

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-2093

EDDIE SIMMONS,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

This cause is before the Court on petition for discretionary review. The parties will be referred to as they stood in the trial court. The trial court granted defendant's motions for the disclosure of the State's confidential informant in two cases (consolidated on appeal), and dismissed both cases because the State indicated that it could not produce the confidential informant. The District Court reversed, remanded for reinstatement of both cases, and certified conflict with *McCray v. State*, 730 So. 2d 817 (Fla. 2d DCA 1999).

For purposes of this brief, the symbol "A." refers to the Appellant's Appendix, containing copies of papers filed in the District Court of Appeal.

STATEMENT OF THE CASE AND FACTS

By information filed on April 26, 2002 (under Case No. F02-9992), the State charged defendant Eddie Simmons with a sale of cocaine on April 4, 2002 to Officer A. Pacheco (A. 1). The State asserted that the sale took place on the porch of a particular residence (A. 3 at ¶ 2).

In a second information, filed the same day (under Case No. F02-1991), the State charged that, on the next day, April 5, 2002, at the same residence, defendant had possessed cocaine with intent to sell, and had possessed a firearm as a

convicted felon (A. 7; see A. 3 at ¶ 3). These items were found at the same residence the day after the April 4 drug purchase, upon the execution of a search warrant apparently procured after that purchase (A. 3 at ¶ 3).

Mr. Simmons' defense in the first case was that he was not the person who sold drugs to Officer Pacheco, and that he was misidentified. In the second case, his defense was that he had gone to a party on April 4, 2002 at the residence, where drugs and a firearm were found the next day, had slept over and was there the next day when the drugs and firearm had been found, but that he had not possessed either the drugs or the firearm. He asserted that he had no ownership or possessory interest in the residence (A. 2 at ¶ 3). He contended the firearm was found under the bed in the master bedroom of the residence, and that \$890 in cash and cocaine residue was found in the purse of Janice Currington, the owner of the residence. See A. 2 at ¶¶ 1-3. These factual assertions were made by sworn motions seeking disclosure of the informant (A. 2, 8).

The State acknowledged that the police had "utilized" a "confidential source" for the purpose of "gaining access" to the porch and front door of the residence on April 4, 2002, when Officer Pacheco purchased cocaine (A. 3 at ¶ 2). The

State agreed that the confidential informant "was involved in" the transaction, and that Officer Pacheco "would not have gotten there without the confidential informant getting him there" (A. 6 at 6). It is apparent that the informant knew the seller, brought the buyer to him, introduced the buyer to the seller, and vouched for Officer Pacheco as a purchaser.

Defendant contends that he was not the seller, that the informant would testify that he did not vouch to defendant for Officer Pacheco's legitimacy as a purchaser, and that the informer would testify that defendant was not the person who sold drugs to Officer Pacheco. Such testimony would support defendant's claim that Officer Pacheco bought drugs from someone else, and that the informant and/or the State subsequently misidentified defendant as the seller. See A. 2.

Defendant further contends that the principal basis for the State's inference that defendant was in possession of drugs and a firearm found in someone else's residence on April 5, 2002 is that defendant allegedly sold drugs on the porch of that residence the previous day. Defendant claims that the informant's testimony that defendant was not the person who sold drugs to Officer Pacheco on April 4, 2002 would corroborate defendant's claim that he did not possess drugs with intent to sell at the same location the following day, or

possess a firearm that was there, and that he was merely a guest in the residence with no dominion or control over the premises and no participation in any unlawful activities that took place (A. 2 at ¶ 4). Indeed, if the informant testified that someone other than Mr. Simmons sold the drugs to Officer Pacheco on April 4, 2002, that testimony would have significant probative value as indicating that the April 4, 2002 seller was also the person who had dominion and control over the drugs and weapon found in the same residence the following day.

The State indicated that it had "no information regarding the identity or current whereabouts of the confidential source" (A. 3 at ¶2). The trial court thus could not grant defendant's request for an *in camera* hearing to determine whether the informant could provide exculpatory evidence (see A. 2 at 5). The trial court appropriately characterized the informant's role as similar to that of a broker, characterized the circumstances as tantamount to the destruction of evidence that might be exculpatory (A. 6 at 5-7), and dismissed both cases (A. 4, A. 10; see A. 12 at 4).

