IN THE SUPREME COURT OF THE STATE OF DELAWARE

MAURICE COOPER,	§	
	§	No. 193, 2011
Defendant Below-Appellant,	§	
	§	Court Below: Superior Court of the State of Delaware in and for New Castle County
v.	§	
	§	
STATE OF DELAWARE,	§	ID No. 1002013686
	§	
Plaintiff Below-Appellee.	§	
	§	

Submitted: September 21, 2011
Decided: December 5, 2011

Before **HOLLAND**, **JACOBS**, and **RIDGELY**, Justices.

O R D E R

This 5th day of December 2011, it appears to the Court that:

(1) Defendant-Below/Appellant Maurice Cooper appeals from his Superior Court conviction and sentence for Trafficking, Possession with Intent to Deliver, and Maintaining a Vehicle for Keeping Controlled Substances. Cooper raises three arguments on appeal. First, Cooper contends that the Superior Court erred when it denied his motion to suppress evidence obtained from a first-time confidential informant. Second, Cooper contends that the delay between the time of his arrest and incarceration and the time he went to trial violated his right to a speedy trial. Third, Cooper contends that the Superior Court abused its discretion

when it rescinded an earlier order that the State produce the confidential informant for a *Flowers* hearing and denied Cooper's motions to dismiss and suppress contraband seized during the arrest. We find no merit to Cooper's appeal and affirm.

(2) Detective Robert Fox of the Wilmington Police Department conducted an investigation that led to Maurice Cooper's arrest.[1] Fox knew Cooper from a prior drug investigation in 2008, when Fox had conducted two controlled purchases of heroin from Copper using a confidential informant. The investigation ended with the execution of two search warrants; Cooper was found with a large amount of currency on his person but no heroin. During the investigation, Fox had learned that Cooper was operating a white Crown Victoria with chrome rims, registered under Cooper's name. Fox recalled that, in 2010, other detectives in Fox's unit discussed Cooper's heroin sales, which had involved at least ten bundles of heroin. Fox also witnessed Cooper operating out of a Grand Marquis with a blue ragtop and chrome rims.

(3) On February 26, 2010 Fox spoke with a confidential informant ("CI") who stated that he knew Cooper. The CI had been arrested on unrelated charges; he was told that his cooperation would be considered later but he was not promised

[1] These facts are based on the trial testimony of Detective Robert Fox and the suppression hearing testimony of Fox, Detective Andrea Janvier, and a private investigator. Cooper contests these facts with respect to the events leading up to his arrest.

any particular leniency. Fox had the CI describe which cars the CI had observed Cooper driving and recite other information that Fox already knew about Cooper. The CI described Cooper as a black male approximately thirty-years-old, five feet and eleven inches tall, weighing 200 pounds, with a beard. The CI correctly identified a picture of Cooper for Fox. The CI told Fox that he communicated with Cooper by phone and provided Cooper's cell phone number.

(4) Fox then asked the CI to contact Cooper. At this time, the CI was seated in the backseat of an unmarked police vehicle operated by Detective Fox and Detective Andrea Janvier. The CI sent a text message to Cooper at 3:44 p.m. stating "I need to c u ready"; he showed that message to Fox, who later recorded the messages word-for-word in his police report. The CI received a reply of "okay" from the cell phone number associated with Cooper. At 4:35 p.m. the CI sent another text message stating "Do u the 3 and half or just the 2." The CI told the officers that this referred to an amount of money the CI owed Cooper from a prior transaction. At 5:10 p.m., the CI received a phone call on his cell phone.[2] The CI advised the officers that Cooper was the caller and that Cooper said he would meet the CI after dropping his children off. At 5:17 p.m., the CI received a phone call from Cooper's cell phone number. According to the CI, Cooper stated that he was at the corner of 14th Street and French Street. At approximately 5:20

[2] Fox could not confirm from which number the 5:10 p.m. call was received.

p.m., Fox observed a black Ford Explorer with Delaware registration at the corner of 14th Street and French Street. The CI identified the vehicle as Cooper's. When Fox drove by, he saw someone matching Cooper's description in the driver's seat and two children in the vehicle. The CI "duck[ed] down" as they drove past Cooper's vehicle so that Cooper would not see him. Fox then advised police units that Cooper's vehicle was in the area. Officers in undercover vehicles approached and observed a subject matching Cooper's description in the front seat and two children in the back seat. Fox was not present when Cooper was taken into custody and did not return to the area. Fox wrote up the police report the same day as the arrest.

