

STATE OF NEW JERSEY,

Plaintiff,

vs.

EDWARD FORCHION,

Defendant.

SUPERIOR COURT OF NEW JERSEY
CRIMINAL DIVISION-MERCER COUNTY

INDICTMENT NO.: 16-08-0667

OPINION OF THE COURT

FILED
FEB 23 2017

SUPERIOR COURT OF NJ
MERCER VICINAGE
CRIMINAL DIVISION

PROCEDURAL HISTORY

This matter arises out of the State's Motion for a Protective Order to protect the name, address, and likeness of the Cooperating Witness (hereafter referred to as "CW"), who aided the State in their investigation of Edward Forchion (hereafter referred to as "Defendant"). Defendant was indicted on an eleven count indictment in this matter on August 5, 2016. The State filed notice of the present Motion and filed, under seal, a written statement to show good cause on August 22, 2016.

The State has provided initial discovery to the defense, along with photographs from the execution of the search warrant. Additionally, the State asserts that video evidence will be made available subject to this Protective Order once it is returned to the Prosecutor's Office from the New Jersey State Police. Finally, the State assures the court they will provide enough information to Defendant to conduct a thorough and complete cross-examination of CW, including a redacted criminal history extract.

It is the State's contention that CW conducted four recorded buys of what is claimed to be marijuana allegedly from Defendant,

using audio/video equipment to record the buys. It was these recorded buys of alleged marijuana, along with other investigatory techniques, that led to the issuance of a warrant for the arrest of Defendant. The State argues that in these recordings, along with other video evidence collected, CW's face can clearly be seen, allowing the viewer to identify CW. The State alleges CW's safety and ability to testify at trial is directly tied to his anonymity, as disclosure of CW's true identity at this time would allow Defendant or others to potentially pose a risk of harm or intimidation to CW.

CW is cited as someone who has given reliable information to the Vice Enforcement Unit of the Trenton Police Department in the past. It is not clear whether CW will conduct controlled buys in the future. CW is aware he may be called to testify. The Court is unaware of the nature of any agreement between CW and the police, if one exists.

After the filing of the initial notice and written statement, the State filed, under seal, a supplemental written statement on September 15, 2016, to demonstrate the potential concerns regarding the safety of CW. The State alleges Defendant has encouraged others to gather information on a person he believes to be CW, and has shown a willingness to repeatedly share this information to cause harm, or to intimidate, CW.

Defendant objected to the State's sealed filings as ex parte communication, stating that under New Jersey Court Rule 1:6-5 he is entitled to the briefs in order to respond to the motion. The Court ordered the State to redact its written statements of any information identifying CW, leaving only the legal arguments, and provide them to the defense. Both redacted written statements were submitted on November 15, 2016 to the defense. The exhibits attached to the September 15th statement were delivered separately under a consent order executed by both the State and defense counsel on December 9, 2016, limiting their publication only to defense counsel. Defendant subsequently filed a response brief on December 11, 2016.

Defendant argues that:

1. A Protective Order violates the holding of Brady v. Maryland, 373 U.S. 83 (1963), as it allows the State to withhold evidence the defense would otherwise be entitled to.
2. Under the Confrontation Clause, a defendant has a right to confront the witnesses against him, and as such, the State is Constitutionally required to provide the identity of CW to the defense, and may not withhold any statements made by CW.
3. There is an exemption to the Informant's Privilege present, both under Supreme Court jurisprudence and New Jersey Rule

of Evidence 516, due to CW's identity having been otherwise disclosed and the recordings of the transactions are vital to Defendant's defense.

4. Defendant asserts CW's identity is either "Zev Lapis," "Zev Lapidus," or "Zed Lepidus."

In reply, the prosecution asserts that:

1. The defense failed to sufficiently state why a restriction on revealing the identity of CW would violate Brady.
2. There are not any statements by CW sought to be withheld in violation of the Confrontation Clause.
3. Defendant overstates the State's aims; the Informant's Privilege under N.J.R.E. 516 has not been claimed.
4. The Court can order the videos be redacted to protect CW, yet allow Defendant the opportunity to prepare a defense.

Oral arguments were heard on January 6, 2017. Both attorneys relied substantially on the arguments made in their briefs. The State argued that this Protective Order was to ensure the safety of CW and prevent witness intimidation. They also expressed "great concern" over Defendant's statements about his desire to disregard the boundaries of any Protective Order issued. Finally, according to the State, regardless of whether Defendant's identification of CW is correct or not, his actions are posing a risk of harm and/or intimidation to CW.

