

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Deadra Jefferson, Circuit Court Judge

RECEIVED

Oct 30 2020

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ANTONIO RICARDO LEE,

APPELLANT

APPELLATE CASE NO 2019-001405

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the lower court erred when it refused to compel the state to disclose the identity of the confidential informant where the informant was not merely an observer but an active participant in law enforcement's investigation of Appellant because law enforcement would never have made Appellant a suspect without the informant's undercover work in this case?

STATEMENT OF THE CASE

During the December 2018 term, the Beaufort County Grand Jury indicted Appellant for possession of marijuana; possession with intent to distribute heroin, 2nd offense; trafficking in cocaine more than two-hundred grams but less than four-hundred grams; and possession with intent to distribute a controlled substance within proximity of a park. R. *. Appellant was re-indicted by the Beaufort County Grand Jury during the August 2019 term for the same charges. R. *.

On August 12 – 14, 2019, Appellant proceeded to trial before the Honorable Deadra Jefferson, and a jury. Tr. 1. Jeffrey Stephens and Sharon Carroway represented Appellant. Id. Sarah Fowler and Daniel Gorley represented the state. Id.

Appellant was found guilty on all charges. Tr. 417, l. 15 – 418, l. 8. Appellant was sentenced to twenty-five years' imprisonment for trafficking cocaine more than two-hundred grams but less than four-hundred grams; eight years' imprisonment for possession with intent to distribute heroin, 2nd offense; eight years' imprisonment for possession with intent to distribute a controlled substance within proximity of a park; one year's imprisonment simple possession of marijuana. Tr. 435, l. 17 – 436, l. 9. All sentences run concurrently. Id.

This appeal follows.

STANDARD OF REVIEW

Although 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. Shupper, 263 S.C. 53, 207 S.E.2d 799 (1974). For instance, if the informant is an active participant in the criminal transaction and/or a material witness on the issue of guilt or innocence, disclosure of his identity may be required depending upon the facts and circumstances. State v. Burney, 294 S.C. 61, 362 S.E.2d 635 (1987); State v. Diamond, 280 S.C. 296, 312 S.E.2d 550 (1984); State v. Batson, 261 S.C. 128, 198 S.E.2d 517 (1973). On the other hand, an informant's identity need not be disclosed where he possesses only a peripheral knowledge of the crime or is a mere "tipster" who supplies a lead to law enforcement. State v. Burney, *supra*; State v. Wright, 322 S.C. 484, 472 S.E.2d 642 (Ct.App.1996). The burden is upon the defendant to show the facts and circumstances entitling him to the disclosure. State v. Humphries, 354 S.C. 87, 90, 579 S.E.2d 613, 614–15 (2003)

ARGUMENT

The lower court erred when it refused to compel the state to disclose the identity of the confidential informant where the informant was not merely an observer but an active participant in law enforcement's investigation of Appellant because law enforcement would never have made Appellant a suspect without the informant's undercover work in this case.

Relevant Facts

On July 19, 2018, a search warrant was executed at 70 Paddle Boat Lane, Apt. 301 on Hilton Head Island, where Appellant resided. Tr. 68, ll. 11 – 19. As a result of the search, cocaine and marijuana were found in the apartment and Appellant was arrested. Tr. 217, ll. 4 – 17; Tr. 266, l. 20 – 274, l. 3.

Prior to the search warrant being executed, police officers in Beaufort county used a criminal informant for their drug interdiction investigation. Tr. 35, l. 22 – 38, l. 14. The officers had the informant call a third party, Joseph Atkins, and instructed the informant to ask Atkins if he had drugs. Id. Atkins responded that he did not have drugs but was going to go buy some. Id. At this point, law enforcement had no reason to suspect Appellant of committing a crime.

After hearing that information, produced from informant's active participation in the investigation, the officers followed Atkins to Appellant's home, "where he engaged in what they perceived was a [drug] transaction." Id.; Tr. 42, ll. 11 – 18. The officers then questioned Atkins and he inculpated Appellant. Tr. 42, ll. 11 – 18. The officers then began surveillance on Appellant's home and secured a warrant to search the residence. Tr. 35, l. 22 – 38, l. 14.

Prior to Appellant's trial, defense counsel moved compel the disclosure of the identity of the confidential informant in this case. Tr. 35, l. 22 – 36, l. 24. Defense counsel argued that to properly challenge the search warrant the defense needed to learn identity of the confidential

informant because the search warrant was based on information derived from the confidential informant's undercover work but the search warrant did not provide information that the informant was reliable.¹ Id. Defense counsel stated that “without being able to review that recording of the phone conversation between the confidential informant [and] Mr. Joey Atkins, or any kind of recorded statement from Mr. Atkins about drug transactions with the [Appellant] ... we have nothing to establish the reliability of the confidential informant or to show probable cause.” Tr. 36, ll. 15 – 23.