The District Court reversed, remanded for reinstatement of both cases, and certified conflict with *McCray v. State*, 730 So. 2d 817 (Fla. 2d DCA 1999). The Third District's

ruling (A. 13) did not look to whether the testimony of the confidential informant would be relevant and helpful to the misidentification defense; it assumed instead that, if the informant testified, he would contradict defendant and testify in support of the State's claims (A. 13 at 7), and that defendant would suffer no prejudice if the State did not call the informant (A. 13 at 8). The court looked to the confidential informant's role in the illegal drug transaction, and mistakenly concluded that, because he neither bought nor sold drugs, he was a mere witness (similar to a passerby, A. 13 at 9) who the State was not required to identify, not an active participant whose testimony would corroborate defendant's if both gave truthful testimony (A. 2). The District Court characterized as "self-serving general speculation" (A. 13 at 7) defendant's sworn statement (A. 2) that he had not sold drugs to Officer Pacheco, and defendant's contention that truthful testimony by the informant, who set up the sale, would indicate he had not been the seller.

SUMMARY OF ARGUMENT

Disclosure of the identity of the alleged confidential informant was required here where defendant asserted a defense of misidentification and asserted that he had not participated in the sale of cocaine to an undercover officer. The informant had introduced the undercover officer to the seller, and vouched for him as a bona fide purchaser. He arranged and facilitated the drug transaction. The informant could testify that the seller was not the defendant, and was the only independent witness who could contradict testimony that defendant was the seller.

Defendant further contends that the principal basis for the State's inference that defendant was in possession of drugs and a firearm found in someone else's residence on April 5, 2002 is that defendant allegedly sold drugs on the porch of that residence the previous day. Indeed, if the informant testified that someone other than Mr. Simmons sold the drugs to Officer Pacheco on April 4, 2002, that testimony would have significant probative value as indicating that the April 4, 2002 seller was also the person who had dominion and control over the drugs and weapon found in the same residence the following day.

The identity and testimony of the informant was more than relevant and helpful to defendant's misidentification defense, and dismissal was required when the State could not identify or produce the informant.

ARGUMENT

I

WHERE THE DEFENSE WAS MISIDENTIFICATION, THE STATE WAS REQUIRED TO IDENTIFY THE INFORMANT WHO PARTICIPATED IN THE SALE OF COCAINE, AND ITS INABILITY TO DO SO REQUIRED DISMISSAL

"What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. 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 that obligation." *Roviaro v. United States*, 353 U.S. 53, 59 (1957) (citations omitted); accord, *State v. Zamora*, 534 So. 2d 864, 867 (Fla. 3d DCA

1988); see also *State v. Diaz*, 678 So. 2d 1341, 1344 (Fla. 3d DCA 1996).

A "limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer'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. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action." *Rovario*, 353 U.S. at 60-61 (footnote omitted, emphasis added); accord, *State v. Zamora*, 534 So. 2d at 867; see also *McCray v. State*, 730 So. 2d 817, 818 (Fla. 2d DCA 1999); *Miller v. State*, 729 So. 2d 417, 419 (Fla. 4th DCA 1999); *State v. Diaz*, 678 So. 2d at 1344.

The question in *Rovario* was whether the Government could "refuse to disclose the identity of an undercover employee who had taken a **material part in bringing about** the possession of certain drugs by the accused, had been present with the accused at the occurrence of the alleged crime, and might be a **material witness** as to whether the accused knowingly trans-

ported the drugs as charged." *Rovario*, 353 U.S. at 55 (emphasis added).

The *Rovario* Court said that "no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *Rovario*, 353 U.S. at 62; accord, *Zamora*, 534 So. 2d 867-68 (public policy considerations supporting nondisclosure "cannot prevail where such nondisclosure either runs a substantial risk of convicting an innocent person or substantially threatens the accused's due process right to a fair trial").

The Court in *Rovario* held that, where the informant was a "material witness" and "the only witness" who could "contradict the testimony of government witnesses," his testimony was sufficiently relevant and helpful to the defense that the prosecution could not proceed without disclosing the informant's identity. *Rovario*, 353 U.S. at 63-65.

The Court in *Zamora* recognized that disclosure of a confidential informant's identity is "absolutely required" where "the confidential informant is a defense witness at trial, and the defendant seeks to cross examine a police officer concerning the informant's identity and active involvement in the charged illegal drug transaction." *Zamora*, 534 So. 2d 869-70, citing *Smith v. State*, 318 So.2d 506 (Fla. 2d DCA 1975); see also *State v. Diaz*, 678 So. 3d at 1344 (disclosure required where informant could contradict witness who said Diaz was the seller, and could name someone else as the seller).

