IN THE SUPREME COURT OF THE STATE OF DELAWARE

HAROLD SMITH,[1]	§	
	§	No.133, 2003
	§	
Respondents Below,	§	Court Below: Superior Court
Appellants,	§	of the State of Delaware in
	§	and for Kent County
	§	
v.	§	
	§	
STATE OF DELAWARE,	§	
	§	
Petitioners Below,	§	
Appellees.	§	

Submitted: November 12, 2003
Decided: December 9, 2003

Before **BERGER**, and **STEELE** and **JACOBS,** Justices.

ORDER

This 9th day of December 2003, upon consideration of the appellant's opening brief and the appellee's answering brief, it appears to the Court that:

(1) The appellant, Harold Smith, was convicted by a Superior Court jury of two counts each, of Delivery of Cocaine, Maintaining a Vehicle for Keeping Controlled Substances, and Possession of Drug Paraphernalia. On February 24, 2003, Smith was sentenced to a 30 a thirty

[1] In this case the defendant has testified and the State agrees that he worked as a confidential informant for the State Police. The Court *sua sponte* is using a pseudonym to identify the defendant in this order.

years' minimum mandatory prison sentence, followed by probation. Smith appeals from the judgment of convictions and the sentence.

(2) On appeal, Smith argues four separate grounds for reversal, namely, that: (i) the trial court erred by not concluding State breached its plea bargain wherein the State agreed not to prosecute Smith on four charges in return for Smith's assisting the police in another drug case; (ii) the trial court erred by admitting into evidence Smith's Department of Motor Vehicles photograph at the trial; (iii) the trial court abused its discretion by not requiring the State to reveal the identity of a confidential informant; and (iv) the trial court gave an erroneous Allen charge to the jury. None of these claims has merit.

(3) Smith's first claim of error was the subject of a motion to dismiss that the trial court denied after an evidentiary hearing. That claim -- that Smith and the police reached an agreement (which the State later breached) in which Smith would cooperate with the State and the criminal charges against him would be dropped – involves a mixed question of law and fact. To the extent the claim challenges the trial court's legal determinations, this Court will review that claim de novo;[2] and to the extent

[2] *Wilmington Country Club v. Cowee*, 747 A.2d 1087, 1091 (Del. 2000).

the appellant attacks the trial court's findings of fact, those findings will be upheld if they are not clearly erroneous.[3]

(4) In its Opinion of October 11, 2002, the trial court denied Smith's motion to dismiss on the ground that even if Smith's version of the plea agreement was factually true, the agreement was unenforceable because only the Attorney General or her Deputy are authorized to make such agreements, and that in this case there was no evidence that the agreement had been authorized by the Attorney General or her Deputy. That ruling is correct as a matter of law.[4]

(5) Smith's second claim of error is that the trial court improperly admitted into evidence the photograph of Smith that had been supplied by the Division of Motor Vehicles. Because Smith did not object to the admission of the photograph, this claim is reviewable only for plain error.[5] As a result, the issue is deemed waived unless Smith can demonstrate that the error was "so clearly prejudicial to substantial rights as to jeopardize the

---

[3] *DeJesus v. State*, 655 A.2d 1180, 1191 (Del. 1995).

[4] *See, e.g., Hunter v. United States*, 405 F.2d 1187, 1188 (9th Cir. 1969) (Federal agents held to lack statutory authority to provide defendant a grant of immunity in exchange for cooperation); *State v. Caswell*, 828 P.2d 830, 833 (Idaho 1992) (unauthorized agreement not to prosecute by a narcotics officer in exchange for cooperation held not enforceable); *People v. Gallego*, 424 N.W.2d 470, 472-76 (Mich. 1988) (refusing to enforce written nonprosecution agreement by DEA agents and state detectives that was not authorized by prosecutors).