(5) Detective DeBonaventura took Cooper out of the vehicle, conducted a patdown, and found 652 bags, or 5.29 grams, of heroin and $1,148 dollars on Cooper's person. Detective DeBonaventura also seized two cell phones—a T-Mobile and a Motorola—in the vehicle. One of the phones corresponded with the number the CI associated with Cooper and contained the texts that the CI had showed to Fox. Cooper was arrested at the time of the seizure. At the time of his arrest, Cooper was on probation. After a preliminary hearing, Cooper was indicted on March 29, 2010 on charges of Trafficking, Possession with Intent to Deliver, and Maintaining a Vehicle for Keeping Controlled Substances.

(6) On May 21, 2010, Cooper filed a motion to suppress the contraband seized during the arrest. Cooper also filed a motion to disclose the CI's identity and address, and to hold a *Flowers* hearing. In the motion to suppress, Cooper argued that (1) he was under arrest at the time the police approached his vehicle and removed him at gunpoint; and (2) the subsequent search of his person was invalid because the police did not possess probable cause to support this seizure. Cooper asserted his belief that the CI would corroborate his contentions regarding the police's conduct. In particular, Cooper disputed the details in Detective Fox's police report as to the content of the text messages, the content of the phone calls, and that the CI identified the heroin dealer by name.

(7) The Superior Court scheduled Cooper's motions to be heard on August 13, 2010. On May 27, 2010, Cooper filed a letter with the Court contending that the *Flowers* issue needed to be heard before the motion to suppress. During a July 28, 2010 office conference, the Superior Court decided that it would not grant the motion for disclosure of the CI's identity or hold an *in camera* meeting with the CI before hearing the motion to suppress.

(8) The Superior Court held a suppression hearing on August 13, 2010, during which Detective Fox and Detective Janvier testified. A private investigator testified that he interviewed a Richard Woodward who denied providing any information on Cooper to the police. The defense also offered an affidavit from a

Richard Woodward who represented that he was arrested for drug charges on February 26, 2010, but did not cooperate with the police in any investigation of Cooper.

(9) The Superior Court indicated it would accept post-hearing briefing, and asked if the State would stipulate to the CI's identity. The State declined to do so, citing "the strong interest in protecting the identity of cooperating witnesses and informants" but expressing its amenability to an *in camera* hearing with the CI. In response, Cooper requested that the Superior Court "conduct an *in camera* hearing with the informant to determine whether s/he did all of the things that Det. Fox described in his testimony at the suppression hearing." On August 24, 2010, the Superior Court informed the parties that, "[g]iven the circumstances," it would schedule an *in camera* proceeding with the CI and requested the State's assistance. The Superior Court also stated that counsel would be advised after the proceeding about the Superior Court's decision regarding the motion to disclose and whether the information provided would be relevant to the motion to suppress. The Superior Court did not provide further explanation for its decision.

(10) On September 7, 2010, the State notified the Superior Court that it had been unable to locate the CI but would continue its efforts. The State and Cooper agreed the trial needed to be rescheduled, and a new date was set for October 26, 2010. One week later, Cooper asked the Superior Court by letter to dismiss the

State's case for failure to produce the CI. Cooper then submitted a supporting brief, contending that the State failed to stay in contact with CI and make reasonable efforts to locate the CI. Cooper also filed a *pro se* motion asserting his right to a speedy trial on September 20; this motion was referred to defense counsel and not reviewed by the court.

(11) At an October 5, 2010 office conference, the Superior Court granted the State twelve additional days to locate the CI. When asked what would happen if the State could not locate the CI in that time, the Superior Court stated: "It may very well be that I'll dismiss the charges, because the circumstances of this case are extremely unusual." But, the Superior Court also expressed concern that "someone who may be fearful of themselves is hiding" and "that, for fear of retaliation, if this person is the confidential informant who gave [the defense] the affidavit, they're trying to undo whatever they did [by appearing for an *in camera* proceeding]." The Superior Court repeatedly indicated that it was "hard-pressed" to accept that the CI would be testifying in an effort to "set the record straight" rather than to avoid retaliation, particularly in light of the State's evidence:

> I have difficulty accepting that [the CI would be testifying to set the record straight] at this juncture. If I talk to him and he says that, then we have a conflict and you will get to talk to him publicly and he'll get to testify and the jury will decide who they believe. But in terms of setting the record straight, there's too much record for me to accept that without talking to him more and knowing that.

