STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AMIRA SAMI SALEM,

Defendant-Appellant.

UNPUBLISHED
January 12, 2001

No. 205746
Macomb Circuit Court
LC No. 95-001195-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BETTINA SCHRECK,

Defendant-Appellant.

No. 206323
Macomb Circuit Court
LC No. 95-001194-fh

Before: White, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

Following a joint trial before a single jury, both defendants were convicted of delivery of 225 grams or more but less than 650 grams of a controlled substance (heroin), MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii), and conspiracy to deliver 225 grams or more but less than 650 grams of a controlled substance (heroin), MCL 750.157a; MSA 28.354(1). The trial court sentenced each defendant to consecutive terms of twenty to thirty years' imprisonment. This Court consolidated defendants' appeals. Both defendants appeal as of right, challenging the trial court's denial of their motions to dismiss on the ground of entrapment, among other things. We remand for a new entrapment hearing, at which the defense will be permitted to confront and cross-examine the informant known as Joe Issa.

I

Schreck argues that her rights of confrontation, compulsory process and due process were denied by the trial court's ruling at the entrapment hearing that the true identity of the police informant, known to defendants as Joe Issa, would not be revealed to the defense.[1] Schreck argues that the trial court clearly erred in upholding the informer's privilege as to Issa.[2] Schreck argues that Issa actively participated in the underlying drug transactions, that he was not a mere supplier of information to the police, and that under those circumstances his identity was not privileged. We agree.

The entrapment hearing was held on January 8 and 9, 1997; April 8 and 9, 1997; April 29 and 30, 1997; and May 6, 7 and 9, 1997. At the entrapment hearing, the prosecutor claimed the informant's privilege in response to defendants' attempt to obtain the real identity, address, and testimony of Joe Issa. On April 30, 1997, the trial court held an in-camera examination of Issa and sealed the transcript. The trial court concluded that Issa's testimony would not be helpful to defendants and that Issa would not be produced.

A

Michigan courts use the objective test of entrapment, which focuses on the government's conduct that resulted in the charges against the defendant, rather than on the defendant's predisposition to commit the crime. *People v Hampton*, 237 Mich App 143, 156; 603 NW2d 270 (1999). The central question is whether the actions of the police were so reprehensible under the circumstances that the court should refuse, as a matter of public policy, to permit the conviction to stand. *Id.* Entrapment occurs when (1) the police engage in impermissible conduct that would induce a person situated similarly to the defendant and otherwise law abiding to commit the crime, or (2) the police engage in conduct so reprehensible that it cannot be tolerated by the court. *Id.*

Under the first prong of the entrapment test, the trial court should look at the following factors:

> (1) whether there existed any appeals to the defendant's sympathy as a friend; (2) whether the defendant had been known to commit the crime with which he was charged; (3) whether there were any long time lapses between the investigation and the arrest; (4) whether there existed any inducements that would make the commission of a crime unusually attractive to a hypothetical law-abiding

[1] Salem's appellate brief sets forth the facts pertinent to this claim, although it does not specifically argue this ground for overturning the trial court's denial of her motion to dismiss on entrapment grounds. However, Salem's trial counsel, who represented both defendants at the entrapment hearing, actively objected below to Issa's not being produced, and this Court can consider this question as to Salem because it implicates constitutional rights.

[2] Schreck has neglected to address the trial court's refusal to hold an in camera hearing concerning the alleged informant, "Omar." Failure to brief an issue on appeal results in its waiver. *People v Kean*, 204 Mich App 533, 536; 516 NW2d 128 (1994).

> citizen; (5) whether there were offers of excessive consideration or other enticement; (6) whether there was a guarantee that the acts alleged as crimes were not illegal; (7) whether, and to what extent, any government pressure existed; (8) whether there existed sexual favors; (9) whether there were any threats of arrest; (10) whether there existed any government procedures that tended to escalate the criminal culpability of the defendant; (11) whether there was police control over any informant; and (12) whether the investigation is targeted. [*People v James Williams*, 196 Mich App 656, 662-663; 493 NW2d 507 (1992), citing *People v Juillet*, 439 Mich 34, 56-57; 475 NW2d 786 (1991).]

Entrapment exists under the second prong of the entrapment test if the police conduct is so reprehensible that the court cannot tolerate the conduct and will bar prosecution on the basis of the conduct alone. *People v Fabiano*, 192 Mich App 523, 531-532; 482 NW2d 467 (1992).

B

Defendant Salem testified at the entrapment hearing that she was forty years old, was employed at Maslin Industry, a subsidiary of Ford Motor Company, before being incarcerated, had a college degree in sociology from the University of Lebanon and was working on an MBA from Wayne State University.

