

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

STATE OF FLORIDA,

Petitioner,

v.

Case No. 5D19-2288

TOMMIE HENRY,

Respondent.

_____ /

Opinion filed November 18, 2019

Petition for Certiorari Review of Order
from the Circuit Court for Orange
County, Tom Young, Judge.

Joseph P. Kelly, Assistant State
Attorney, of Office of the State Attorney,
Orlando, for Petitioner.

David Varet, Assistant Regional
Counsel, of Office of Criminal Conflict
and Civil Regional Counsel, Casselberry,
for Respondent.

PER CURIAM.

The State seeks certiorari review of the trial court's order granting the defendant's motion to compel the disclosure of certain witnesses, the identities of whom the State wishes to keep confidential. The State argues that the order is a departure from the

essential requirements of the law and results in irreparable harm for which there is no remedy on appeal. We agree and quash, in part, the order under review.

Tommie Henry, the defendant, is subject to ongoing prosecution for attempted first-degree murder with a firearm, shooting into an occupied vehicle, and possession of a firearm by a convicted felon. Henry moved to compel disclosure of the identities of five individuals who were listed as potential witnesses. In the motion, Henry argued that the failure to disclose the witnesses' identities prejudiced him because his attorney could not determine potential conflicts. Further, Henry asserted in a conclusory fashion that the lack of disclosure affected his right to a speedy trial.

In response to the motion, the State asserted the privilege of nondisclosure and sought to restrict the disclosure of four of the individuals' identities. The State indicated that it would not call these individuals as witnesses and that each individual had expressed concern for his or her own safety and agreed to speak with law enforcement only in confidence.

Following a hearing, the trial court entered a lengthy order that required the State to disclose the names of two of the individuals to defense counsel and to schedule their depositions at defense counsel's request. The order further provided that if the individuals failed to appear for depositions, their full contact information including address, birthdate, and employer would be provided to Henry. The State timely filed a petition for certiorari review.

"Our standard of review on a petition for writ of certiorari is whether the trial court's order constitutes a departure from the essential requirements of law that causes material injury throughout the lawsuit, leaving no other adequate remedy." State Farm Fla. Ins.

Co. v. Marascuillo, 161 So. 3d 493, 496 (Fla. 5th DCA 2014) (citing Allstate Ins. Co. v. Boecher, 733 So. 2d 993, 999 (Fla. 1999)).

Pursuant to its privilege of nondisclosure, the State may withhold the identity of a confidential informant. See Fla. R. Crim. P. 3.220(g)(2). “The purpose of the privilege 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 that obligation.” Id.

However, this privilege is not absolute and must yield if the failure to disclose the witness’s identity will infringe upon the defendant’s constitutional rights. Fla. R. Crim. P. 3.220(g)(2). Thus, the privilege will not be maintained when the witness’s identity is relevant and helpful to the defense of the accused or where the identity is essential to a fair determination of the cause at issue. Simmons v. State, 887 So. 2d 1283, 1284 (Fla. 2004) (citing Roviaro, 353 U.S. at 60–61).

Once the State has asserted the privilege of nondisclosure, the burden shifts to the defendant to show that the disclosure is necessary. See State v. LaBron, 24 So. 3d 715, 717 (Fla. 4th DCA 2009). Therefore, when a defendant seeks the disclosure of a confidential witness’s identity, the defendant must allege a legally cognizable defense to the crime charged and support the defense with sworn evidence. See State v. Harklerode, 567 So. 2d 982, 984 (Fla. 5th DCA 1990). Accordingly, “in the absence of sworn allegations of a legally cognizable defense, a trial court is without authority to order disclosure.” State v. Powell, 140 So. 3d 1126, 1131 (Fla. 5th DCA 2014); see also State

v. Titus, 70 So. 3d 763, 763–64 (Fla. 4th DCA 2011); State v. Davila, 570 So. 2d 1035, 1038 (Fla. 2d DCA 1990) (“The defendant must make a preliminary showing of the colorability of the defense prior to disclosure. A bare allegation that failure to disclose would impede the ability to prepare a defense is not sufficient to require disclosure; the defense must be supported by sworn proof.” (citations omitted)).

In this case, Henry’s motion failed to raise a legally cognizable defense, did not include any sworn proof or an oath of any kind, and alleged prejudice only in vague terms related to speedy trial and the potential for a conflict. Further, at no point did Henry assert in his motion below that failure to disclose the witnesses would result in an unfair determination of the cause at issue—a requirement of Rule 3.220(g)(2). Therefore, Henry failed to properly assert, under oath, sufficient grounds to show that disclosure of the witnesses’ identities are relevant or helpful to his defense or essential to a fair determination of the cause.¹

Thus, we conclude that in granting the motion to compel, the trial court departed from the essential requirements of the law. Accordingly, we grant the petition, quash the portion of the underlying order compelling disclosure, and remand for further proceedings.

PETITION GRANTED; ORDER QUASHED, in part; CAUSE REMANDED.

ORFINGER, EDWARDS, and GROSSHANS, JJ., concur.

¹ Nothing in this opinion precludes Henry from filing a proper motion or the trial court from granting said motion should Henry meet his burden to overcome the privilege of nondisclosure asserted by the State.