On October 13, 2010, the State filed its response to the motions to suppress and to dismiss and attached a letter allegedly seized by Wilmington police in an unrelated case. The letter, signed by "Coop," told the recipient to "have a influence on the Fukboy" because "a private investigator has been sent out for him cuz (sic) he kept telling folks that stuff wasn't said or done so tell him to talk. Call my lawyer Natalie Woloshin."[3] The letter also referred to a suppression hearing and described the subject of the letter as the writer's "only witness." The State relied on the letter to argue that the Woodward affidavit submitted at the suppression hearing may have been a product of coercion. The State also requested that the defense be ordered to produce Woodward.

(12) On October 25, 2010, the Superior Court, *sua sponte*, continued the trial, noting Cooper's pending motion to dismiss. Two days later, Cooper filed a motion to dismiss through counsel, raising his right to a speedy trial.

(13) On November 29, 2010, at the Superior Court's request, the State provided an affidavit from Detective Fox detailing Fox's unsuccessful efforts to locate the CI. Fox stated that he was directed to locate the CI on or about August 24, 2010. He released wanted flyers and personally attempted to locate the CI at the CI's last known residence. At the CI's last place of employment, the employer stated that the CI was no longer working there. A close family member stated that

[3] Natalie Woloshin represented Cooper in the Superior Court proceedings.

the CI had separated from a spouse and moved out of state. The family member did not know the CI's whereabouts.

(14) On December 1, 2010, the Superior Court issued an oral ruling denying the motions to dismiss, to suppress, and to disclose the CI's identity. The Superior Court also indicated it would consider a motion for a *Franks* hearing, explaining:

> [T]he reason I ordered the *Flowers* hearing was because of a challenge to the credibility of the officers' testimony and support of probable cause, which takes me to *Franks*, not *Flowers*, and I remain convinced that, although it appears a charade, procedurally there is that gap of Mr. Woodward connecting himself directly to this particular arrest.

(15) On December 10, Cooper filed a motion to continue the trial scheduled for December 14, citing his intent to file a motion for reargument. That day, the Superior Court issued its written decision denying Cooper's motions but allowing for a *Franks* hearing if Cooper requested one.

(16) The trial was rescheduled for February 8, 2011. On December 29, 2010, the parties received an order to respond to a special call of the criminal calendar on January 21, 2011 to confirm that the matter was ready for trial and that motion practice had ended. On January 4, 2011, Cooper filed additional support to his motion for reargument, including an affidavit that sought to rebut the letter from "Coop." Two weeks later, Cooper filed another supplement. On February 3, 2011, the Superior Court issued an order noting the case's non-compliance with the

speedy trial guidelines and requiring counsel to appear in court the next day. On February 3, the State also responded to Cooper's supplement and indicated that it was ready for trial. On February 4, the Superior Court denied Cooper's motion for reargument. That day, Cooper also requested the Superior Court to hold a *Franks* hearing.

(17) The Superior Court granted Cooper's request for a continuance on February 8, 2011, noting the pending motion for a *Franks* hearing. The Superior Court rescheduled the *Franks* hearing and the trial for March 22, 2011. The Superior Court held a hearing on February 22, 2011 that was intended to be the *Franks* hearing, but the defense was unable to produce the CI. Per order of the Superior Court, the State disclosed the CI's identity to the Superior Court by letter on February 24, 2011. On March 17, 2011, Cooper filed a *pro se* motion to dismiss, in which he raised his speedy trial right.

(18) The parties agreed to a stipulated trial, which was held on March 22, 2011. A different Superior Court judge presided over the proceeding. The State agreed not to present any evidence at trial relating to the information provided by the CI. Detective Fox testified as to the stop itself and the contraband found on Cooper's person. The Superior Court found Cooper guilty on all charges. The Superior Court followed the State's recommended sentence of three years of

incarceration for the charges and an additional six months for a violation of probation.

