

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MATTHEW KENNARD, )  
 ) No. 74, 2007  
 Defendant Below, )  
 Appellant, ) Court Below: Superior Court  
 v. ) of the State of Delaware in  
 ) and for New Castle County  
 )  
 STATE OF DELAWARE, ) Cr. A. No. 0603000676 and  
 ) 0505021068  
 Plaintiff Below, )  
 Appellee. )

Submitted: August 22, 2007

Decided: September 6, 2007

Before **STEELE**, Chief Justice, **HOLLAND** and **JACOBS**, Justices.

***ORDER***

This 6<sup>th</sup> day of September 2007, it appears to the Court that:

(1) Appellant-defendant Matthew Kennard appeals his Superior Court convictions for Possession of a Deadly Weapon by a Person Prohibited (two counts), Possession of a Destructive Weapon, and Possession of Ammunition by a Person Prohibited, Receiving a Stolen Firearm (two counts), and several burglary related offenses. The State entered *nolle prosequis* on two of the burglary charges and the ammunition charge. After a four day trial, a jury acquitted Kennard of the remaining burglary offenses and convicted him of all of the weapons charges. The trial judge sentenced Kennard to four years and nine months at Level V followed by probation. Kennard appeals from those convictions and contends that the trial

judge violated his right to cross examination and confrontation when, without conducting a *Flowers* hearing, the trial judge allowed the State to conceal the identity of its confidential informant. After consideration of the record, we conclude that because the CI did not give police any information regarding Kennard, the trial judge did not abuse his discretion when he refused to disclose the CI's identity. Furthermore, the record shows that the State continued to use the CI in other investigations. Faced with those circumstances, Kennard has failed to demonstrate that the CI possessed any information that would materially aid his defense, and thus, outweigh the State's need to protect the CI's identity. Accordingly, we affirm.

(2) On November 16, 2005, Michelle Lindsay reported that her home in Townsend had been burglarized. According to Lindsey, a play station, games, DVD player, discs, two laptop computers and two shotguns were missing. Lindsay gave the serial numbers of the two missing weapons to the police and identified the guns at trial. On December 5, 2006, Patricia Ayala notified police that her home in Townsend had been burglarized and that \$40,000, coins, jewelry, and \$2 bills were missing. Neither Lindsay nor Ayala knew who perpetrated the crime, and there was no physical evidence to link anyone to the crimes.

(3) One month later, on January 14, 2005, Newark Police Detective Mark Fenney received a tip from a CI, who told him that an individual named Justin

Jackson was trying to get rid of some guns. The CI also told Feeney that Jackson was with a female and that the two of them would soon be driving to Cherry Hill Manor Apartments in Newark to meet another person named Sean, who would help Jackson dispose of the guns. Based on that information, the police surveilled Jackson and saw him riding in a blue Kia with a female driver in Newark, Delaware. Once the police located the car, Officer Beighley pulled the car over for failure to signal. The driver of the car was Lindsay Emery, Kennard's girlfriend. Justin Jackson and Sean Prestbury were also in the car. Emery could not produce registration and proof of insurance.

(4) Beighley asked for permission to search the vehicle and Emery consented. Beighley found marijuana in the passenger compartment and on the back seat. Beighley also found two shotguns and two rifles in the trunk wrapped in what was later determined to be Kennard's jacket. Police determined that the two shotguns were the ones stolen from Lindsay's home.<sup>1</sup>

(5) The police arrested Jackson and interviewed him. At the beginning of the interview, Jackson stated that he did not know where the guns came from or that they were stolen. Six weeks later and after being charged with multiple weapons offenses, Jackson implicated Kennard. He told police that he saw

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<sup>1</sup> Kennard was incarcerated at the time of this stop.

Kennard with a case of guns in December 2005 and that the guns had been hidden in the attic and basement at 3 Messen Drive.

(6) Jackson also told police that Kennard had called him from prison and told him to get rid of the weapons, which explained why police found the guns in the car. The police obtained taped recordings of phone calls Kennard made from the prison. At trial, the State claimed that these recordings corroborated Jackson's statement.

(7) From late November to mid December 2005, Kennard had lived with Emery in her mother's basement. Emery's mother, Joanne, testified that during that time Kennard did not work, but he spent a lot of money. She also testified that Kennard flashed a wad of cash at her. After leaving Joanne's house, Kennard moved to 3 Messen Drive. Three other people, Tim Meyers, Justin Campbell, and Joe Pszenycyniak "hung out" at that address as well.