Both defendants testified that they met a man they knew as Joe Issa in connection with Issa's hiring Schreck to do a painting job for him. Defendants testified that the three became friends and that Issa came to their Royal Oak house frequently. Defendants testified that Schreck, a German citizen who had been in the United States since about 1992, used drugs and had accumulated large debts to several local drug dealers. They testified that they were being threatened because the debts were not paid. Defendants testified that Issa was aware of these problems and that he got Schreck re-addicted to heroin, a habit which she had kicked several years earlier, by inducing her to sample and sell an ounce of heroin for him for $6,000, holding out the prospect of defendants being able to pay against Schreck's drug debt.

Salem testified that several months later, around December 1994, Issa introduced her to a man named Jim Hurley, told her that Hurley was a big supplier who could pay cash for drugs, and that Issa kept asking her to make a big drug deal with Hurley. She testified that Issa

> took advantage of the situation that we had a problem because Ms. Schreck was a user, and she bought some drugs from some people in Detroit and hasn't paid the bill. She was extensively on drugs. They were threatening to kill us, and they knew where we lived. Joe Essa [sic] knew all of this, and he took advantage of the situation and came to us and kept calling me and asking me if I wanted to make a deal so I can pay my debts instead of being dead.

When asked how Issa introduced her to Hurley, Salem responded:

> He just told me I have somebody that can buy drugs to get you out of the situation that you were in because I was expressing my fear to him that the people that Bettina took drugs from because of her addiction are calling our house and

> threatening us, if we don't pay the money we are going to get killed. I was working and making money but I wasn't making enough money to pay her drug bills.
>
> * * *
>
> *Q* Did you ever talk to Joe Essa [sic] about his connection with John [sic Jim] Hurley?
>
> *A* I talked about his connection with John [sic Jim] Hurley and he told me he was in prison before and he did five years on a drug charge. I don't know if that's true. About ten years ago he was in prison and he met a big drug dealer who is the boss of John [sic Jim] Hurley, and he's going to be dealing with John [sic Jim] Hurley because he trusted him because he talked to his boss already and he gave him the okay to deal with him.
>
> *Q* That's what Essa [sic] told you?
>
> *A* That's what he said.
>
> *Q* Okay.

Salem testified that she and Issa met Hurley at a restaurant, and Hurley and Issa said they wanted ten kilos of cocaine and two kilos of heroin to start. Salem testified that Hurley said to her if she did not trust him, he would show her the money, and that the three of them drove in Hurley's car to the bank, where Hurley showed her a big drawer of money. Salem testified that

> I really was thinking about it before I wanted to do it. He wouldn't give me a chance. He [Issa] kept calling me, paging me, calling me at work, on my cellular phone, on my pager. I finally contacted my people and made a deal with them. And we decided to fly to New York and –
>
> *Q* Who was going to fly to New York with you?
>
> *A* Me and Ms. Schreck and Joe Essa [sic Issa].

Salem testified that Hurley flew to New York separately and that Issa claimed that he would split the profit 50/50 with Salem. Salem testified that the New York deal fell through, that Hurley got angry and that Issa told Hurley that Salem would try to find someone in Michigan to sell Hurley some drugs.

> This is when I agreed to find somebody in Michigan to – and when I talked to John [sic Jim] Hurley he wanted one kilo and the other person said he didn't have one kilo, half a kilo. And John [sic Jim] Hurley kept calling me and asking me if I could get more until we down to 250, which the person who supplied me with that couldn't get me more than that. John Hurley called me on the way when I was bringing the drugs to him and asked me if I could get more than 250 and if I can I should page him because he's ready to go pick up more money.

Salem testified that Schreck was a German citizen and stayed in the United States after her permit expired. She testified that they were working with a lawyer to get Schreck a working visa when Issa stepped in and "offered her a fraud marriage and introduced her to somebody to marry in order to stay in this country." Salem testified that Schreck did not want to do that, but that Issa kept on pressuring her until he convinced her. Salem further testified that Issa took her and Schreck to obtain the marriage license. She testified that Issa insisted that the wedding ceremony take place in Macomb County. Salem testified that the man Schreck married, whom they later learned was an undercover police officer, provided her only with a pager number, not a phone number or address where he lived. Salem testified that every time she asked Issa about it, Issa said the man was out of town and that he (Issa) would contact him and have him get in touch with Schreck, but that the man never did. Salem testified that even after she and Schreck were arrested, Issa visited her in jail every week "in order to win my trust that he was not the person that set me up."