In *Smith v. State*, 318 So. 2d 506 (Fla. 2d DCA 1975), the court held that the trial court improperly refused to permit defense counsel to show the identity of the State's confidential informant, and his relations with defendant and undercover police, "where the state's evidence disclosed substantial participation by the informant in 'setting up' a narcotics sale." *Smith*, 318 So. 2d at 507 (emphasis added). Defendant claimed he had not been involved in narcotics activities, but had merely gone along with his friend, who turned out to be a police informant. The court held that defendant's inability to show the relationship between the police officer and the informant "effectively precluded [defendant] from

establishing his defense." *Smith*, 318 So. 2d at 507. The court explained that "there is a basis for requiring disclosure of the identity of the informant" where "an informer was an active participant in an illegal drug sale" or "the state has used informants who, at request of an officer, have actively participated with an accused in commission of the offense." *Smith*, 318 So. 2d at 508 (emphasis added, citations omitted). *Smith* is the case closest to the facts here, but the Third District's ruling is inconsistent with *Smith*.

In *Miller v. State*, 729 So. 2d 417 (Fla. 4th DCA 1999), the defense was misidentification. The court held that identification of the informant was required where defendant claimed he was not present during the alleged drug transaction and "met his initial burden of showing that disclosure was necessary to a specific defense." *Miller*, 729 So. 2d at 420. The *Miller* court reiterated that "[d]isclosure of a confidential informant is required if an informant's identity or content of his communication is relevant and helpful to the defense . . . or is essential to a fair determination of a cause. The first component necessarily centers around a specific defense asserted by the defendant in the case, as to which the informant's testimony is material and helpful. See

[*State v. Zamora*, 534 So. 2d 864, 868 (Fla. 3d DCA 1988)].

The second component concentrates on general due process considerations and is not confined to a defense raised by the defendant. See *id.* Disclosure is the balancing of the public's interest in protecting the flow of information against the individual's right to prepare his defense. See [*Roviaro v. United States*, 353 U.S. 53, 60-61 (1957)]."

In *McCray v. State*, 730 So. 2d 817 (Fla. 2d DCA 1999), the defendant's sworn motion "asserted that the confidential informant apparently knew the defendant, that the confidential informant was present when the crime transpired, that the undercover officer misidentified the defendant as the perpetrator of the crime, that the confidential informant's testimony was essential to the defense of misidentification, and that the defendant was not involved in the sale of cocaine as charged." *McCray*, 730 So. 2d at 817.¹ The Second District in *McCray* held that the defendant had met his initial burden because the sworn motion set forth a sufficient factual basis to support the legal defense of misidentification. *McCray*, 730 So. 2d at 817. The court held that an *in camera* inspection was required to determine whether the informant's testi-

¹ The sworn motion here, together with the facts conceded by the State, is to the same effect.

mony was exculpatory because defendant had "demonstrated a sound factual basis for concluding that the confidential informant is an essential witness for a specific defense." *McCray*, 730 So. 2d at 818. The Third District here certified that its ruling was in conflict with *McCray*.

Here Mr. Simmons asserted a defense of misidentification and swore that he had not participated in the sale of cocaine to an undercover officer. The informant had introduced the undercover offer to the seller, and vouched for him as a bona fide purchaser. He arranged and facilitated the drug transaction. The informant could testify that the seller was not the defendant, and was the only independent witness who could contradict testimony that defendant was the seller. This was a stronger case for the disclosure of the confidential informant than *McCray*, because here the informant's role in the transaction and his basis for testimony relevant to the misidentification defense were attested to by the State. Yet the Third District reached a result inconsistent with *McCray*.

Defendant further contended that the principal basis for the State's inference that defendant was in possession of drugs and a firearm found in someone else's residence on April 5, 2002 is that defendant allegedly sold drugs on the porch of that residence the previous day. Indeed, if the informant

testified that someone other than Mr. Simmons sold the drugs to Officer Pacheco on April 4, 2002, that testimony would have significant probative value as indicating that the April 4, 2002 seller was also the person who had dominion and control over the drugs and weapon found in the same residence the following day.²

The Third District's decision here did not look to whether the testimony of the confidential informant would be relevant and helpful to the misidentification defense, assuming instead that the informant would testify in support of the State's claims. The court looked to the confidential informant's role in the illegal drug transaction, and mistakenly concluded that, because he neither bought nor sold drugs, he was a mere witness who the State was not required to identify, not an active participant whose testimony would corroborate defendant's if both gave truthful testimony. This view led to a ruling that interfered with the fair presentation of the defendant's defense.

