

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2018-CA-000579-MR

JOSHUA FOWLER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE MITCHELL PERRY, JUDGE  
ACTION NO. 15-CR-002048-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: JONES, KRAMER, AND MAZE, JUDGES.

KRAMER, JUDGE: Joshua Fowler entered a conditional guilty plea to multiple felonies in the Jefferson Circuit Court. He was sentenced to a total of five years' imprisonment. Fowler appeals from an order of the Jefferson Circuit Court denying his motion to require the Commonwealth to reveal the identity of a

confidential informant (CI). Having reviewed the arguments of the parties, the record and the applicable law, we find no reversible error and affirm.

Sometime prior to February 21, 2015, a CI conducted a controlled buy for the Louisville Metro Police Department (“LMPD”) at a specified address in Louisville, Kentucky. According to the affidavit for search warrant, the CI purchased narcotics from a black male known as “Josh” at the address and indicated there were more narcotics inside the apartment. LMPD performed an independent investigation and noted multiple subjects going into the residence for short periods of time. LMPD obtained a search warrant which was executed at the specified address on February 21, 2015.

Prior to execution of the search warrant, LMPD saw Fowler arrive at the residence, exit his vehicle, use a key to enter the residence, and exit some time later. Upon exiting the residence, Fowler was detained while the search warrant was executed. The record indicates that LMPD seized various amounts of narcotics, marijuana, and prescription pills; as well as \$7395 in U.S. currency, two handguns, and a rifle.

Fowler motioned the trial court to require the Commonwealth to produce the name and current address of the CI. In his argument, Fowler pointed to the affidavit for search warrant. Although the CI had purchased narcotics from “Josh” at the specified address, the affidavit listed an individual named Jovan

Hornbeak. Fowler was not specifically named in the affidavit, nor was he named in the search warrant. Fowler argued that, if Hornbeak was the one who sold drugs to the CI, that information would be exculpatory to Fowler. He asserted that the defense needed to know the identity of the CI to question him or her regarding who sold the drugs during the controlled buy. Following a hearing, the trial court denied the motion. Fowler entered a conditional guilty plea and this appeal followed.

On appeal, Fowler argues the trial court erred in denying his motion because the CI's testimony was relevant to his defense and may have proven exculpatory to him if in fact Hornbeak was the one who sold the drugs during the controlled buy. We disagree.

In general, Kentucky Rule of Evidence (KRE) 508 grants the Commonwealth the privilege to refuse to disclose the identity of confidential informants. However, there are three exceptions to the privilege, set forth in KRE 508(c): (1) voluntary disclosure by the holder of the privilege or the CI; (2) if the CI is a witness for the Commonwealth; and/or (3) the CI's testimony is relevant to the issues of the case. "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." *Roviaro v. U.S.*, 353 U.S. 53, 60-61, 77 S. Ct. 623, 628, 1 L. Ed. 2d 639

(1957). Generally, when the CI participates in the criminal transaction for which the defendant is charged, Kentucky law requires disclosure. *Schooley v.*

*Commonwealth*, 627 S.W.2d 576, 578 (Ky. 1982). However, “where the informer gives the police a ‘tip’ or a ‘lead’ which provides information enabling police to identify and charge a defendant, and the informant’s information is not used at trial, disclosure is not required.” *Id.*

On appeal, the trial court’s ruling denying Fowler’s motion to require the Commonwealth to reveal the identity of the CI is reviewed under an abuse of discretion standard. *Hawkins v. Commonwealth*, 536 S.W.3d 697, 701 (Ky. 2017).

In the instant action, when the CI participated in a controlled buy, LMPD received a tip or lead which provided information necessary to obtain a search warrant for Fowler’s residence. Fowler merely speculates that the CI *could* testify that Hornbeak, not Fowler, sold the drugs. Fowler cannot meet the burden of showing that disclosure would be relevant and helpful to the defense through mere speculation. *Taylor v. Commonwealth*, 987 S.W.2d 302, 304 (Ky. 1998).

Even if we accept Fowler’s argument that Hornbeak could have sold the drugs to the CI, he still cannot meet his burden. Fowler was not charged with any crime related to the controlled buy (*i.e.*, Fowler was not charged with trafficking heroin because he sold narcotics to the CI; rather, Fowler was charged with trafficking heroin because LMPD seized heroin “packaged for sale” upon execution of the

search warrant). The CI was not present when the search warrant was executed and was not a material witness to any crime for which Fowler was charged. Therefore, the CI would be unable to provide testimony about what occurred on February 21, 2015. Even though LMPD may have mistakenly named Hornbeak in the affidavit,<sup>1</sup> LMPD saw Fowler coming and going from the residence and using a key to enter the apartment just minutes prior to detaining him and executing the warrant.<sup>2</sup>

In short, the trial court did not abuse its discretion in denying Fowler's motion to require the Commonwealth to disclose the identity of the CI. We therefore affirm.

ALL CONCUR.

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<sup>1</sup> The Commonwealth argued that it was, in fact, a mistake. Hornbeak had been in a prior relationship with Fowler's co-defendant, Britain Thomas. Ms. Thomas also lived at the address specified in the affidavit.

<sup>2</sup> Fowler also motioned the trial court to suppress all physical evidence seized from the residence and from his person due to what he argued was a defect in the affidavit and warrant because Hornbeak, not Fowler, was named. The trial court denied his motion and that ruling was not appealed.

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