[5] Del. Supr. Ct. Rule 8; D.R.E. 103 (d); *Capano v. State*, 781 A.2d 556, 653 (Del. 2001).

fairness and integrity of the trial process."[6] Smith has not met this burden. He asserts that the photograph affected the fairness of the trial, because the jury never was told why the police had his photograph even before they conducted the undercover drug purchase that led to his arrest. But, Smith's defense counsel had an opportunity to cross examine the police officer witness who testified that the photograph was the basis for his identification of Smith as the seller of the drugs. Yet, Smith's counsel chose not to cross examine on that point. Accordingly, Smith has not shown plain error in the admission of the photograph.

(6) The third claim of error is that the trial court improperly denied Smith's motion to require the State to reveal the identity of a confidential informant after conducting an evidentiary hearing *in camera*. That claim is reviewed on appeal for abuse of discretion.[7]

(7) The basis for the trial court's ruling was that it did not "appear to the Court that the confidential informant may be able to give testimony which would materially aid the defendant."[8] Smith argues that the confidential informant directly participated in the first undercover drug transaction and, hence, was integral to the identification of Smith as the

[6] *Capano,* 781 A.2d at 653; *Brown v. State*, 729 A.2d 259, 265 (Del. 1999).
[7] *See Davis v. State*, 1998 WL 666713 (Del. 1988 ORDER).
[8] A-14.

seller. That argument, however, defeats Smith's claim, because it demonstrates that Smith knew who the confidential informant was. Apart from Smith and the undercover Detective, the only other participant in the drug sale was the driver of the automobile that transported Smith to the transaction site. Indeed, and in his opening brief Smith contends that the confidential informant was the driver.[9] Yet Smith did not -- although he could have -- called the driver as a defense witness at the trial. If, in fact, the informant had information helpful to Smith (as Smith urges), it must be supposed that his counsel would have called the driver as a witness. The decision not to call the driver as a witness supports the trial court's ruling that the confidential informant had no testimony to give that would have helped Smith.

(8) Moreover, although Smith argues that he was improperly denied the opportunity to propound questions to the informant at the *in camera* hearing, Smith did not identify what those questions would have been, nor what responses would have aided the defense. Smith's speculative assertions that the confidential informant would offer helpful evidence, are insufficient to satisfy his burden of proof. In short, Smith has not shown that

[9] Appellant's Op. Br. at 24.

the trial court abused its discretion by denying his motion to compel disclosure of the confidential informant's identity.

(9) Smith's final claim is that the trial court's pattern charge under *Allen v. United States*[10] was erroneous as a matter of law, because it suggested that the jury was free to disregard the trial court's jury instruction. The language that forms the basis of this claim was the final sentence (italicized below) in one of the concluding paragraphs of the charge, where the trial judge stated:

> You are not partisans. You are judges. Judges of the facts. Your sole purpose is to ascertain the truth from the evidence before you. You are the sole and exclusive judges of the credibility of all of the witnesses and of the weight and effect of all the evidence, and in the performance of this high duty, *you are at liberty to disregard the comments of both the Court and counsel, including, of course, the remarks I'm now making.*[11]

In response to defense counsel's objections, the trial judge ruled: "Well, it's part of the standard Allen charge. I don't think it instructs [the jury] that they're free to disregard the Court's instructions. It refers to *comments* of the Court and counsel."[12]

(10) For Smith's claim to have plausibility, the single sentence that forms the basis of that claim must be viewed out of context and in isolation.

---

[10] 164 U.S. 492 (1896).
[11] A-65 (italics added).
[12] A-66 (italics added).

But, the propriety of the concluding portion of the trial court's *Allen* charge cannot be viewed in isolation, but must be examined in its entire context. When that is done, it becomes manifest that the concluding portion of the italicized sentence was not misleadingly instructing the jury that it was free to disregard all of the Court's prior instructions. All the jury was being told was that as part of its duty to assess the credibility of all witnesses, it could disregard comments of counsel (or even the Court) that, in the process of weighing the evidence, it found were not credible. There is no evidence that the jury was confused about its function or role, and the trial court committed no error in giving the standard *Allen* charge to the jury.

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

BY THE COURT

Jack B. Jacobs
Justice