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Indiana Supreme Court
Court of Appeals
and Tax Court

IN THE

Indiana Supreme Court

Supreme Court Case No. 21S-CR-50

State of Indiana,
Appellant

–v–

Justin Jones,
Appellee

Argued: April 8, 2021 | Decided: June 22, 2021

Appeal from the Marion Superior Court
No. 49D31-1802-F2-5853
The Honorable Grant W. Hawkins, Judge

On Petition to Transfer from the Indiana Court of Appeals
No. 20A-CR-664

Opinion by Chief Justice Rush

Justices David, Massa, Slaughter, and Goff concur.

Rush, Chief Justice.

The confidential informer's privilege allows the government to withhold the identity of those who provide information about crimes, furthering important law-and-order interests. But these interests must be balanced with a defendant's right to prepare a defense and have a fair trial. So, the general rule of nondisclosure can be overcome if a defendant demonstrates that an exception to the privilege should apply. And when a defendant makes an argument for disclosure, a trial court must balance the countervailing concerns at play.

Yet, courts need not engage in such a balancing inquiry unless the State makes a threshold showing that the confidential informer's privilege even applies—by establishing that fulfilling the defendant's discovery request would reveal the informant's identity. *Beville v. State*, 71 N.E.3d 13, 21 (Ind. 2017).

Today, we hold that, as a matter of law, an informant's identity is inherently revealed through their physical appearance at a face-to-face interview. Thus, when a defendant requests such an interview—as Justin Jones did here—the State has met its threshold burden to show the informer's privilege applies. And because the trial court did not apply the established balancing test before ordering disclosure, we reverse and remand.

Facts and Procedural History

During the early hours of a June morning, two men, one masked and one not, broke into a home. They tied up, assaulted, and robbed a woman while her two young children watched. The armed men then spent hours ransacking the house, stealing thousands of dollars' worth of items.

Later that day, officers discovered the victim's stolen vehicle; and next to it, they found Justin Jones's phone. The phone would reveal, among other information, that Jones knew the victim through his girlfriend; he had been in the victim's neighborhood for approximately two hours

during the time of the attack; and he had made a fourteen-minute call to his girlfriend during that period.

Two months later, a confidential informant (CI) provided a detective with information. The CI relayed the names of the two men who allegedly broke into the house and said that a third man, someone named "Haughville Cody"—later identified as Jones—had organized the crimes. The CI claimed to have learned this information at "the Clubhouse" while talking with a few other people, including a man who said he had participated in the robbery. Jones and two men were subsequently charged with burglary, armed robbery, kidnapping, criminal confinement, and auto theft.

Jones and his codefendants attempted to learn the CI's identity by deposing the detective and later filing a motion to compel. The State, however, refused to disclose the informant's identity. It explained that, though the CI was mentioned in the probable cause affidavit, the CI was not a witness to the crime. It further explained that the information the CI provided was used only to develop potential suspects, the CI would not testify, and none of the information provided by the CI would be offered at trial.

Upon informal direction from the trial court, the parties attempted to reach a consensus on what information could be revealed. But Jones was unsatisfied, so he sought to interview the CI. Jones claimed he had a right to know the details of the conversation between his codefendant and the CI, along with any other information the CI had learned. The trial court then directed the parties to find a way to allow Jones's counsel to interview the CI without revealing the CI's identity.

The first attempt allowed Jones's counsel to question the CI using a voice-disguising machine. But the machine malfunctioned, so the State relayed the CI's answers to defense counsel by phone. Jones's counsel determined this format wasn't working because the CI's answers differed from the detective's answers at the earlier deposition. A few weeks later, the parties tried again. This time, Jones provided written questions; the State recorded the CI's answers using a voice-disguising device; and the State sent the answers to Jones. But Jones again found this unsatisfactory

because some of the recording was difficult to understand and he could not ask follow-up questions. The State finally agreed to provide Jones with a transcript of the interview and said Jones's counsel could come to the State's office to ask additional questions to the CI on speakerphone.

Jones took the State up on this offer. With the CI in one room and Jones's counsel in another, the State relayed questions and answers over the phone. But Jones objected, complaining of pauses before the CI would answer and contradictions between the CI's answers and the detective's previous testimony. At this point, Jones insisted the CI was a necessary witness for trial and so he needed to interview the informant face-to-face.

The trial court agreed and ordered the State to produce the CI for a face-to-face interview with Jones's counsel. The order required defense counsel not to ask "any questions that may disclose the [CI's] identity, identifiers, residence, etc." The State then brought this interlocutory appeal.