Defense counsel countered that, to the best of his knowledge, no one has harmed the man the defense claims is CW. Counsel also asserted that he needs to investigate CW prior to trial, both in preparation for an entrapment defense, and in general for cross examination. Finally, he claimed through Defendant's publishing of the man he believes is CW, the defense was able to obtain a "tremendous" amount of information evidence on that person, either from publicly available sources or from people with knowledge.

ANALYSIS

A party may move for a Protective Order to deny, restrict, or limit discovery requested by the opposing party upon a showing of good cause. N.J. Ct. R. 3:13-3(e)(1). In determining whether to grant this motion, the court may consider the protection of witnesses and others from "threats of harm, bribes, economic reprisals and other intimidation," the maintenance of secrecy for informants, or any other relevant considerations. Id. In order to demonstrate good cause, the moving party may submit a written statement to the court. This written statement is "to be inspected by the court alone." R. 3:13-3(e)(2). This allows the moving party to reveal possibly confidential information in order for the court to properly rule on the amount of protection to be given. If the motion is granted, the entire statement is sealed and preserved in case of appeal. Id. This procedure is provided for in the New

Jersey Court Rules, and is not considered ex parte communication, as alleged by Defendant.

In lieu of a written statement, the Court may hold an *in camera* hearing in order to determine if good cause can be shown, which the defense may be barred from attending without prejudice. See, Matter of Application for Protective Order, 282 N.J. Super. 244, 251-52 (App. Div. 1995). Both the *in camera* hearing and the determination to permit or deny disclosure of material can be done "without notice to...defendants." Id. at 251. "Where the defendant requests *Brady* material, his or her interests are sufficiently protected by *in camera* review by the trial court to determine whether the information is material and helpful." Id. at 252 (citing Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987)).

"Under most circumstances...an informer's identity will be kept secret and will not be revealed for insignificant or transient reasons." State v. Foreshaw, 245 N.J. Super. 166, 181 (App. Div.), certif. denied, 126 N.J. 327 (1991); see also, State v. Milligan, 71 N.J. 373, 392 (1976) ("we are cognizant that free and unwarranted access to the identity of informers will effectively eliminate the informer's privilege."). These "insignificant or transient reasons" can encompass speculation that the informer's identity exculpates the defendant. State v. Williams, 356 N.J. Super. 599, 605-06 (App. Div. 2003); see also, Milligan 71 N.J. at 391 ("Most courts have found that the possibility that an

informer's testimony might establish a defense of mistaken identity is too speculative to warrant disclosure."). A variety of courts have limited the disclosure of names and addresses of witnesses in other certain instances, as laid out in Postorino:

State v. Florez, 248 N.J.Super. 54, 589 A.2d 1382 (Law Div.1991) (substantial concern over safety of prosecutor's paid, professional informant who set up defendant's drug buy justified refusal to disclose informant's real name and address where other information was known about him and deemed sufficient to permit full cross-examination). See also, Clark v. Ricketts, 886 F.2d 1152 (9th Cir.1989) (right of confrontation did not require government's "John Doe" to testify as to current address where his real identity and arrest record was disclosed, where that information was enough to give defendant the "avenues of in-court examination and out-of-court investigation" denied in Smith v. Illinois, where "John Doe" did give a general area of residence during trial testimony, and where *in-camera* proceeding revealed "John Doe" was a Drug Enforcement Agency informant against whose life threats had been made and who was expected to provide testimony in other pending cases); U.S. v. Spector, 793 F.2d 932 (8th Cir.1986) cert. denied 479 U.S. 1031, 107 S.Ct. 876, 93 L.Ed.2d 830 (1987) (right to confrontation did not require informant to testify as to his address where cross-examination revealed his current address and where "a review of the wide-ranging cross-examination of [the informant] disclosed an extensive knowledge of his background" such as to give defendant an "ample opportunity to identify this witness with his environment," 793 F.2d at 938). Accord U.S. v. Chavez-Vernaza, 844 F.2d 1368, 1376-77 (9th Cir.1988); U.S. v. Mesa, 660 F.2d 1070, 1075 (5th Cir.1981).

Postorino, 253 N.J. Super. at 105.

1. Brady Violation

The defense claims the State is attempting to seek a court-sanctioned Brady violation through a Protective Order. In response, the State asserts Defendant has failed to adequately state how the video footage and CW's name, address, and likeness would be Brady material, particularly in light of the possibility of limited disclosure.

