

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LEONARD P. BUTCHER,	§
	§
Defendant Below-	§ No. 283, 2005
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Kent County
	§ Cr. ID. 0403022988
Plaintiff Below-	§
Appellee.	§

Submitted: November 8, 2006
Decided: November 22, 2006

Before **STEELE**, Chief Justice, **HOLLAND**, **BERGER**, and **JACOBS**,
Justices, and **NOBLE**, Vice Chancellor,¹ constituting the Court *en banc*.

ORDER

This 22nd day of November 2006, upon consideration of the parties' briefs, oral argument, record on appeal, and the Superior Court's report following remand, it appears to the Court that:

(1) The defendant-appellant, Leonard Butcher, filed this appeal following his conviction and sentence for delivery of a controlled substance. After hearing oral argument, we remanded this matter to the Superior Court to conduct an adequate *in camera* hearing to determine whether the informer

¹ Sitting by designation pursuant to Del. Const. art. IV, § 12 and Supr. Ct. R. 2 and 4.

used by the State had information that could materially aid Butcher's mistaken identity defense.²

(2) In *Butcher I*,³ we noted that the purpose of a *Flowers* hearing⁴ is to determine whether the State's privilege to withhold the identity of its informant is outweighed by the defendant's right to prepare his defense.⁵ In cases like Butcher's, where the informer participated in, but was not a party to, the illegal transaction, disclosure of the informer's identity is required only if the trial judge determines that the informer's testimony is material to the defense.⁶ We noted that the most suitable method for accomplishing the balancing of these competing interests is for the trial judge to interview the informer in person and *in camera*.

(3) If the physical presence of the informer is not possible, the informer may testify under oath via telephone or video conference. If the options of having the trial judge interview the informer under oath *in camera* are not viable, then as a last resort, the trial judge may direct the State to

² *Butcher v. State*, 906 A.2d 798 (Del. 2006) ("*Butcher I*").

³ The underlying facts in this case are set forth more fully in the Court's opinion in *Butcher I* and are incorporated by reference.

⁴ See *Flowers v. State*, 316 A.2d 564 (Del. Super. 1973), which outlines the *in camera* procedure to be followed by the trial judge in determining whether a confidential informer's identity should be disclosed to the defense.

⁵ *Butcher I*, 906 at 802.

⁶ *Id.* at 803.

obtain an affidavit from the informer for the trial judge's *in camera* review. We remanded Butcher's case for another *in camera* hearing because the informer had not testified at the first hearing, either in person, by telephone, by video conference, or by affidavit.

(4) The sealed record on remand reflects that the Superior Court conducted the second *in camera* hearing on September 21, 2006. The trial judge, the confidential informer, a court reporter, the prosecuting attorney, Trooper Voshell, and a law clerk were all present at the hearing. The trial judge solicited questions in advance from both the prosecution and defense. Neither Butcher nor his counsel was present at the hearing.

(5) At the second *in camera* hearing, the trial judge conducted all of the questioning. After hearing the informer's sworn testimony, the trial judge concluded that the informer would be unable to provide testimony that would materially aid the defense. In fact, the informer was positive that Butcher was the man who sold drugs to Trooper Voshell. Because the informer could not provide testimony that would aid the defense and because disclosure of the informer's identity could create danger for the informer and possibly adversely affect on-going police investigations, the trial judge concluded that the State's interest in protecting the informer's identity outweighed any interest of Butcher's.

(6) In *Butcher I*, we described and approved the preferable procedure for *in camera* hearings, which is prescribed by many of the United States Circuit Courts. That procedure excludes counsel for both parties as well as the defendant and the police officers.⁷ The trial judge questioned the confidential informer in the presence of the court reporter and no one else.

(7) On remand in Butcher's case, the trial judge took notice of the preferable procedure that had been outlined by this Court. Nevertheless, the trial judge allowed the prosecutor and Trooper Voshell to be present during the *in camera* hearing. The trial judge explained that he permitted Trooper Voshell and the prosecutor to be present in the event he needed to elicit further information from either of them. The trial judge described this action as an exercise of his discretion under Delaware Rule of Evidence 509(c)(2).⁸

(8) The prosecutor and Trooper Voshell could have remained available in the courthouse on the day of the *in camera* hearing without being present *during* the hearing. Under the circumstances of this case, where the credibility of the undercover officer's identification of Butcher was at issue, it was an abuse of discretion for the trial judge to permit the undercover officer to be present during the *in camera* questioning of the

⁷ See *id.* at 801, n.30 (collecting cases).

⁸ In Rule 509(c)(2) the words "have the right" were substituted for the words "be permitted" in the last line to indicate that the presence of counsel or parties at an *in camera* hearing is discretionary with the trial court. See Del. R. Evid. 509 cmt. (2006).

confidential informer. Notwithstanding this error, there was no prejudice to Butcher, because the record supports the trial judge's conclusion that the confidential informer did not have any information that was material to Butcher's defense. Accordingly, we affirm the trial judge's ruling denying Butcher's motion to compel.

(9) The other issue raised in Butcher's appeal is a challenge to the trial judge's denial of his motion to suppress, on which we deferred ruling in *Butcher I*. The record reflects that prior to trial, Butcher filed a motion *in limine* to exclude evidence of any in-court or out-of-court identification of him as the person who sold crack cocaine to Trooper Voshell. Butcher argued that Voshell had viewed a single photograph of him within 45 minutes to an hour after the drug transaction and that the single photograph "lineup" was impermissibly suggestive and created a substantial likelihood of mistaken identification at trial. After conducting a hearing at which the two police officers involved in the undercover transaction testified, the trial judge denied the motion to suppress, holding that, under the totality of the circumstances, Voshell's view of a single photograph of Butcher was not impermissibly suggestive.

(10) This Court reviews the denial of a motion to suppress evidence pursuant to an abuse of discretion standard.⁹ An identification procedure will not pass constitutional muster where it is “so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.”¹⁰ The factors the United States Supreme Court has set forth when considering the reliability of an identification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.¹¹ In this case, the record supports the trial judge's finding that Voshell's identification of Butcher was sufficiently reliable under the totality of the circumstances.

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

BY THE COURT:

/s/ Randy J. Holland
Justice

⁹ *Hicks v. State*, 631 A.2d 6, 8 (Del. 1993).

¹⁰ *Younger v. State*, 496 A.2d 546, 550 (Del. 1985) (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)).

¹¹ *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). See also *Richardson v. State*, 673 A.2d 144, 148 (Del. 1996).