The Court of Appeals affirmed, finding the State did not meet its burden to show the confidential informer's privilege applied because it hadn't shown the CI's identity "would be" revealed by a face-to-face interview. *State v. Jones*, 155 N.E.3d 1287, 1292 (Ind. Ct. App. 2020). The panel added that, even if the State had satisfied its burden, Jones had established an exception to the privilege should apply—by showing the CI had information relevant and helpful to his defense or necessary for a fair trial. *Id*.

The State petitioned for transfer, which we granted, vacating the Court of Appeals opinion. Ind. Appellate Rule 58(A).

Standard of Review

Because trial courts have broad discretion on issues of discovery, we review discovery rulings for an abuse of that discretion. *Hardiman v. State*, 726 N.E.2d 1201, 1206 (Ind. 2000). But the particular issue before us—whether the confidential informer's privilege applies to physical appearance revealed through a face-to-face interview—raises a question of

law that we review de novo. *See State v. Moss-Dwyer*, 686 N.E.2d 109, 110 (Ind. 1997).

Discussion and Decision

The confidential informer's privilege allows the State to withhold the identity of a person who provides information to the government. *Lewandowski v. State*, 271 Ind. 4, 7, 389 N.E.2d 706, 708 (1979); *see also Roviaro v. United States*, 353 U.S. 53, 59 (1957). The privilege promotes law and order, but it also implicates another significant concern: a criminal defendant's ability to obtain useful information to prepare a defense or ensure a fair trial. *Lewandowski*, 271 Ind. at 7, 389 N.E.2d at 708. And, so, a defendant may argue that disclosure is nonetheless necessary, requiring the trial court to balance countervailing interests and decide whether an exception to the privilege applies. *Id.* at 7–8, 389 N.E.2d at 708–09.

But such a determination isn't necessary unless the State has made the threshold showing that it can invoke the confidential informer's privilege. *Beville*, 71 N.E.3d at 21. Specifically, the State must demonstrate "that the CI's identity would be revealed" if it were to comply with the defendant's discovery request. *Id.*

Here, the State argues that disclosing the CI's physical appearance through a face-to-face interview necessarily reveals the CI's identity, triggering application of the privilege. Jones asserts that a face-to-face interview doesn't inevitably disclose a person's identity—rather, that occurs only when the interviewer recognizes the CI or the CI somehow reveals "other identifying information."

We agree with the State. As a matter of law, the confidential informer's privilege protects a CI's physical appearance. Accordingly, because Jones requested a face-to-face interview with the CI, the State satisfied its threshold burden to show the privilege applies. And so the trial court must employ the established balancing test to determine whether an exception to the confidential informer's privilege is warranted.

Before we explore these issues in depth, however, we provide a brief background on the principles underlying the privilege.

I. The confidential informer's privilege implicates important competing interests.

The long-standing confidential informer's privilege furthers and protects the public's interest in law and order. *Roviaro*, 353 U.S. at 59. By promising anonymity to informants, the privilege encourages citizens to report crimes, prevents retaliation, and ensures individuals feel safe helping law enforcement. *Beville*, 71 N.E.3d at 19. Thus, the general rule is one of nondisclosure. *Randall v. State*, 474 N.E.2d 76, 81 (Ind. 1985).

While these law-and-order concerns are significant, they conflict with a defendant's important interest in obtaining relevant information that could lead to an acquittal. *Lewandowski*, 271 Ind. at 7, 389 N.E.2d at 708. So, where the disclosure of an informer's identity "is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause," the privilege must yield. *Id.*, 389 N.E.2d at 708 (quoting *Roviaro*, 353 U.S. at 60–61). These exceptions to the general rule of nondisclosure stem from our fundamental concern for fairness. *Roviaro*, 353 U.S. at 60.

Thus, when a criminal defendant argues that a confidential informant's identity must be disclosed, courts employ a balancing test to determine whether the defendant has overcome the State's interest in invoking the privilege. *See, e.g.*, *Beville*, 71 N.E.3d at 19. Yet, courts need not weigh the countervailing interests at play unless the privilege applies in the first place, a showing the State must make. *Id.* at 20.

We accordingly turn to this threshold inquiry—that is, what the State needs to establish to invoke the confidential informer's privilege—before providing details on the aforementioned balancing test.

II. Physical appearance disclosed by a face-to-face interview reveals a CI's identity and thus triggers application of the confidential informer's privilege.