The state argued that the confidential informant was a “mere tipster who gave information to law enforcement” but the informant's knowledge was “peripheral of the crime.” Tr. 39, ll. 13 – 20. The state also alleged that since the confidential informant is “not material to the defendant's guilt or innocence” learning his or her identity is not necessary in this case. Id.

The trial court denied the motion to disclose the identity of the confidential informant because “it does not appear that the confidential informant had any direct knowledge of the transaction.” Tr. 39, l. 25 – 43, l. 8. The trial court stated the confidential informant's identity should not be disclosed because he did not participate in the transaction between Appellant and Atkins. Id. Therefore, the informant was not an active participant.

The drugs discovered from the search were admitted to trial and as a result, Appellant was found guilty as indicted. Tr. 417, l. 15 – 418, l. 4.

Discussion

The lower court erred when it denied Appellant's motion to compel the disclosure of the confidential informant's identity because the informant played an active role in the investigation of Appellant and the evidence obtained from the informant's undercover work was the impetus

¹ The search warrant and affidavit were not admitted as exhibits in Appellant's trial.

for the police to procure the search warrant that produced the drugs found in this case. Appellant required disclosure of the identity of the informant because without it Appellant could not properly challenge the search warrant for lack of probable cause and suppress the drugs found from the search of his residence. That error unfairly prejudiced Appellant because his case hinged on the admissibility of the drugs found during the search.

To support a finding of probable cause for a search warrant based on evidence provided by a confidential informant, the state must prove the confidential informant was sufficiently reliable. “[A] warrant based solely on information provided by a confidential informant must contain information supporting the credibility of the informant and the basis of his knowledge.” State v. Coin-Operated Video Game Machs., 338 S.C. 176, 192, 525 S.E.2d 872, 881 (2000). “Mere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient.” State v. Smith, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990). Sworn oral testimony is permissible to supplement search warrant affidavits which are facially insufficient to establish probable cause. See State v. Weston, 329 S.C. 287, 292, 494 S.E.2d 801, 803 (1997); see also State v. Dill, 423 S.C. 534, 542, 816 S.E.2d 557, 562 (2018), reh'g denied (Aug. 2, 2018).

Furthermore, in determining whether disclosure of the informant’s identity was required, our Courts have recognized a distinction between a “mere tipster” and a “confidential informant.” State v. Humphries, 354 S.C. 87, 90, 579 S.E.2d 613, 614 – 15 (2003). The state is not required to disclose the identity of mere tipster who “possesses only a peripheral knowledge of the crime” or “who supplies a lead to law enforcement.” Id. Whereas the state is required to disclose the identity of a confidential informant who was an “active participant” in the investigation. Id.

In State v. Dill, 423 S.C. 534, 536 – 38, 816 S.E.2d 557, 559 – 60 (2018) Dill was convicted of manufacturing methamphetamine and appealed his conviction because the search warrant lacked probable cause to search his residence. Id. At the pretrial suppression hearing Dill argued the state’s refusal to disclose the informant’s identity made “the position that [he had] in arguing that the warrant should not have been issued based upon the veracity of information provided by the affiant... hampered to the point of almost being unable to make an argument.” Id. at 538, 816 S.E.2d at 560. In response, the state argued that the person who provided police information was not a “confidential informant” but was a “mere tipster” whose identity need not be disclosed. Id.

The affidavit used to procure the search warrant in Dill claimed that the “confidential informant working in an undercover capacity... did see numerous items [at Dill’s residence] that are used in the manufacturing of methamphetamine.” Id. Sergeant Moody testified at the pretrial suppression hearing that he supplemented the affidavit with oral testimony to the magistrate that “the individual who provided information to him was reliable and had been used in two prior cases in which arrests had been made.” Id. at 537, 816 S.E.2d at 559.

Dill contended there was no way for him to properly challenge the charges against him without knowing the identity of the confidential informant. Id. at 539, 816 S.E.2d at 560 – 61. The state responded that “the fact that a confidential informant, the term being used in the search warrant is irrelevant because it is not being used as a term of art in law that this was an *active participant*. But rather this was just someone supplying information.” Id. (emphasis added)

Our Supreme Court held that the affidavit and oral testimony before the magistrate were insufficient for the magistrate to find probable cause that Dill was manufacturing methamphetamine at his residence. Id. at 543, 816 S.E.2d at 562. The Court determined that the

affidavit supplied no information supporting the initial conclusory assertion that there was “an active methamphetamine lab... in operation” and “*In particular, the affidavit does not relate who gave Moody this crucial information.*” Id. (emphasis added)

In State v. Diamond, 280 S.C. 296, 312 S.E.2d 550 (1984) our Supreme court held that the trial court erred when it refused to compel the state to disclose the identity of the confidential informant. Diamond, at 297, 312 S.E.2d at 550. In that case, the informant introduced Diamond to an undercover officer and told Diamond the officer “wanted to pick up a package.” Id. at 298, 312 S.E.2d at 551.

