

Date Submitted: February 12, 2001

Date Decided: February 27, 2001

Joelle Wright, Deputy Attorney General
Department of Justice
Office of the Attorney General
820 N. French Street
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Joseph A. Hurley, Esquire
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Re: State of Delaware v. Brent Johnson
Def. ID: 0008008362

Dear Counsel:

The defendant, Brent Johnson, has filed two documents: (1) Motion Requiring Disclosure of the Identity and Address of Confidential Informant; and (2) Memorandum of Law in Support of Scheduling a Flowers Hearing. The State has filed written opposition to both applications. The Court will reserve decision on the defendant's Motion to Disclose the Identity of Confidential Informant. For the reasons that follow, defendant's request for a Flowers¹ hearing will be GRANTED.

¹*State v. Flowers*, Del. Super., 316 A.2d 564 (1973).

On August 10, 2000, the defendant was present at a private residence in Wilmington when police executed a search warrant. During the search of the residence, the police discovered a substantial quantity of cocaine, currency and a weapon. The defendant was then arrested and charged with various narcotics offenses. The application for the search warrant relied, in part, upon information received from a confidential informant who allegedly purchased cocaine at the same residence some time prior to August 10, 2000. The physical description of the seller offered by the confidential informant apparently does not match the defendant.² It is undisputed that the confidential informant was not present at the residence at the time of the defendant's arrest.

²The confidential informant purportedly described an individual substantially smaller in stature than the defendant. Indeed, it is alleged that the confidential informant's description matches a co-defendant "to the tee."

Defendant has requested a so-called Flowers hearing on the ground that the confidential informant may be able to offer testimony helpful to the defense. *Flowers*, 316 A.2d at 567; DRE 509.³ The State contends that a Flowers hearing is not necessary because the confidential informant was used simply to provide a factual basis to establish probable cause for the search warrant; he/she was not involved in the events leading to defendant's arrest. *See Flowers*, 316 A.2d at 567 (disclosure of informant's identity not required when he "is used merely to establish probable cause for a search"); *State v. DiFilippo & Dorph*, Del. Super., Cr. A. No. 85-05-1877, Poppiti, J. (Jan. 10, 1986) (no Flowers hearing required when informant supplies information only about prior illegal activity which forms the basis for a search warrant). The rationale for these decisions, which suggest that a Flowers hearing is not appropriate when the confidential informant is not involved in the events leading to arrest, is that the confidential informant's testimony that the defendant was or was not involved in an uncharged illegal drug transaction is irrelevant and inadmissible. *DiFillipo & Dorph*, supra, Mem. Op. at *3. Accordingly, the confidential informant

³The hearing envisioned by Judge Quillen in *Flowers* involves an *in camera* inspection of affidavits relating to or authored by the confidential informant and/or an *in camera* interview of the witness to determine whether the informant may be able to give testimony which would materially aid the defense. *Flowers*, 316 A.2d at 568. See also, DRE 509; *Marin v. State*, Del. Supr., No. 134, 1998, Veasey, C.J. (March 13, 1999) (ORDER).

cannot, as a matter of evidentiary law, provide information helpful to the defendant.

*Id.*⁴

⁴The Court finds *DiFillipo* to be persuasive authority and declines defense counsel's invitation to determine that *DiFillipo's* holding is stale in light of DRE 509. The Court is satisfied that the evidentiary basis for the decision survived the adoption of DRE 509. Thus, defense counsel need not be concerned that his arguments have provoked the Court to question the decision of his once-upon-a-time mentor. Moreover, the Court questions whether the clearly misguided career counseling offered to counsel by Judge Poppiti (steering him away from bartending and towards lawyering) justifies such concern in any event.

The State's contention, on first glance of the record, would appear to be correct. Nevertheless, Flowers instructs that "the court has a duty to inquire further into the 'remote possibility that an informer's testimony might serve some defendant.'" *Flowers*, 316 A.2d at 568. While it is quite likely that the Flowers hearing will not yield helpful evidence for the defendant, the Court cannot conclude that the possibility of material exculpatory evidence from the confidential informant does not exist.⁵ Accordingly, the defendant shall provide to the Court within 10 days proposed questions to be answered by the confidential informant. The Court will determine if the questions are appropriate and, if so, will direct the State to supply the confidential informant's sworn written answers to the questions for *in camera* inspection. The written answers must be received by the Court within 20 days of the date of transmittal. If the Court determines that further clarification is required, the Court will conduct an in-chambers hearing with the confidential informant.

⁵The Court's decision to hold a Flowers hearing in this case by no means should be construed as an invitation to criminal defendants to request such hearings in every case where a confidential informant is involved nor should it be cited for the proposition that a Flowers hearing is required whenever it is requested. The Court's decision here is based upon the unique facts of this case. Specifically, unlike the defendant in *DiFillipo*, *supra*, who acknowledged that he was a resident of the home which was the scene of both the prior drug buys and the arrest at issue in that case, the defendant here denies that he was a resident of the home, or otherwise in a position to exercise "control" over its contents, either on the occasion of the prior controlled buys or on the day of his arrest. The Court will explore through a Flowers hearing the possibility that the confidential informant can provide material support for this defense.

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IT IS SO ORDERED.

Very truly yours,

Joseph R. Slights, III

JRS, III/sb

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