To show the confidential informer's privilege applies, the State must establish that, if it complies with the defendant's discovery request, the informer's identity would be revealed. *See Beville*, 71 N.E.3d at 21. The question, then, is whether the State satisfied its burden after Jones requested a face-to-face interview with the CI. The State did.

In *Beville v. State*, this Court found that when a defendant's discovery request "would obviously reveal" an informant's identity, then "the State has necessarily made the threshold showing that the informer's privilege is being properly invoked." *Id.* There, the defendant requested a copy of a recording of an alleged controlled buy between him and a CI. *Id.* at 17. Accordingly, the question was whether the State established that the CI's identity would have been revealed if the defendant watched the recording. *Id.* at 22.

The Court determined that the State failed to meet this threshold showing. *Id.* at 24. This was because "only the State's bare assertion suggest[ed] that the CI's identity would be revealed," *id.* at 19; and it was unclear whether the CI's physical appearance would have been visible in the recording. *Id.* at 22. Indeed, it was unknown whether the camera had been pointed at the target of the investigation or at the CI. *Id.* If the video had been pointed at the target—as is the case in most controlled-buy videos—then the CI's identity would not have been revealed. *Id.* On the other hand, if the camera somehow captured the CI, and the CI was visible, the CI's identity would have been disclosed. *Id.* Given this uncertainty, the State was not entitled to withhold disclosure of the video. *Id.* at 24.

The situation before us, though, is markedly different from that in *Beville*. Unlike the video of the controlled buy, Jones's requested face-to-face interview with the CI "would obviously reveal" the CI's identity, as the interview would disclose physical appearance, which is tantamount to

an informant's identity. *Id.* at 21. Indeed, "few other types of information . . . would reveal the CI's identity more readily than his or her physical appearance." *Goodloe v. City of New York*, 136 F. Supp. 3d 283, 297 n.7 (E.D.N.Y. 2015). Thus, just as the informer's privilege protects an informant's name and address, *Schlomer v. State*, 580 N.E.2d 950, 954 (Ind. 1991), the privilege must also protect a CI's physical appearance. So, if the State shows the defendant is requesting a face-to-face interaction, as here, then the State has necessarily met the threshold showing to invoke the confidential informer's privilege. *See Beville*, 71 N.E.3d at 19.

Jones argues that such a showing is insufficient to trigger the privilege and rather, to satisfy the threshold requirement, the State must establish either that (1) the interviewer would "recognize" the CI, or (2) a face-to-face interaction would lead to "other identifying and locating information." We address each argument in turn.

There are three reasons why we reject Jones's first contention regarding a recognition standard. First, proving recognition would be an impossible burden for the State to meet. The State has no advance insight about who an interviewer may recognize. And any actions taken to learn whether the interviewer would recognize the CI would likely reveal the person's identity anyway.

Second, an interviewer's recognition of a CI would depend on that CI's personal characteristics. And it would be arbitrary to apply this privilege to people with distinct physical characteristics, making them more easily recognizable, but not to others who have less identifiable features. Further, such a standard could also raise questions of bias, as trial judges—the ones deciding whether a person has recognizable features—would use their own experiences to determine what was and was not "recognizable." *See, e.g.*, Caroline Michel et al., *Holistic Processing Is Finely Tuned for Faces of One's Own Race*, 17 Psych. Sci. 608 (2006). Additionally, the pool of potential informants will often be small—for instance, here, Jones already knows the CI was someone his codefendant spoke with at the "Clubhouse." So something as basic as skin or hair color could be uniquely identifying.

Finally, such a standard would vary based on geographical area. For example, CIs in a large city might be relatively anonymous; and it might be unlikely that an interviewer would recognize them. But in rural and less populous areas, where "everybody knows everybody," recognition would be more likely. To be sure, even within urban areas, tight-knit neighborhoods and communities "where everybody knows your name" still exist.

We also find Jones's alternative argument unavailing—that the State must establish the face-to-face meeting would reveal some type of "identifying or locating information." This type of information would inevitably be revealed during such an interaction; so, requiring the State to make such a showing is unnecessary. Specifically, even if seeing a CI's physical appearance is not enough for the interviewer to identify or locate that person, the meeting would provide details that could be described to others—either intentionally or accidentally. And if that information is relayed to someone who wants to identify or locate the CI, we trust there would be creative ways to do so.