(19) Cooper raises three arguments on appeal. Cooper first contends that the Superior Court erred when it denied Cooper's motion to suppress evidence obtained pursuant to information from a first-time confidential informant. He asserts violations of the Fourth Amendment of the U.S. Constitution and Article I, Section 6 of the Delaware Constitution. Whether probable cause exists is a mixed question of fact and law.[4] "The trial court's basic factual findings will be upheld on appeal if they are supported by the record and are the product of an orderly and logical deductive process. The trial court's ultimate findings, however, implicate questions of law and, therefore, the standard of appellate review is *de novo*."[5]

(20) Title 11, section 1904(b) of the Delaware Code authorizes law enforcement officers to make a warrantless arrest whenever "[t]he officer has reasonable ground to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed." This Court has construed "reasonable ground" to mean probable cause.[6] Probable cause may be based on information supplied by a CI. In *Brown v. State*, this Court explained:

> An informant's tip may provide probable cause for a warrantless arrest where the totality of the circumstances, if

[4] *Brown v. State*, 897 A.2d 748, 750 (Del. 2006).
[5] *Id.*
[6] *Tolson v. State*, 900 A.2d 639, 642–43 (Del. 2006).

> corroborated, indicates that the information is reliable. In making that determination, a court must consider the reliability of the informant, the details contained in the informant's tip, and the degree to which the tip is corroborated by independent police surveillance and information.[7]

While the reliability of the informant is one factor, tips from a first-time or anonymous informant may still provide probable cause for an arrest. "If the informant's tip can be corroborated, the tip may establish probable cause, even where nothing is known about the informant's credibility."[8]

(21) In *Tolson v. State*, this Court held that even though an informant was new and nothing was known about his credibility, there was sufficient corroborating evidence to establish probable cause where the informant "was able to predict details of [the defendant's] behavior that supported the conclusion that [the informant] was truthful."[9] In *Tolson*, the defendant appeared at a specific location in accordance with the informant's telephone instruction.[10] The informant accurately stated that the defendant would park elsewhere and then walk to the specified meeting location.[11] Similarly, in *Alabama v. White*, the informant accurately predicted that the defendant would travel from his apartment to a certain motel in a brown Plymouth and would carry the drugs in a brown attaché case.[12]

---

[7] 897 A.2d 748, 751 (Del. 2006).
[8] *Tolson*, 900 A.2d at 643.
[9] *Id*.
[10] *Id*.
[11] *Id*.
[12] 496 U.S. 325, 327 (1990).

Finally, in *Miller v. State*, this Court found probable cause even though the informant "was not a past-proven, reliable source."[13] The informant had told detectives that two young black males would be delivering a specific quantity of heroin to a specific parking lot location, and then contemporaneously confirmed with the detectives when the correct vehicle arrived.[14]

(22) Here, the CI had previously demonstrated to the officers his knowledge of Cooper's physical appearance, one of the vehicles Cooper operated, and Cooper's business of selling heroin. The CI predicted that Cooper would arrive at 14th Street and French Street, and he properly identified the car as Cooper's Ford Explorer when it was observed at that location. The officers witnessed the CI's exchange of text messages with someone anticipating a transaction for heroin. Officers also verified that Cooper matched a previously-known physical description before proceeding with the arrest. Even though nothing was known about the CI's credibility, independent evidence substantially corroborated his information.

(23) *Florida v. J.L.*,[15] a United States Supreme Court case cited by Cooper, is distinguishable. In *Florida*, police officers stopped and frisked the defendant based solely on an anonymous tip that the person was carrying a weapon, and not

[13] *Miller v. State*, 25 A.3d 768, 769 (Del. 2011).
[14] *Id*. at 769-77.
[15] *Florida v. J.L.*, 529 U.S. 266 (2000).

any of their own observations.[16] The record did not include an audio recording of the tip, and nothing was known about the informant.[17] The Supreme Court held that the anonymous caller's tip, by itself, could not justify the stop and frisk.[18] Here, the officers independently verified Cooper's physical appearance before proceeding with the arrest. Moreover, this was not an anonymous tip received from an unrecorded telephone call—the CI sat with Detectives Fox and Javier and showed them the text messages indicating that the message recipient was ready to proceed with a transaction. The Superior Court did not err in finding no violation of the Fourth Amendment of the U.S. Constitution.