Schreck testified she had been friends with Salem for approximately five years. She testified that they had five houses, purchased with money her parents sent to the United States, as well as with Salem's income from her job as an engineer. Schreck testified that she purchased her drugs on the street and owed a drug dealer named Jim approximately $40,000 for the crack and heroin she obtained from him. Schreck testified that when she was not forthcoming with the money, Jim began threatening Salem and Schreck. Once, he sent people to their house in Royal Oak to threaten their lives.

Schreck testified that when it became apparent that the New York deal was collapsing, Issa told Salem and her that he would allow them to keep all the profit from the deal, approximately $50,000, if they could manage to make it happen after all.

Schreck testified about the "sham" wedding Issa planned for her. Issa introduced Schreck to a man named Troy Sake, and Schreck married Sake to obtain citizenship. Issa told Schreck she could pay him in drug transactions for setting up the marriage.

Two of the persons who supplied Schreck with drugs testified at the entrapment hearing.

Agent Timothy Houghtaling testified at the entrapment hearing, on examination by defendant Salem's counsel, that he was a special agent with the INS assigned to the Great Lakes Drug Task Force, and that he assisted other agencies in investigations and took care of immigration violations as they came along. He testified that he was the first governmental agent that had anything to do with this case. He testified that around June or July 1993, about one month after defendants came to the United States, "an individual who I had learned the identity of as a witness in another document fraud case contacted me saying that the young ladies had just arrived here and were looking for people to buy kilo quantities of cocaine, and that began this whole thing." Houghtaling testified that "the individual who brought it to my attention was nothing more than a witness. The individual wasn't involved in or had a history of narcotics involvement. Couldn't even speak some of the same languages, in narcotic language, so I made arrangements to allow the young ladies to encounter an undercover officer who would be conversant with that kind of language and let them do as they would like to have done."

Q . . . . What were your instructions to this party, this agent?

A As near as I recall, there was a pager number passed and they did everything themselves thereafter.

Q You mean the parties, the agent and the girls, is that what you are talking about?

A One or both of the young ladies in concert contacting the undercover police officer.

Q Uh-huh.

A Or a series of them.

Q And were those police officers members of Macomb County Nark [sic] Squad?

A COMET Squad.

Houghtaling testified that he contacted friends at COMET, including FBI agent Bill Feeley, and that they worked together. When asked when the team gathered to actively pursue the tip about defendants, he responded:

This is sort of a funny case because it would go in spurts and drop down to a little bit of nothing and go in spurts. And as I said, there were periods of undercover activity and then there were periods that there was little involvement basically depending on how they called the shots.

Q In the mean time [sic], what was your function at this time?

A I made a lot of attempts for record checks to confirm the criminal records of the two of them and the status, escapees and violations of parole for narcotic offenses in Germany. Didn't have much luck at it, but I worked hard at it.

Q And the girls were then arrested?

A After they brought a bunch of heroin to the police.

The informant, Joe Issa, testified at an in camera hearing and was not subject to cross-examination by defense counsel. The trial court concluded that defendants had not been entrapped.

C

"The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *People v Sammons*, 191 Mich App 351, 360; 478 NW2d 901 (1991), citing *Maryland v Craig*, 497 US 836; 110 S Ct 3157; 111 L Ed 2d 666 (1990). This Court in *Sammons* held that the protections afforded by the Confrontation Clause extend to a pretrial entrapment hearing:

> We do not believe that the irrelevance of a defendant's guilt or innocence in resolving an entrapment claim renders the protections afforded by the Confrontation Clause inapplicable to an entrapment hearing. . . [T]he central concern of the Confrontation Clause is to ensure the reliability of evidence by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. [*Maryland v Craig, supra.*] While an entrapment hearing may not be a criminal prosecution involving the assessment of guilt or innocence, it remains, like a criminal trial, adversarial in nature and requires the resolution of factual issues by a trier of fact. Like at a trial, evidence is presented and testimony given.
>
> We believe the interests involved in ensuring the reliability of evidence at a trial also apply to an entrapment hearing. Indeed, a defendant who claims entrapment, because he essentially concedes commission of the offense charged, is likely to view resolution of the entrapment issue more critically than he views a trial of his guilt or innocence. Further, unlike the situation in [*Kentucky v Stincer*, 482 US 730; 107 S Ct 2658; 96 L Ed 2d 631 (1987)], a defendant in Michigan may not renew the entrapment issue at trial. Thus, to deny the protections afforded by the Confrontation Clause to a defendant at an entrapment hearing would be to deny him the opportunity to ensure that the evidence presented against him, which may defeat his claim of entrapment and remove any impediment to a subsequent trial and conviction, "is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings." *Craig*, 111 L Ed 2d 678-679. Finally, we believe it would be fundamentally unfair, and contrary to principles of due process, to allow the state to present evidence designed to defeat a defendant's claim of entrapment and at the same time restrict the defendant's ability to effectively examine the reliability of such evidence. [*Sammons, supra* at 361-362.]

