

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MICHAEL DAVID HOWELL,

Defendant-Appellee.

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UNPUBLISHED

March 6, 2007

No. 266864

St. Clair Circuit Court

LC No. 05-002041-FH

Before: Servitto, P.J., and Talbot and Schuette, JJ.

PER CURIAM.

Defendant was charged with possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(iv), possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), and possession with intent to deliver another controlled substance, MCL 333.7401(2)(b)(ii). The prosecutor appeals as of right from a circuit court order dismissing the charges after the prosecutor failed to disclose the identity of a confidential informant. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The trial court's ruling on a motion to disclose a confidential informant is reviewed for an abuse of discretion. *People v Rodriguez*, 65 Mich App 723, 728-729; 238 NW2d 385 (1975). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

The identity of a confidential informant is generally privileged, although the privilege is not absolute. *People v Sammons*, 191 Mich App 351, 368; 478 NW2d 901 (1991). The "application of the informer's privilege depends on the particular circumstances of each case." *People v Underwood*, 447 Mich 695, 704; 526 NW2d 903 (1994). "Where 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." *Roviaro v United States*, 353 US 53, 60-61; 77 S Ct 623; 1 L Ed 2d 639 (1957). In deciding whether disclosure is necessary, the trial court should consider such factors as "the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *Id.* at 62. Disclosure may be appropriate, for example, where the informant was not "a mere supplier of information" but actually participated in the charged offense. *Sammons*, *supra* at 368; *People v Cadle*, 204 Mich App 646, 650-651; 516 NW2d 520

(1994), overruled in part on other grounds by *People v Perry*, 460 Mich 55, 64-65; 594 NW2d 477 (1999).

In this case, defendant failed to establish a legitimate need for the informant's testimony. The informant participated in two controlled buys of controlled substances from defendant. Based on that and other information supplied by the informant, the police stopped defendant's vehicle and arrested him. The charges arise solely from controlled substances found in defendant's vehicle. Defendant sought to have the informant produced so that he could challenge probable cause for his arrest. However, defendant did not deny the existence of the informant or deny that the controlled buys occurred, and there is no indication that the informant witnessed or participated in the offenses with which defendant was charged, so the only possible testimony the informant could provide would be to describe how the controlled buys transpired. The police could provide the same information and it is the information known to them that determines whether there is probable cause to arrest. *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996).

The crux of defendant's argument below was that if the police had probable cause to arrest him based on information that he had engaged in the delivery of a controlled substance during the controlled buys, they could not arrest him unless they intended to charge him with that conduct. Regardless of the merits of that contention, if any, it is solely a legal issue and is not dependent on any factual determinations, much less any factual determinations related to the controlled buys themselves. Therefore, the trial court abused its discretion in ordering disclosure of the informant because defendant had not shown any possible need for the informant's testimony that would be relevant to the defense or necessary to a fair determination of any issue.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto

/s/ Michael J. Talbot

/s/ Bill Schuette