(24) We turn next to Cooper's claim under Article 1, Section 6 of the Delaware Constitution. The State argues that Cooper waived his state constitutional law claim by not addressing it independent of his federal claim. We agree. "A proper presentation of an alleged violation of the Delaware Constitution should include a discussion and analysis of one or more of the following non-exclusive criteria: "textual language, legislative history, preexisting state law, structural differences, matters of particular state interest or local concern, state

[16] *Id*. at 268.
[17] *Id*.
[18] *Id*.

traditions, and public attitudes."[19] Here, Cooper failed to provide more than conclusory assertions as to his state law claim, and thus that claim is waived.

(25) Cooper next contends that the delay between the dates of his arrest and incarceration and the date of his trial violated his right to a speedy trial. This Court reviews an alleged infringement of a constitutional right *de novo*.[20] To determine if the defendant's right to a speedy trial has been violated, we use the four-factor balancing test adopted by the U.S. Supreme Court in *Barker v. Wingo*.[21] The four factors are: "(1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of the right to a speedy trial, and (4) prejudice to the defendant."[22] The factors are related and no one factor is conclusive.[23]

(26) *Length of the Delay.* The right to a speedy trial "attaches as soon as the defendant is accused of a crime through arrest or indictment, whichever occurs first."[24] This Court has found that if the delay between arrest or indictment and trial exceeds one year, the Court generally should consider the other *Barker* factors.[25] Here, Cooper was arrested on February 6, 2010 and indicted on March

---

[19] *Wallace v. State*, 956 A.2d 630, 637–38 (Del. 2008).
[20] *Harris v. State*, 956 A.2d 1273, 1275 (Del. 2008).
[21] *Middlebrook v. State*, 802 A.2d 268, 273 (Del. 2002) (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)).
[22] *Id.*
[23] *Id.* (citing *Barker*, 407 U.S. at 533).
[24] *Dabney v. State*, 953 A.2d 159, 164–65 (Del. 2008) (quoting *Middlebrook*, 802 A.2d at 273).
[25] *Skinner v. State*, 575 A.2d 1108, 1116 (Del. 1990) ("[T]he State concedes that the period of [approximately one year between arrest and trial] is facially sufficient to provoke inquiry into the remaining factors."). *See also Doggett v. U.S.*, 505 U.S. 647, 652 n.1 (1992) (noting that

29, 2010. His case did not go to trial until March 22, 2011. Due to the delay of over one year between arrest and trial, this factor weighs in Cooper's favor and requires a full *Barker* analysis.

(27) *Reasons for the Delay.* Cooper contends that the delay is attributable to the State and the Superior Court, and thus that this factor also weighs in his favor. But, for purposes of the *Barker* analysis, "[i]t is well established that 'a defendant who prolongs a matter cannot then blame the result solely on the acts or omissions of the prosecution.'"[26] In *Butler v. State*, we found that a defendant's refusal to waive extradition after fleeing the state could be held against him when considering the reason for the delay.[27] Here, Cooper engaged in persistent motion practice in an attempt to force a *Flowers* and/or *Franks* hearing; that motion practice included multiple motions for continuances. Cooper agreed to the first continuance on September 7, 2010, in light of his pending motions. Cooper also requested two trial continuances, one on December 14, 2010 and one on February 8, 2011. After the Superior Court denied the motion to disclose the CI's identity, Cooper filed motions for reargument and supplemental letters that further contributed to delays in the trial.

"[d]epending on the nature of the charges, the lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year").

[26] *Butler v. State*, 974 A.2d 857, 2009 WL 1387640, at *2 (Del. 2009) (TABLE) (citing *State v. Key*, 463 A.2d 633, 637 (Del.1983)).

[27] *Id*. at *2.

(28) The record also demonstrates that the State made reasonable efforts to locate the CI between August and December, an investigation which the Superior Court had ordered because Cooper had insisted that the State produce the CI. The Superior Court noted during the December 1, 2010 hearing on Cooper's motion to dismiss:

> [T]he majority of the time this case has been delayed has been to try [to] afford the defendant full access to all of the remedies he has sought. The motions were brought by the defense and instigated by the defense. I have tried my best to handle them timely. I have asked the State, I did give the State a second bit of opportunity to try and locate the confidential informant. It would be to benefit the defendant in this matter.

The delay resulting from this investigation cannot be counted against the State. The second factor weighs against Cooper.