² The State now claims it has other evidence linking defendant to the drugs and the firearm found in Ms. Currington's house, but no such evidence was put before the trial court, or otherwise made part of the record. The record reflects only defendant's sworn denial that either the drugs or the firearm was his.

Defendant's sworn motion asserted that defendant was not present when cocaine was sold to Officer Pacheco. Defendant contends the State's confidential informant here was not merely a witness, a bystander or a tipster; instead, he was the person the police had "utilized" as a "confidential source" for the purpose of "gaining access" to the porch and front door of the residence on April 4, 2002, when Officer Pacheco purchased cocaine (A. 3 at ¶ 2).³ The confidential informant thus acted as a broker, arranging and facilitating the deal. The informant must therefore have known both the seller and Officer Pacheco and, as the person who brought them together, he was an active participant in their illegal transaction. He was involved in the transaction, and the deal could not have been made without his participation. His

³ It is ironic that defendant's motion to disclose the confidential informant initially alleged only that the informant had "witnessed" the transaction (A. 2 at ¶ 1). However, the State Attorney's submission clearly showed that the informant had taken an active role in setting up or brokering the deal (A. 3 at ¶ 2), and that his participation in bringing the parties together thus gave him a unique perspective from which to give testimony relevant to defendant's misidentification defense. The State may not rely on the fact that defendant initially claimed only that the informant witnessed the transaction, when the full record clearly reveals that the State has admitted that the informant set up the deal and that it would not have proceeded without his participation. Indeed, the State conceded that the informant would have been charged had he not been acting for the police (A. 6 at 7).

testimony as to the identities of the people he brought together is critical to defendant's misidentification defense.

The confidential informant's testimony is not only relevant and helpful to the defense, but is also essential to a fair determination. The State's failure to identify the confidential informant, so that defendant can call him as a witness, is tantamount to the destruction of exculpatory evidence, not remedied by the bland assurance that the State will not call the informant either. Where the misidentification defense is supported by sworn proof, the claim that the truthful testimony of the informant, who knows who he brought together, will support the defense, is not merely speculation.

Indeed, it is apparent that the Third District considered defendant's claim, that the informant's testimony would help him, as "speculation" because the court disbelieved defendant's sworn claim that he was not present when cocaine was sold to Officer Pacheco. See A. 13 at 7 ("[t]he undisputed record evidence in this case reveals that the police utilized the informant solely to lure the appellee onto the front porch for a direct drug transaction with Detective Pacheco") (emphasis added). The sole issue in this case is whether defendant-appellee was the person who was lured out on the porch and sold drugs to Officer Pacheco; his sworn statement is that he

was not, and the State's contrary evidence is hardly undisputed, and not of record. Defendant speculates only as to why the informant gave police a false identification: defendant contends the informant was afraid to identify the real seller.

Defendant further contends that the principal basis for the State's inference that defendant was in possession of drugs and a firearm found in someone else's residence is that defendant allegedly sold drugs on the porch of that residence the previous day. The State cannot effectively prosecute the possession charges without proof of the April 4 drug sale at the same location because the drugs and weapon were not found on defendant's person. If the informant testified that someone other than Mr. Simmons sold the drugs on April 4, 2002, that testimony would have significant probative value as indicating the April 4, 2002 seller was the person who possessed the drugs and weapon found in the same residence the following day.

The identity and testimony of the confidential informant as to the identities of the parties he introduced to each other was more than relevant and helpful to defendant's misidentification defense. The State's inability to produce the confidential informant interfered with the fair presentation of the defense by preventing defendant from offering evidence

which presumably would be exculpatory. The confidential informant played a material part in the transaction, was not a mere witness or tipster, and the State's inability to produce him for an *in camera* hearing to determine the effect of his testimony mandated dismissal.

CONCLUSION

The order appealed from should be quashed, the trial court's rulings should be reinstated.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copies of the foregoing, and the attached Appendix, were mailed to Barbara A. Zappi, Assistant Attorney General, Office of the Attorney General, Criminal Appellate Division, 110 S.E. 6th Street, 9th Floor, Ft. Lauderdale, Florida 33301 on January 7, 2004.

ROY A. HEIMLICH
Assistant Public Defender

CERTIFICATE OF COMPLIANCE

I hereby certify that the type font in this brief is Courier New 12 point, except that the headings are set in Times New Roman 14 point.

ROY A. HEIMLICH
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