The defendant in *Sammons* was convicted of possession with intent to deliver cocaine and conspiracy to deliver cocaine. At the entrapment hearing, the defendant testified regarding the involvement of a police informant he knew only as "Rick." The prosecution called Rick to rebut the defendant, and Rick was permitted to testify while wearing a mask and without disclosing his true identity. Rick denied the defendant's allegations, and the trial court concluded there had been no entrapment. On appeal, the defendant argued that his Sixth Amendment right of confrontation was violated when the trial court allowed Rick to testify while masked and without disclosing his true identity. This Court concluded that defendant had been denied his right of confrontation:

> Here, there is no doubt that credibility was the major issue at the entrapment hearing. The defendant's testimony tended to show that he agreed to the drug sale only after being repeatedly pressured with persistent telephone calls, threats, and appeals to his sympathy and friendship. . . . Through its masked witness, however, the prosecution was able to refute each of the defendant's allegations. Ultimately, the trial judge accepted the testimony of the masked witness over that of defendant in concluding that there had been no entrapment.

Because the masking of the prosecution's chief witness precluded the trial judge from adequately observing the witness' demeanor when testifying, we are constrained to find that the procedure of masking denied defendant a critical aspect of his confrontation rights. *Craig, supra.*

D

We also find that it was a violation of defendant's confrontation rights to completely preclude disclosure of identifying information.

The ability to identify and "place" one's accusers has been recognized as an important aspect of confrontation. In *Smith v Illinois*, 390 US 129; 88 S Ct 748; 19 L Ed 2d 956 (1968), the United States Supreme Court reversed the conviction of a defendant accused of illegally selling narcotics where he was prevented from cross-examining the principal prosecution witness regarding his name or where he lived. . . .

* * *

Here, while we agree that the trial court would have been justified in limiting cross-examination regarding identifying information in light of the alleged threats [against "Rick"], it instead precluded all such cross-examination altogether. . . .

We reject the prosecution's claim that it was entitled to withhold the identity of its chief witness under the so-called "informer's privilege." As explained in *Roviaro* [*v United States*, 353 US 53; 77 S Ct 623; 1 L Ed 2d 639 (1957).[3]], this

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[3] The *Roviaro* Court stated:

> 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 that 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. [Citations omitted]
>
> The scope of the privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged. Likewise, once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable.
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> A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's

(continued…)

> privilege entitles the government to **preserve the anonymity** of citizens who have furnished information concerning violations of the law to law enforcement officers, thus encouraging them to communicate such knowledge to the police. Even then, however, the privilege is not absolute . . .
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> **In the present case, the prosecution's witness was an actual participant in the underlying transaction, rather than a mere supplier of information.** Moreover, his testimony was essential to a fair determination of the issue of entrapment. Thus, the informer's privilege does not apply. [*Sammons, supra* at 365-368. Emphasis added.]

In *People v Cadle,* 204 Mich App 646; 516 NW2d 520 (1994), remanded on other grounds 447 Mich 1009; 526 NW2d 918, on remand 209 Mich App 467, 469; 531 NW2d 761 (1995)[4], the defendants argued that the prosecution's failure to produce an alleged informant violated their rights of due process. This Court agreed, noting:

> Generally, the people are not required to disclose the identity of confidential informants. *People v Sammons,* 191 Mich App 351, 368; 478 NW2d 901 (1991). However, "'[w]here 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.'" *Id.,* quoting *Roviaro, [supra* at 60-61]. Similarly, where the informant was a participant in the underlying transaction rather than a mere supplier of information, he is a res gestae witness, and the privilege does not apply. *Simmons* [sic *Sammons*], *supra* at 368. . . .
>
> Here, the evidence showed that the alleged informant was a part of Amo's drug conspiracy and may have participated in this crime. There was evidence that the

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(…continued)

> 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. . . .
>
> * * *
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> We believe 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. [*Roviaro, supra* at 59-62.]

[4] *Cadle,* 204 Mich App at 646, was overruled on other grounds by *People v Perry,* 460 Mich 55; 594 NW2d 477 (1999).

prosecutor had met with the informant and spoken to him on the phone, but made little or no effort to produce him or serve him.