(29) *Assertion of the Right to a Speedy Trial*. "If and when a defendant asserts his rights are factors of considerable significance in determining whether there has been a speedy trial violation."[28] Here, Cooper's attorney filed a motion asserting his right to a speedy trial on October 26, 2010, one day after the Superior Court continued the trial *sua sponte*.[29] But a timely initial motion does not end the inquiry. The Court also considers whether the defendant acted inconsistently with

[28] *Bailey v. State*, 521 A.2d 1069, 1082 (Del. 1987).
[29] Cooper filed a *pro se* motion asserting the right on September 21, but the motion was referred to his defense counsel and not considered by the court.

his assertions of the speedy trial right. The U.S. Supreme Court explained this consideration in *Bailey v. State*:

> At the same time Bailey was making a record of claims in the Superior Court alleging the denial of a speedy trial, he was also filing with the Superior Court and with this Court motions and requests for interlocutory appeals and other extraordinary relief, *pro se* and through counsel that materially added to any delay in scheduling his various trials. Although the record reflects that Bailey has repeatedly moved for a dismissal on speedy trial grounds, that finding alone does not establish that Bailey has appropriately asserted his right. When we examine Bailey's speedy trial motions in the context of the history of this case, i.e., the filing of motions, petitions, and interlocutory appeals, we conclude that Bailey made a conscientious choice to conduct his defense along alternative lines, some of which were mutually inconsistent with his announced desire to have a speedy trial.[30]

(30) Here, the record similarly suggests that Cooper has conducted his defense in a way "mutually inconsistent" with his requests for a speedy trial. Between October 26, 2010 and his trial on March 22, 2011, Cooper filed numerous motions for continuances, motions for reargument and supplemental letters. On a January 21, 2011 special call of the criminal calendar, the State stated that it was ready for trial but the defense advised that the February 8, 2011 trial date was unlikely to occur.

(31) Between October 2010 and February 2011, Cooper did not reassert his speedy trial right. It was not until March 17, 2011 that Cooper again sought to

[30] *Bailey*, 521 A.2d at 1082 (internal citations omitted).

assert the claim, this time *pro se*. Here, as in *Bailey*, Cooper "made a conscientious choice to conduct his defense along alternative lines, some of which were mutually inconsistent with his announced desire to have a speedy trial."[31] Accordingly, the third factor weighs against Cooper.

(32) *Prejudice to the Defendant.* The Court analyzes the fourth prong, prejudice to the defendant, in light of three interests that the speedy trial right seeks to protect: "(1) preventing oppressive pretrial incarceration; (2) minimizing the anxiety and concern of the accused; and (3) limiting the possibility that the defense will be impaired."[32] The first interest weighs in Cooper's favor, as he was held in default of bail during the delay.[33] The second interest does not weigh in Cooper's favor, as Cooper has not alleged excessive concern or anxiety. As for the third interest, Cooper contends that his defense was impaired by the delay because he believed the State was attempting to produce the CI. The record does not support that this delay prejudiced Cooper. Cooper argues that without the CI, he was unable to challenge the State as to the police's conduct when he was seized. Yet the Superior Court believed, and Cooper has not denied, that he had an independent means of contacting the CI. Accordingly, Cooper's second claim on appeal also fails.

---

[31] *Id*.
[32] *Dabney v. State*, 953 A.2d 159, 168 (Del. 2008) (citing *Middlebrook*, 802 A.2d at 276).
[33] *Dabney*, 953 A.2d at 168–69 (Del. 2009).

(33) Finally, Cooper contends that the Superior Court "abused its discretion when it rescinded an earlier order that the State produce a confidential informant for a *Flowers* hearing" and denied Cooper's motions to dismiss and suppress. We review the Superior Court's evidentiary rulings, including the denial of a motion to disclose an informant's identity, for abuse of discretion.[34] If we determine that the Superior Court abused its discretion, we then determine whether the error rises to the level of significant prejudice to deny the defendant a fair trial.[35]

(34) Delaware Rule of Evidence 509 provides the State a privilege to refuse to disclose an informer's identity, unless it appears that the informer "may be able to give testimony which would materially aid the defense."[36] To invoke this exception, the defendant must "show, beyond mere speculation, that the confidential informant may be able to give testimony that 'would materially aid the defense.'"[37]