Importantly, modern technology offers plenty of ways to interview a CI without the meeting being "face-to-face." Phone applications and camera filters can mask one's appearance. *See* Nicholas Mirra, *Putting Words in Your Mouth: The Evidentiary Impact of Emerging Voice Editing Software*, 25 Rich. J.L. & Tech. 1 (2018). In an age where an attorney can appear in a Zoom court hearing as a cat,[1] the State and defendants can certainly work together to provide the information necessary for a full defense without revealing a CI's physical appearance and, thus, identity. We, of course, acknowledge the potential for technological glitches. But, on the flipside, in-person meetings could face comparable "glitches"—for example, someone may lack convenient transportation; a vehicle could break down on the way to an interview; or an individual may be too ill to attend a meeting in person (but could potentially use video conferencing at home).

[1] Guardian News, '*I'm Not a Cat': Lawyer Gets Stuck on Zoom Kitten Filter During Court Case,* YouTube (Feb. 9, 2021), https://www.youtube.com/watch?v=lGOofzZOyl8 [https://perma.cc/LN2X-EFCP].

In fact, technology, and the ability to remotely communicate, can allow more flexibility in this context.

In short, because a CI's physical appearance during a face-to-face interview reveals the informant's identity, any request for such a meeting triggers the informer's privilege. But this does not mean a CI's identity can't be disclosed. Rather, the burden simply shifts to the defendant to show why disclosure is warranted; and then the trial court must engage in a balancing inquiry. We explain this in detail below.

III. We remand to the trial court to apply the burden-shifting test.

Once the State has met the threshold requirement to show the confidential informer's privilege applies, the burden falls on the defendant to demonstrate disclosure is relevant and helpful to the defense or that it's necessary for a fair trial. *Lewandowski*, 271 Ind. at 7–8, 389 N.E.2d at 708–09. Specifically, the defense must show it's not speculating that the information may prove useful; and a court should not permit an exception for a "mere fishing expedition." *State v. Cook*, 582 N.E.2d 444, 446 (Ind. Ct. App. 1991) (quoting *Dole v. Local 1942*, 870 F.2d 368, 373 (7th Cir. 1989)). If the defense satisfies this burden, it has shown an exception is warranted.

The State then gets the opportunity to dispute whether disclosure is necessary to the defense or show that disclosure would threaten its ability to recruit or use CIs in the future. *Beville*, 71 N.E.3d at 19 (citing *Williams v. State*, 529 N.E.2d 323, 324 (Ind. 1988); *Furman v. State*, 496 N.E.2d 811, 814 (Ind. Ct. App. 1986)). As we explained in *Beville*, the State may demonstrate, for example, "that the CI played a merely tangential role, that the CI's safety would be in danger, that the defendant or his associates have a violent or threatening history, or that it would be difficult for the State to use or recruit CIs in the future." 71 N.E.3d at 23.

Then, with both sides' evidence in hand, the trial court balances the respective interests to determine whether the general rule of nondisclosure has been overcome. *Id.*; *Furman*, 496 N.E.2d at 814. In applying this balancing test, courts consider factors like the crime charged,

possible defenses, and the potential significance of the CI's testimony. *United States v. Valles*, 41 F.3d 355, 358 (7th Cir. 1994). For example, CIs who played a major role in a crime will offer more significant testimony than those whose roles were more peripheral. *Id.* So, showing that a potential defense depends on the CI's involvement weighs in favor of disclosure, while a CI's minimal role would not. *Id.*; *see also Beverly v. State*, 543 N.E.2d 1111, 1114 (Ind. 1989). Similarly, the fact that a CI will testify at trial supports disclosure, while the fact that a CI simply provided a tip that police followed up on favors nondisclosure. *Beverly*, 543 N.E.2d at 1114. Then, only after a trial court is satisfied that an exception is warranted, should the court order disclosure of the CI's identity. *Id.*

Here, however, nothing in the record suggests the trial court engaged in the appropriate balancing inquiry when ordering a face-to-face interview. Rather, the trial judge explained he had known defense counsel for a long time and trusted counsel was "looking for something real." The judge added that "I'd be curious, too," and so decided to "let him talk to the guy, let him find out what he can find out." But, as explained above, this is not sufficient. We thus remand to the trial court to apply the established balancing test outlined above.

Conclusion

Today, as a matter of law, we hold that disclosing a CI's physical appearance through a face-to-face interview reveals the CI's identity. Thus, by showing Jones requested such an interview, the State has met its threshold burden to show the confidential informer's privilege applies. And because the trial court did not engage in the necessary balancing inquiry to determine whether an exception to nondisclosure was warranted, we reverse the court's order and remand.

David, Massa, Slaughter, and Goff, JJ., concur.

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