During his trial, Diamond contended that the disclosure of the identity of the informant may have assisted him in his defense of misidentification. Id. at 299, 312 S.E.2d at 551. Our Supreme Court held “considering the various factors and circumstances surrounding the drug transaction and the testimony given by the police officers,” the trial court erred in refusing to compel the state to disclose the identity of the informant. Id. at 299, 312 S.E.2d at 552. Moreover, the Court stated that, “public policy considerations for nondisclosure of an informant’s identity are absent where the informant openly participates in the criminal transaction.” Id. at 299, 312 S.E.2d at 551.

In State v. Burney, 294 S.C. 61, 362 S.E.2d 635 (1987) our Supreme Court held that the state was not required to disclose the identity of the informant because he was not an active participant in the investigation. Id. In Burney, the Greenville County Sheriff’s department opened an investigation into Burney and after the investigation began law enforcement had an informant buy cocaine from Burney at his residence. Id. at 62, 362 S.E.2d at 635 – 36. However, the police did not obtain a search warrant at that time, but waited for Burney to possess a larger amount of drugs at his residence. Id.

Ten months later the informant bought drugs from Burney again and this time did observe a large quantity of drugs. Id. at 62, 362 S.E.2d at 636. The officers obtained a search warrant, seized drugs, drug paraphernalia, and weapons from Burney's residence and arrested him. Id.

Our Supreme Court held that the lower court did not err when it refused to compel the disclosure of the informant's identity because his role was "limited to supplying information regarding Burney's possession of narcotics" and "although he did participate in the controlled buy..., the transaction only served to aid in establishing the informant's reliability." Id. at 62 – 63, 362 S.E.2d at 636. It is important to note that the officers in Burney *already had an open investigation* on Burney before the informant provided the observations from inside Burney's residence.

In State v. Humphries, 354 S.C. 87, 579 S.E.2d 613 (2003) our Supreme Court held that the informant's identity need not be disclosed because "*At the time he made his ruling*, the only information before the trial judge was that the confidential informant notified law enforcement that a package containing illegal narcotics would be delivered by UPS to petitioners' garage." Id. at 90, 579 S.E.2d at 615. (emphasis in original) In that case, the informant's only involvement was to notify law enforcement that a package containing drugs was going to be delivered by United Parcel Service (UPS) to Humphries' garage. Id. at 90 – 91, 579 S.E.2d at 614. The informant did not participate in any part of the police investigation, and the informant was not present when the package was seized or when it was delivered by the undercover officer. Id. Accordingly, disclosure of the tipster's identity was not required because he was a mere "tipster." Id. at 90, 579 S.E.2d at 615.

As opposed to Burney, there was no open investigation into Appellant before the confidential informant began participating in the investigation. In this case the confidential

informant's active participation was the first step of law enforcement's investigation. Tr. 35, l. 22 – 38, l. 14; See Burney, at 62, 362 S.E.2d at 635 – 36. Accordingly, the informant's role in the investigation of Appellant was crucial because law enforcement would have had not made Appellant a suspect but for the recorded phone call from the confidential informant to Atkins.

Moreover, as opposed to the informant in Humphries, the informant's value in this case was not in any observation he relayed to law enforcement, but in his undercover work during the phone call. Tr. 35, l. 22 – 38, l. 14; Humphries, at 89, 579 S.E.2d at 614. Accordingly, much like the informants in Dill and Diamond, the confidential informant in this case was an active participant of the investigation. The informant provided critical information against Appellant such that his disclosure was necessary for Appellant's defense and the trial court's refusal to compel the disclosure of the informant was an error. Dill, at 543, 816 S.E.2d at 562; Diamond, at 299, 312 S.E.2d at 551 – 52.

The trial court's refusal to compel disclosure of the informant's identity left Appellant unable to challenge the probable cause supporting the search warrant such that his ability to argue at trial for suppression of the drugs was impermissibly hampered. Appellant's entire case hinged on his ability to suppress the drugs found during the wrongful search of his residence; thus, the trial court's error prejudiced Appellant because it eliminated his ability to argue for suppression.

CONCLUSION

By reason of the forgoing arguments, Appellant's conviction should be reversed, and this case remanded to the Beaufort County Court of General Sessions for a new trial



Victor R Seeger
Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of October, 2020.

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CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon William M. Blich, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Antonio Ricardo Lee, #381145, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 30th day of October, 2020.



Victor R Seeger

Appellate Defender

ATTORNEY FOR APPELLANT