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." Brady 373 U.S. at 87. "The Brady rule applies even where defendant makes no formal request for Brady material." State v. Nelson, 330 N.J. Super. 206, 212 (App. Div. 2000) (citing U.S. v. Agurs, 427 U.S. 97, 107 (1976)). "In order to establish a Brady violation, the defendant must show that: (1) the prosecution suppressed evidence; (2) the evidence is favorable to the defense; and (3) the evidence is material." State v. Martini, 160 N.J. 248, 268 (1999) (citing Moore v. Illinois, 408 U.S. 786, 794-95 (1972)). "[E]vidence is 'material' if there is a 'reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" Id. at 269 (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)). Evidence affecting the credibility of a witness must still pass the three-part Moore test by showing that the effect on the witness's credibility would

have changed the verdict. State v. Carrero, 428 N.J. Super. 495, 516 (App. Div. 2012) (overturned on other grounds) (explaining Giglio v. United States, 405 U.S. 150, 154 (1972)); State v. Carter, 91 N.J. 86, 117-19 (1982). Stated differently, evidence affecting credibility is not inherently material in regards to a Brady analysis. This dovetails with the defense's requirement to demonstrate the disclosure of an informant's actual identity is relevant and necessary to prepare and present a defense. See, Roviario v. United States, 353 U.S. 53, 60-61 (1957). Additionally, in Application, supra, the court declined to determine if a written statement containing a confidential informant's name would be Brady material, remanding it for determination by the trial judge, stating they would defer to that decision. 282 N.J. Super. at 249.

The name, address, and likeness of CW are not material to the defendant to the degree that non-disclosure would violate Brady, as the name, address, and likeness of CW are not relevant and necessary to prepare and present any defenses at this time.

2. Confrontation Clause

The defense argues that under the Sixth Amendment's Confrontation Clause, a defendant has a right to confront the witnesses against him, and as such, the State is constitutionally required to provide the identity of CW to the defense. Furthermore, the State may not withhold any statements by CW, pursuant the holding of Crawford v. Washington, 541 U.S. 36 (2004). The State

counters that there are not any statements sought to be withheld in violation of the Confrontation Clause. The State also asserts that Defendant will have the opportunity to cross examine CW at trial.

A defendant may inquire into a witness's name and address during cross-examination under the Sixth Amendment's Confrontation Clause. Smith v. Illinois, 390 U.S. 129 (1968). However, pretrial disclosure of such information is still subject to appropriate Protective Orders and does not implicate the Confrontation Clause. Ritchie 480 U.S. at 53 ("The ability to question adverse witnesses, however, does not include the power to require the pretrial disclosure of any and all information that might be useful"); State v. Postorino, 253 N.J. Super. 98, 103-05 (App. Div. 1991).

Defendant's Confrontation Clause rights will be satisfied through the opportunity to cross examine CW at trial. The Confrontation Clause is a trial right, and therefore does not require the State to disclose the name, address, and likeness of CW prior to trial. Since the Protective Order is to protect the name, address, and likeness of CW, which are not testimonial statements sought to be entered by the State, Crawford would not be implicated by the issuance of a Protective Order.

3. Exemption to Informant Privilege; Identity of CW Has Been Otherwise Disclosed

The Defense argues that CW's name, address, and likeness has otherwise been disclosed, an explicit exception to the Informant Privilege. N.J.R.E. 516(a). The State responds that they are not raising the Informant's Privilege in order to protect the identity of CW.

While most case law involves confidential informants, there is a difference between informants and cooperating witnesses. Again, Postorino is instructive on this issue. There, the court dealt with a witness who did not appear to be a paid, professional confidential informant with a continuing relationship with the police. 253 N.J. Super. at 107. Because the witness was merely cooperating with the State and was not a confidential informant, the court rather bluntly said they were "not dealing with an issue of informant privilege." Id.; See also N.J.R.E. 516; N.J.S.A. § 2A:8A-28. Despite the inability of the State to invoke the privilege, the court still gave "substantial deference" to the trial court in determining whether the witness's new identity should be protected, and found that there was no abuse of discretion in denying disclosure of the witness's name and address. 253 N.J. Super. at 108.

