant, "the burden is upon the accused to show facts and circumstances giving rise to an exception to the privilege against disclosure[.]" *Batson*, 261 S.C. at 134, 198 S.E.2d at 520. "[T]he onus is on the defendant to 'come forward with something more than speculation as to the usefulness of such disclosure.'" *United States v. Blevins*, 960 F.2d 1252, 1259 (4th Cir. 1992) (citations omitted). In deciding whether to require the disclosure of a confidential informant's identity, the trial judge has "considerable discretion" on the matter. *Batson*, 261 S.C. at 134-35, 198 S.E.2d at 520. Thus, as noted above, a trial judge's decision not to require disclosure of an informant's identity will not

be reversed unless the defendant can demonstrate that disclosure was required and prejudice resulted from the lack of disclosure. *Id.* at 135, 198 S.E.2d at 520.

Here, the trial judge properly declined to require the disclosure of the CI's identity because the disclosure of that information was not relevant, significant, or essential to any aspect of Appellant's defense. Indeed, the CI in Appellant's case merely provided information regarding a drug transaction for which Appellant was ***not*** criminally charged, and the information provided by the CI was solely used to obtain a search warrant as opposed to being used to prove Appellant's guilt or to obtain a warrant for Appellant's arrest in connection to the drug transactions in which the CI actually participated. Appellant was ***not*** indicted for any offense related to the transactions in which the CI participated but, instead, was charged with trafficking in heroin and distribution of heroin within proximity of a school based solely on the discovery of narcotics during the search of the targeted residence. *See Bultron*, 318 S.C. at 331, 457 S.E.2d at 621 (finding disclosure of the identity of a confidential informant was not required where "[t]he State presented evidence Appellants were in constructive possession of the narcotics independent of the information offered by the informant"). The CI was not involved with and was not connected to the heroin discovered in the search of the targeted residence in any way. *See Roviaro*, 353 U.S. at 64 (finding the prosecutor was required to reveal the identity of an informant in "a case where the Government's informer was the sole participant, other than the accused, in the transaction charged"); *Diamond*, 280 S.C. at 298, 312 S.E.2d at 551 ("The informant was clearly a participant in the transaction, not a mere 'tipster' or witness or, as the trial judge ruled, a 'conduit.'"). Accordingly, there was no compelling reason requiring disclosure of the identity of the CI in Appellant's case, and the informant's identity was not essential to any aspect of Appellant's defense.

As his basis for arguing that the CI's identity should have been disclosed, Appellant contends the CI's presence was needed at trial to answer questions about the two people he named by nickname and claimed to see selling drugs from the house. He argues this information demonstrates the CI was more than a "mere tipster" and had more than a "periphery" knowledge of what occurred inside the house. However, Appellant confuses knowledge of the controlled buy itself with knowledge of the trafficking and proximity charges for which he was indicted. Besides the buy providing probable cause for the search of the residence, the incidents are distinct. As noted by the solicitor, Appellant was charged with trafficking solely based on his possession of a large quantity of heroin discovered during the search, not based on the heroin purchased in the controlled buy. As a result, Appellant failed to articulate a valid reason for the identity of the confidential informant to be disclosed. *See State v. Shupper*, 263 S.C. 53, 57, 207 S.E.2d 799, 800 (1974) (finding no error in the refusal to require disclosure of the confidential informant's identity where "the defendant made no showing whatever that his lot may have been improved by the informer's testimony").

The CI's testimony was irrelevant to any material issue in dispute in Appellant's trial. Because it was not necessary for establishing Appellant's guilt or innocence or towards aiding in the preparation of Appellant's defense, there was no compelling reason justifying or mandating the disclosure of the confidential informant's identity. Therefore, the trial judge did not abuse her broad discretion in declining to do so, and Appellant failed to articulate any meaningful reason either at trial or on appeal that would justify a conclusion to the contrary. *Batson*, 261 S.C. at 134-35, 198 S.E.2d at 520. Appellant's convictions should be affirmed.

CONCLUSION

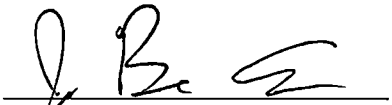
For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

BY: 
J. Benjamin Aplin
S.C. Bar No. 8729

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
January 17, 2017

STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
JAN 17 2017
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2016-000161

THE STATE, ...RESPONDENT

v.

OMAR SHARIFF GENTILE, ...APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, Administrative Coordinatior, hereby certify that I have served the within *Initial Brief of Respondent* and *Designation of Matter*, both dated January 17, 2017, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

I further certified that all parties required by Rule to be served have been served. This 17th day of January, 2017.

Angela Bennett
Administrative Coordinator

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ALAN WILSON
ATTORNEY GENERAL

January 17, 2017

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

Re: The State v. Omar Shariff Gentile
Appellate Case No. 2016-000161

Dear Ms. Hudgins:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

J. Benjamin Aplin
Senior Assistant Deputy Attorney General
S.C. Bar No. 8729

JBA/ab
Enclosures

cc: Honorable Jenny A. Kitchings (original enclosed)
Victim Services