(8) At trial, the State referred to the CI during its opening statement.<sup>2</sup> Defense counsel then requested that the State disclose the CI's identity. The State

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<sup>2</sup> During opening statement, the prosecutor told the jury that:

January 14th of 2006, Detective Mark Feeney of the Newark Police Department received information from a confidential source that a black male by the name of Justin Jackson was in possession of several firearms, and he was trying to get rid of them. He was advised that he would be in the company of a white female; that they would be going to Cherry Hill Manor in Newark, Delaware, to meet up with another black male by the name of Sean who was going to help him get rid of the guns.

argued that the CI's name was privileged and need not be disclosed because the CI did not have information about the burglaries, the stop and search did not result from the tips and the CI had no information material to Kennard's defense. In response, defense counsel asked the trial judge to meet with the prosecutors and ask certain questions of them to determine if the CI's name should be disclosed.

(9) The trial judge then met with the prosecutors and the police officer. The parties filed the transcript of that conference under seal with this Court. After the conference, the trial judge told defense counsel that he had asked the prosecutors the questions that defense counsel had requested.

(10) Defense counsel then told the trial judge that it was necessary for the CI to come in and the trial judge examine him. Defense counsel further argued that the trial judge should not rely solely on the State's representations about what information the CI may have about Kennard or the crimes for which he stood accused. Based on the State's representations, the trial judge denied this request and ruled that State was not required to disclose the CI's identity, because the CI had no knowledge of the crimes for which Kennard was being tried.

(11) At trial, the jury found Kennard guilty of two counts of Receiving a Stolen Firearm and Possession of a Destructive Weapon. The trial judge found Kennard to be a "Person Prohibited" from possessing a firearm. The trial judge

sentenced Kennard to four years and nine months at Level V followed by probation. Kennard's sole argument on appeal is that the trial judge violated his rights to cross examination and confrontation when, without conducting a *Flowers* hearing, he allowed the State to conceal the identity of its CI.

(12) “We review a trial court’s refusal to compel disclosure of the identity of a confidential informant for abuse of discretion.”<sup>3</sup> “An abuse of discretion occurs if the trial court’s decision is based on ‘clearly unreasonable or capricious grounds.’”<sup>4</sup> Delaware Uniform Rule of Evidence 509 (a) affords the State a privilege to refuse to disclose the identity of a CI unless it appears that the CI may be able to give testimony that would “materially aid the defense.”<sup>5</sup> “The defense has the burden of establishing, beyond mere speculation, that the informant’s testimony would materially aid the defense.”<sup>6</sup> Moreover, “where the State claims that the identity of an informer is privileged, the trial court must examine, in detail and case-by-case, whether the informer’s identity should be disclosed.”<sup>7</sup>

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<sup>3</sup> *Davis v. State*, 1998 WL 666713, \*1 (Del.), citing *Brown v. State*, 1992 WL 53420, \*4 (Del.).

<sup>4</sup> *Bultron v. State*, 897 A.2d 758, 762 (Del. 2006).

<sup>5</sup> D.R.E. 509 (a); D.R.E. 509 (c) (2).

<sup>6</sup> *Price v. State*, 2000 WL 1616590, \*2 (Del.).

<sup>7</sup> *Butcher v. State*, 906 A.2d 798, 802 (Del. 2006).

(13) “The comment to D.R.E. 509 notes that the Delaware rule of informer privilege follows, in part, the Superior Court’s holding in *State v. Flowers*.”<sup>8</sup> The *Flowers* Court described four circumstances under which the issue of disclosing the informer’s identity arises: (1) the informer’s information formed the basis to establish probable cause for a search; (2) the informer witnessed a criminal act; (3) the informer participated in, but was not a party to, an illegal transaction; and (4) the informer was an actual party to an illegal transaction.<sup>9</sup>

(14) In the case at bar, the record shows that the CI made no mention of Kennard nor implicated him in any way, and that apparently the police did not ask the CI the weapons’ source. The State notes that the police lawfully stopped the vehicle for a traffic violation, had the driver’s consent to search, seized the weapons pursuant to that search and information about their source did not come

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<sup>8</sup> *Id.*; see also *State v. Flowers*, 316 A.2d 564 (Del. Super. 1973).

<sup>9</sup> *Id.* at 802, citing *State v. Flowers*, 316 A.2d at 567. In *Butcher*, we held that:

In *Flowers*, the Superior Court noted that while the privilege is generally protected in the first situation and disclosure is usually required in the fourth situation, there is no general rule for the second and third situations—where the informer witnessed the criminal act or participated in the illegal transaction. In the second and third scenarios, disclosure of the informer’s identity is required only if the trial judge determines that the informer’s testimony is material to the defense.

*Butcher*, 906 A.2d at 802-03.

from the CI.<sup>10</sup> Justin Jackson, not the CI, implicated Kennard. Therefore, under *Flowers* and its progeny, the informant privilege prevails because the CI's tips and observations satisfied none of the four *Flowers* criteria.