It has also been found that disclosure is not necessary when the defendant claims to know the informant's identity through a

source other than the State or the witness themselves¹. State v. Williams, 364 N.J. Super. 23, 38 (App. Div. 2003); see also, Postorino, 253 N.J. Super. at 107-09 (despite knowing the witness's actual name and prior address, the Court refused to disclose the witness's new identity and location). The Williams Court "question[ed] the necessity of identification in [that] case, since [the defendant] professed to know the informant when she placed her drug order." Id. at 38. That Court also determined that non-disclosure of the informant's identity did not affect her reliability as they "found the informant's on-site identification to have been decisive in finding reliable her identification of defendant as the person with whom she set up a drug deal. Knowing who the informant was adds no relevant information in this context." Id. at 39-40. Even when the informant's identity is disclosed to "those who might seek retaliation," an order seeking to prevent additional disclosure is a matter "for consideration by the trial judge" and not automatically moot. 282 N.J. Super. at 254.

While the State did not invoke N.J.R.E. 516, it is not applicable in the present case, as CW is a cooperating witness, not a confidential informant. While there may be overlap in the case law and principles of the Informant Privilege and Protective

¹ Defendant has submitted three names – "Zev Lapis," "Zev Lapidus," and "Zed Lepidus" – as the potential names of CW

Orders, one is not required for the other. Insofar as Defendant has supposedly secured information on "Zev Lapis," "Zev Lapidus," and "Zed Lapidus," an individual Defendant claims is CW, he has secured that information through independent means. Therefore, the exception to N.J.R.E. 516 under Subsection (a) would not apply.

4. Necessary to Prepare an Entrapment Defense

The defense next asserts they need this information to prepare an entrapment defense, particularly the video evidence.²

Irrespective of the informer's position with police, "courts will generally deny a request for disclosure" of their identity. State v. Florez, 134 N.J. 570, 578 (1994). When determining whether to disclose the identity of an informant, the Court must weigh and balance the competing considerations of both the defendant's right to a fair trial, and the public interest of protecting the flow of information. 71 N.J. at 384; 134 N.J. at 579; McCray v. Illinois, 386 U.S. 300, 311 (1967); Roviaro 353 U.S. at 62. When there are threats against an informant, the court should consider "the claim of harm to the safety of an informant based on revelation of the identity of the informant." Florez 134 N.J. at 582. "The State has legitimate concerns for the safety of witnesses who are considered 'snitches' or 'rats.'" State v. Hernandez, 225 N.J. 451, 467

² A review of the court documents show that Defendant has not yet filed notice of an entrapment defense as required by Rule 3:12-1, although Defendant has mentioned the potential for an entrapment defense in his brief and on the record during oral arguments. Presumably, the determination to file notice in conformity with Rule 3:12-1 will be made after the defense reviews the redacted video evidence.

(2016). These concerns are particularly salient when the witness has been involved in other investigations unrelated to the one in which the request was made, as the people involved in the other cases may learn of the witness's identity and attempt to harm them. Id. "We fully understand that the reliability of State informants and cooperating witnesses must be subject to special scrutiny because the charge-reduction and sentence-reduction incentives given to such witnesses have the capacity to induce false testimony." Id. at 468.

After receiving and reviewing discovery pursuant to this Court's order, if Defendant files notice of an entrapment defense, the Court will return to this Protective Order and address the disclosure of CW's identity in that context.

5. Franks Hearing

The defense, in their brief, asserts Defendant "is entitled to a hearing on the issue of probable cause pursuant to" Franks v. Delaware, 438 U.S. 154 (1978) as the State used a cooperating witness to establish probable cause without identifying who that witness is. The Court denies the hearing without prejudice at this time, as Defendant must first preliminarily show (1) a material false statement or omission, (2) made by the affiant law enforcement officer, (3) either knowing and intentionally, or with reckless disregard for the truth. Franks v. Delaware, 438 U.S. 154, 155-56 (1978). Then, Defendant must state with specificity

the portions of the warrant that are claimed to be untrue and provide proof supporting such a claim. Id. at 171 (1978); State v. Broom-Smith, 406 N.J. Super. 228, 240-41 (App. Div. 2009). Finally, Defendant must show that the material false statement or omission was necessary to the finding of probable cause. 438 U.S. at 155-56; State v. Howery, 80 N.J. 563, 567-68 (1979).

CONCLUSION

For the above stated reasons, the Court finds it necessary to protect CW's name, address, and likeness, and therefore grants the State's Motion for a Protective Order at this time.



Anthony M. Massi, J.S.C.