(35) In *State v. Flowers*, the Superior Court described four contexts in which the issue of disclosing an informer's identity typically arises:

> (1) The informer is used merely to establish probable cause for a search. (2) The informer witnesses the criminal act. (3) The

[34] *Manna v. State*, 945 A.2d 1149, 1153 (Del. 2008) (citing *Pope v. State*, 632 A.2d 73, 78–79 (Del. 1993)); *Horsey v. State*, 892 A.2d 1084, 2006 WL 196438, at *2 (Del. 2006) (TABLE).
[35] *Id.* (citing *Seward v. State*, 723 A.2d 365, 372 (Del. 1999)).
[36] D.R.E. 509.
[37] *Davis v. State*, 1998 WL 666713, at *2 (Del. July 15, 1988) (internal citations omitted.).

informer participates but is not a party to the illegal transaction.
(4) The informer is an actual party to the illegal transaction.[38]

In *Butcher v. State*, we recognized that generally the privilege afforded under Rule 509 is protected in the first *Flowers* scenario, but not in the fourth.[39] "In the second and third scenarios, disclosure of the informer's identity is required only if the trial judge determines that the informer's testimony is material to the defense."[40]

(36) Here, the Superior Court properly found in its December 1, 2010 decision that the CI's information provided probable cause, but that the CI was not a party to an illegal transaction.[41] Cooper was charged with possession, trafficking, and maintaining a vehicle for keeping controlled substances. None of these charges require an illegal transaction. Moreover, Cooper and the CI did not participate in any exchange of money or contraband. Fox testified and the Superior Court found that the detective's car in which the CI was located left the area before the stop and arrest.[42] Thus, the case is distinguishable from *State v. Woods*, where the defendant was "present at the time the transaction was to have

[38] *State v. Flowers*, 316 A.2d 564, 567 (Del. Super. 1973).
[39] *Butcher v. State*, 906 A.2d 798, 802–03 (Del. 2006).
[40] *Id*. at 803.
[41] *See State v. Cooper*, No. 1002013686, slip. op. at 6 (Del. Super. Dec. 10, 2010).
[42] *See id.* at 4.

occurred."[43] Accordingly, this case falls under the first *Flowers* category and the Superior Court did not err in determining that disclosure was not required.

(37) The cases cited by Cooper do not require a *Flowers* hearing under the circumstances of this case. *McNair v. State* did not involve the first *Flowers* context, because the informant did not provide a basis for probable cause.[44] In *McNair*, there was conflicting testimony as to whether the defendant consented to a search; consent was a critical issue given the lack of probable cause.[45] This Court held that the defendant had met his initial burden for a *Flowers* hearing because "the informant may have seen the beginning of McNair's interaction with the officers,"[46] and thus may have been able to provide testimony that would materially aid the defense on the independent issue of consent.

(38) Here, by contrast, the CI provided probable cause for the arrest and thus the Superior Court could find the privilege protected without considering whether the CI's testimony could materially aid to the defense. In *Simonsen v. State*,[47] this Court noted its approval of the use of a *Flowers* hearing where the informant provided information to establish probable cause. But it did not *require*

[43] *State v. Woods*, 1999 WL 33495350, at *1 (Del. Super. Mar. 1, 1999) (finding third *Flowers* context applied where defendant arranged illegal transaction and was present when transaction was expected to occur).
[44] 947 A.2d 1122, 2008 WL 199831, at *2 (Del. 2008) (TABLE).
[45] *Id*. at *1.
[46] *Id*.
[47] 542 A.2d 1215, 1988 WL 61567, at *10, n.4 (Del. 1988) (TABLE).

the use of the hearing in every case, particularly where the record shows that the State was unable to locate the CI after reasonable efforts.

(39) The Superior Court initially stated that it would hold an *in camera* proceeding because of the circumstances, not because one was required under *Flowers*. In revisiting its decision, the Superior Court explained: "[u]pon learning that the State could not locate the informant, the Court undertook an analysis of whether, under the facts presented, an *in camera* interview of the informant was *required* for the determination of the suppression on the grounds initially raised."[48] The Superior Court properly found that the *in camera* interview was not required here.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice

[48] *See State v. Cooper*, No. 1002013686, slip. op. at 6–7 (Del. Super. Dec. 10, 2010).