

Affirmed and Memorandum Opinion filed December 14, 2010.



In The

Fourteenth Court of Appeals

NO. 14-09-00500-CR

JIMMY LEE BUTLER, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 149th District Court
Brazoria County, Texas
Trial Court Cause No. 57,601**

MEMORANDUM OPINION

A jury found the appellant, Jimmy Lee Butler, guilty of possession of controlled substances and the trial court sentenced him to six years' confinement in the Texas Department of Criminal Justice, Institutional Division. On appeal, Butler contends the trial court erred by denying his motion to suppress evidence obtained as the result of an allegedly illegal search and by failing to require the State to disclose its confidential informant. For the reasons explained below, we affirm.

In June 2008, Officer Matthew Christopoulos of the Freeport Police Department conducted surveillance of Butler's residence and observed suspicious activity there. Christopolous used a confidential informant to purchase drugs from the residence on May 29, 2008, and June 3, 2008. The confidential informant purchased both cocaine and hydrocodone from Butler at his residence.

On June 3, 2008, Christopolous obtained a search warrant for Butler's residence. Regarding the confidential informant, Christopolous alleged in his affidavit supporting the search warrant:

Your affiant states that the confidential informant has provided information to your affiant in the past and that the information has been found to be true and reliable. Your affiant has utilized the CI in the past on numerous narcotics investigations.

Christopolous then provided details of the two "controlled buys" the confidential informant made at Butler's residence.

When officers executed the search warrant at Butler's residence, they found, among other things, cocaine and hydrocodone. Butler was charged and convicted of two counts of possession of cocaine and hydrocodone, alleged as one criminal episode.

Before the trial, the trial court heard Butler's motion to suppress. Concerning the confidential informant, Butler argued in his motion that the warrant was conclusory because it failed to sufficiently support the allegation that the confidential informant was reliable or credible. Butler called Christopoulos, who testified concerning the controlled buys using the confidential informant. The State also clarified that the drugs obtained as part of the controlled buys were not the basis of the current charges, and Butler was being prosecuted only on the drugs found during the execution of the search warrant. The trial court denied the motion to suppress.

At trial, Christopolous again testified concerning his use of the confidential informant and the information he attested to in the affidavit supporting the search warrant. He testified that the confidential informant who had made the controlled buys had been used in the past and had proven to be reliable. Further, he testified that the confidential informant was not present at the time the house was searched. Christopolous then testified concerning the execution of the search warrant and the items found in Butler's residence, including the cocaine and hydrocodone.

During Christopoulos's testimony, the parties approached the bench and defense counsel requested permission to ask questions which could potentially reveal the identity of the confidential informant. The State again noted that the confidential informant was not a witness to this case. Butler argued, "I would like to find out her credibility as to the whole basis of the probable cause to enter someone's home." The State invoked the privilege to refuse to disclose the identity of the confidential informant.

A discussion followed between the parties and the trial judge. At one point the judge noted that he had found the confidential informant to be reliable, but found that the defense could still offer evidence that she was not reliable. Over the State's objections, the judge allowed the defendant to ask Christopolous a limited number of questions concerning the confidential informant. Outside of the jury's presence, Christopoulos testified that no female officer was present to search the confidential informant, assuming the confidential informant was female. Christopolous also testified that that if a female had been used, he would have searched her, but he would not have searched under her underwear.

Christopolous further testified that the confidential informant had worked about eight or nine previous cases over a period of about a month prior to trial. About three or four cases resulted in warrants being issued. In each of these cases, officers located drugs. The confidential informant proved credible in each case. There was no indication that the confidential informant was hiding drugs on her body. Christopolous also

explained that the confidential informant was working off a case in which she had broken off a piece of her prescription drug for anxiety while in jail and given it to another inmate.

After this questioning, Butler declined to present any evidence showing that the confidential informant provided unreliable information in this case. The judge then ruled, “I’ll find there is no plausible showing as to how her testimony would be necessary to a fair determination of guilt or innocence.” Butler’s counsel clarified for the record that he never requested an *in camera* hearing for the confidential informant. The judge then stated that he would not prohibit the defense from calling a witness who might have been the confidential informant, and the State would need make a relevancy objection at that time and another hearing would be held.

The jury then returned. Christopoulos testified that in this case he searched the confidential informant first by having the informant empty pockets. Christopolous then checked the confidential informant’s socks and shoes, did a pat down search, and checked the waistband area. He also explained that the confidential informant was “working off” a possession-of-Xanax case.

Later in the trial, the court held a hearing outside the jury’s presence concerning a witness the defense had subpoenaed but who failed to appear. The witness, Soledad Muniz, stated that she did not appear because she had “been threatened because of what actually is going on.” She stated that she was scared. The court fined her \$500 for failing to appear. The trial judge then conducted two *in camera* hearings, after which he announced that he found nothing which would undercut the witness’s reliability if she were, in fact, the confidential informant.¹ He also found “that the information that was the underlying source of obtaining the evidence is reliable.”

¹ The trial court also held a separate *in camera* hearing that was sealed.