(15) In *Roviaro v. United States*,<sup>11</sup> the United States Supreme Court held that the appellate court was only required to “balanc[e] the public interest in protecting the flow of information against the individual’s right to prepare his defense.”<sup>12</sup> After reviewing the trial judge’s ruling<sup>13</sup> and the sealed *ex parte*

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<sup>10</sup> At trial, the prosecutor argued that:

But I think the argument Mr. Barber was making was that this stop wasn't based on this [confidential informant]. When a stop is made based on the [confidential informant]'s information, there's often a hearing to determine was he reliable, what did he say, how is it reliable. But this stop was ultimately made based on the traffic stop, the finding of the marijuana, and then a search pursuant to a lawful custodial arrest into the trunk area. And the CI really doesn't come into play at all. That's why we really don't think it's relevant. But I have no problem meeting with the Court and divulging that information to the Court alone.

<sup>11</sup> 353 U.S. 53, 62 (1957).

<sup>12</sup> *Id.* at 62.

<sup>13</sup> In response to Kennard's request to disclose the Informant's identity, the trial judge ruled that:

. . . Okay. In this case, probable cause for the stop was established by the driver's failure to signal. Police had probable cause to stop the vehicle. The driver then failed to produce registration and insurance information. After the driver consented to a search, a green leafy substance was found consistent with marijuana. That was found on the floor of the back of the car. The search subsequent to the arrest led to the discovery of weapons in the trunk.

The officer who testified who made the stop testified that he didn't know prior to the stop that the weapons were in the trunk. Most case incidents involving a requirement of disclosure of an informant identity arise when the legality of the



conference transcripts submitted to this Court, we conclude that because the CI did not implicate Kennard and appeared to have no information concerning Kennard, further inquiry to derive information from the CI would not result in material aid to Kennard's defense. Furthermore, because the State continued to use the CI in other investigations, Kennard has failed to demonstrate that his need for disclosure outweighed the State's need to protect the CI's identity. Therefore, the trial judge

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search without a warrant is an issue, and the communications of an informer are claimed to establish probable cause.

If you do the analysis of the case, first, if you look at *Brady* material, if the State knows that the unnamed witness can give information favorable to the defense, then the State has a duty to disclose. And, typically, that is a witness who is referred to in trial testimony. Here the witness has no information that would have been favorable to the defense. And reference to the confidential informant was not made in trial testimony --

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The jury was told in the opening -- the jury was told what was said in opening statements are not evidence. If you look at the *Flowers* analysis, as a result of the hearing, as a result of talking to the officers, the confidential informant was not used to establish probable cause for the search. With respect to this defendant's -- if you look at the defendant's charges and what he was indicted for and the criminal acts which he stands accused, this informant was not a party to any of the indicted illegal transactions that took place.

Also, there's a case out there, *Boomer v. State*, Supreme Court case, 1996, Delaware [Lexis] 374. In this case, at the time of trial, the defendant, while cross-examining the police officer, demanded that the confidential informant be revealed. At that time the Supreme Court would not consider the issue because the defendant did not make a request for the identification of the informant as required under *State v. Flowers*. He did not make use of the discovery provisions of Delaware Rule of Evidence 509, which are very similar to this case.

Based on the hearing I had yesterday and questioning of the police officer, I drew the conclusion that this informant had nothing to do with any of the indicted crimes that the defendant is accused of having done.

properly determined that the privilege not to disclose the CI's identity should prevail.

(16) Alternatively, relying on *Butcher v. State*,<sup>14</sup> Kennard claims that the *ex parte* hearing was inadequate because the trial judge examined the police, but not the CI, in the presence of prosecutors. We disagree. First, we have previously upheld a trial judge's conclusion that the defendant had not shown a reasonable probability that the CI could give testimony that would materially aid the defense, under similar circumstances where the trial judge examined the police officer alone.<sup>15</sup> Second, in *Butcher*, the defendant moved to disclose the CI's identity, by claiming "the informer was the only person other than [the Detective] who witnessed the [alleged illegal act]."<sup>16</sup> Here, the record does not support that *any* of the four *Flowers* criteria are implicated. Kennard's contention that the identity of the CI would have materially aided him in proving his defense by challenging Jackson's credibility has no merit. Kennard's contention that an interview with the CI may have furthered his defense is based on pure speculation. Thus, Kennard has failed to meet his burden to show that the CI may be able to give testimony which would materially aid his defense.

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<sup>14</sup> 906 A.2d 798 (Del. 2006).

<sup>15</sup> *Hooks v. State*, 1992 Del. LEXIS 305 (Del.).

<sup>16</sup> *Butcher v. State*, 906 A. 2d 798, 800 (Del. 2006).

(17) We conclude that the trial judge did not abuse his discretion when he denied Kennard's request that the State disclose the CI's identity or when he denied Kennard's related request to produce the CI for an *in camera Flowers* hearing.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Myron T. Steele  
Chief Justice