We find that the trial court clearly erred in ruling that the informant was not a res gestae witness and that his identity need not be disclosed. The trial court also clearly erred in forbidding defendants from mentioning the alleged informant's name at trial. In our opinion, these errors are independent grounds for reversal, because they impinged on defendants' rights of confrontation and to a fair trial. Were we not reversing on other grounds, we would remand to allow the prosecutor to rebut the presumption that these errors prejudiced defendants. [*Cadle*, 204 Mich App at 650-651.]

The *Roviaro* balancing test was also applied in *People v Underwood*, 447 Mich 695, 705-706; 526 NW2d 903 (1994), and cases cited therein.

The proper procedure for determining the appropriateness of disclosure is an in-camera hearing:

"The procedural vehicle generally recognized as being the most useful for helping a trial judge to strike the appropriate balance between these competing interests is the in camera hearing . . . .

"Thus, where the government invokes the privilege in the face of a defense request for disclosure, and where the accused is able to demonstrate a possible need for the informant's testimony, the trial judge should require production of the informant and conduct a hearing in chambers, and out of the presence of the defendant. At this hearing the court will have an opportunity to examine the informant in order to determine whether he could offer any testimony helpful to the defense. A record should be made of the in camera session and its contents sealed so that only an appellate court will have access thereto. [*Underwood*, *supra* at 706, quoting *People v Stander*, 73 Mich App 617, 622-623; 251 NW2d 258 (1977).]

The informer's privilege is not absolute. *Roviaro, supra; Sammons, supra* at 368. See also 22A CJS, Criminal Law, § 534, pp 135-136:

The factor of primary importance in striking the balance between the disclosure of an informer's identity and protecting him is the degree of his participation in the criminal activity or in the police activity in bringing accused to justice. Where the informer had not merely given information to the arresting officer, but was a participant with accused in the criminal transaction charged, **or where he played an active and crucial role in the events underlying the potential criminal liability,** his identity is material to the defense, and should be disclosed on request. Furthermore, where the informer is shown to be a material witness to the transaction, or as to whether accused knowingly committed the act charged, his identity should be disclosed.

> On the other hand, disclosure of the informer's identity is not required where he is not a material figure in the criminal activity, or a participant in the crime, or at least only a minimal participant therein, or where he is not a witness to, or present during the commission of, the crime. Nevertheless, a nonparticipant non-eyewitness informer can be a material witness whose identity must be disclosed where he is a material witness on the issue of guilt.

We conclude that the trial court erred under these circumstances in concluding that the informer's privilege applied to Issa. In the instant case, it is clear that Issa was not a mere supplier of information to the police, rather, he was actively and continually involved in the events underlying defendants' potential criminal liability.[5] While he was not a witness to the delivery at issue, his involvement in the events leading to the transaction is directly material to defendants' entrapment defense. We recognize that the court conducted an in camera hearing and examined Issa regarding his involvement, apparently concluding that the conduct admitted to by Issa did not amount to entrapment.[6] However, defendants were not permitted to challenge and probe Issa's testimony through cross-examination. It well may be that the trial court will ultimately come to the same conclusion after having the benefit of vigorous cross-examination of Issa; however, it is also possible that cross-examination will yield admissions that will substantiate defendants' entrapment defense. Defendants were entitled to cross-examine Issa and were denied their rights of confrontation and due process. We vacate the trial court's opinions and orders on the entrapment issue and remand for additional testimony.

In light of our disposition, we do not now address defendants' remaining claims. We remand for a new entrapment hearing at which defendants will have opportunity to confront and cross-examine the informant known as Joe Issa. The court may enter an appropriate protective order, but may not impinge on defendants' right to confront and cross-examine Issa concerning his credibility and his involvement in the matter at issue. This hearing shall take place within fifty-six days of the issuance of this opinion, and the trial court shall, within twenty-one days of the hearing, in writing or orally on the record, make findings and conclusions with regard to the entrapment issue. The trial court shall then notify the Clerk of this Court and cause the transcripts and decision to be transmitted to this Court. We retain jurisdiction.

/s/ Helene N. White
/s/ Martin M. Doctoroff
/s/ Peter D. O'Connell

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[5] Defendants knew Issa well, albeit not his true identity. Issa also knew defendant Salem's brother.

[6] We also recognize that the court was not obliged to accept defendants' testimony as true, and that the drug-suppliers' testimony tended to undermine defendants' testimony on certain points. Nevertheless, we cannot speculate regarding what testimony defense counsel may have secured from Issa on cross-examination, or the extent to which it may have corroborated defendants' claims.