II

On appeal, Butler contends that the jury should have had the right to determine the credibility of the confidential informant based on cross-examination by his counsel. He also contends the trial court should have held an *in camera* hearing to question the informant, and not simply rely on the officer's statement. Butler argues that because no hearing was held, his Sixth Amendment right to confront the witness was violated. The State responds that Butler failed to preserve error as to these complaints and, in any event, he presented no evidence from which the trial court could have determined that the informant was not reliable or credible.

The State has the “privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in a criminal investigation.” Tex. R. Evid. 508(a). Exceptions to the rule require the State to disclose the identity of a confidential informant if: (1) the informer may reasonably be able to give testimony necessary to a final determination of the issues of guilt or innocence, Tex. R. Evid. 508(c)(2); or (2) “information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible.” Tex. R. Evid. 508(c)(3).

A defendant who makes a request under Rule 508 has the threshold burden of demonstrating that the informant's identity must be disclosed. *See Bodin v. State*, 807 S.W.2d 313, 318 (Tex. Crim. App. 1991).² The appellant must make a “plausible showing” of how the informant's information may be important; mere conjecture or speculation is insufficient. *Washington v. State*, 902 S.W.2d 649, 656 (Tex. App.—Houston [14th Dist.] 1995, pet. ref'd). We review the trial court's determination for

² Although Butler mentions Rule 508 in his brief, he does not argue that any specific provision of the rule applies or that he made the required showing contemplated under the rule.

abuse of discretion. *Hall v. State*, 778 S.W.2d 473, 474 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd).

We agree that Butler failed to preserve error as to whether he was entitled to either the disclosure of the confidential informant's identity or an *in camera* examination of the confidential informant. Below, Butler never requested that the trial court direct the State to disclose the confidential informant's identity. In fact, Butler stated on several occasions he was not asking that the confidential informant's identity be disclosed, and he also stated that he was not requesting an *in camera* examination of the confidential informant. At trial, Butler argued that he was entitled to ask Christopoulos certain questions about the confidential informant to determine whether that person was credible and reliable. But the State perceived some of Butler's questions to be calculated to lead to the discovery of the informant's identity, rather than the informant's credibility or reliability.³ The State objected to those questions and invoked the privilege under Rule 508.

Butler's claims at trial do not comport with his claims on appeal, and therefore he has not preserved error on those issues. See *Buchanan v. State*, 207 S.W.3d 772, 774–78 (Tex. Crim. App. 2006) (trial court motion based on constitutional arguments did not preserve error for statutory claims on appeal); *Foster v. State*, 874 S.W.2d 286, 289 (Tex. App.—Fort Worth 1994, pet. ref'd) (claim on appeal of deficiencies in affidavit and warrant did not comport with motion claiming arrest was without probable cause and argument that affidavit failed to show informant was reliable).⁴

³ For example, Butler asked Officer Christopolous, "Do you know where [the confidential informant] is today?" Butler believed he knew the identity of the confidential informant, and was apparently seeking information to assist him in obtaining a subpoena for the informant. The State also objected when Butler asked for the name of the defendant in the first case the confidential informant worked on with Christopolous.

⁴ Moreover, the confidential informant was involved only in assisting Officer Christopolous in establishing probable cause for him to obtain a search warrant for Butler's residence; the informant did not testify against Butler and was not involved in the determination of his guilt or innocence. We note

Alternatively, considering Butler's issue on the merits, we conclude that he has not demonstrated that the trial court abused its discretion. The confidential informant in this case participated in the transactions that resulted in probable cause to search Butler's residence, but did not participate in the charged offense. Thus, Rule 503(c)(3) governs whether the identity of an informer must be disclosed to support the means used to obtain evidence. *See Washington*, 902 S.W.2d at 656.

Under Rule 503(c)(3), if the judge is not satisfied that the informant was reliable and credible, the judge may require the identity of the informant to be disclosed. Here, the trial judge denied Butler's motion to suppress at the hearing on the motion and again at trial. The judge's rulings reflect his determination that he was satisfied that the information upon which the warrant was based was received from an informant reasonably believed to be reliable or credible. *See id.*; *Ashorn v. State*, 802 S.W.2d 888, 892 (Tex. App.—Fort Worth 1991, no pet.). Butler points to no evidence to the contrary. Therefore, Butler has not demonstrated that the trial court abused its discretion in denying his motion to suppress. *See Washington*, 902 S.W.2d at 656; *Ashorn*, 802 S.W.2d at 892; *Bosquez v. State*, 792 S.W.2d 550, 552 (Tex. App.—El Paso 1990, pet. ref'd).

* * *

We overrule Butler's issue and affirm the trial court's judgment.

/s/ Jeffrey V. Brown
Justice

Panel consists of Justices Anderson, Frost, and Brown.

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that several courts have held that in this circumstance, an appellant's right of confrontation is not implicated. *See Shedden v. State*, 268 S.W.3d 717, 736–37 (Tex. App.—Corpus Christi 2008, pet. ref'd); *Lillard v. State*, 994 S.W.2d 747, 753 (Tex. App.—Eastland 1999, pet. ref'd).