IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: NOVEMBER 26, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2007-SC-000373-MR

JOE WILLIE BYRD — APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
NO. 05-CR-01446-001

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

On September 28, 2005, a search warrant was executed at 446 Hawkins Avenue, a residence in Lexington. Appellant, Joe Willie Byrd, Jay C. Duvall, and another individual, Jeffery Wayne Allen, were arrested at that address and subsequently charged with first-degree trafficking in a controlled substance, trafficking in marijuana over eight ounces, possession of drug paraphernalia, subsequent offense, and being a first-degree persistent felony offender. Prior to trial, charges against Duvall and Allen were dropped. Appellant, then appearing *pro se* with the assistance of stand-by counsel, was convicted by a Fayette County jury, found guilty of all charges and sentenced to twenty-eight (28) years in prison. This appeal followed. Ky. Const. § 110(2)(b).

Facts

The search warrant executed on 446 Hawkins Ave. was obtained partially on information learned from a "qualified confidential informant."[1] The informant advised Sergeant Chris Schnelle, the officer who filed an affidavit in support of the search warrant, that someone the informant knew as "Joe" was selling marijuana from a residence at 446 Hawkins Ave. According to the informant, no one lived at the residence, but it was being used for gambling and drug sales. Schnelle then arranged for the informant to make a controlled drug purchase from that residence within 48 hours of obtaining the aforementioned search warrant, searching the informant before and after the drug purchase, and observing the informant entering and leaving the premises. Upon exiting the house at 446 Hawkins Ave., the informant gave Schnelle the contraband, saying it had been purchased from "Joe Willie."

The informant indicated he knew the person who sold drugs as Joe Willie, and knew that Joe Willie did not live at 446 Hawkins Ave. The informant also said that Joe Willie lived on Ohio Street and drove an older model pick-up truck. Based on this information, Schnelle checked the license plate on a truck parked in front of 446 Hawkins Ave., and found the truck registered to Joe Willie Byrd.

Upon executing the search warrant on 446 Hawkins Ave., Schnelle, the first officer through the door, observed a large room with a bar,

---

[1] A "qualified confidential informant" is an informant who had provided reliable information to the police on at least two prior occasions. Specifically, here, the informant made two prior controlled drug purchases for the officer who filed an Affidavit in support of the search warrant.

several tables, and three men, Duvall, Allen, and Appellant, sitting at one of the tables. On his person, Appellant had $1,500 in cash in his wallet, and $138 in cash in his front pants pocket. A number of items were confiscated including marijuana, cocaine, a Viagra pill, a prescription bottle with the name Robert R. Cowen on the label containing a quantity of cocaine folded up in a dollar bill, and a black satchel containing plastic bags, a digital cell phone charger, and two sets of digital scales.

The officers executing the warrant also observed a Kentucky Utilities bill addressed to "Joe W. Byrd at 460 [sic] Hawkins Ave.," two business cards in the name of Robert Cowen at 446 Hawkins Ave., "numerous marijuana roaches," $173 in cash, a police scanner, multiple cell phones, including a Nextel, and a green plate with a straw, a knife, a razor blade, and a line of cocaine, which looked, in one of the officer's words, "like somebody had shaped it up to get ready to snort it."

The defense stipulated that the Nextel cell phone belonged to Appellant and that he had the cell phone with him the night of the search. The cell phone charger, found in the black bag with the drugs and drug paraphernalia, fit Appellant's cell phone.

Following the search, Appellant, Duvall, and Allen were arrested. As they were being led from the house, Appellant said "the other suspects didn't have anything to do with what was found," though he did not expressly claim possession of the items found at the residence.

Subsequent investigation revealed Vivian Cowen as the owner of

446 Hawkins Ave. At trial, she testified that she and her husband, Robert Cowen, owned the property until the time of her husband's death in July of 2004, at which time she became the sole owner of the property. She then rented the property to Appellant for $300 a month. Appellant signed no lease and paid her each month in cash. Mrs. Cowen said that she never went to the house on 446 Hawkins Ave. and did not know what went on there.

Appellant testified that he rented out the house at 446 Hawkins Ave. for parties about three weekends a month, and that no one lived in the house. He testified that at least three other people had keys to the house. Appellant also testified that he collects rent on unrelated property owned by his adopted father, which accounted for $1,000 of the money he had on him at the time of the search. He further testified that he was not doing drugs the night of the search, that he saw neither the black bag, nor the green plate with a razor blade and cocaine, and that nothing in the black bag belonged to him.

Appellant now alleges five (5) errors on appeal: 1) prosecutorial misconduct, as exculpatory evidence was not provided as required in discovery, 2) the trial court erred in overruling Appellant's motion to suppress, 3) it erred by not holding a Faretta hearing, in regards to his waiver of counsel, 4) it erred in denying Appellant's motion for mistrial, and 5) it erred in failing to order the disclosure of the identity of the confidential informant. For the following reasons, we disagree and affirm

Appellant's convictions.

I. Alleged Prosecutorial Misconduct

After trial, Appellant filed a motion for a new trial, alleging the Commonwealth's Attorney withheld notice and disclosure of potentially exculpatory evidence and, further, at trial, made improper reference to the evidence withheld. The evidence Appellant refers to is a "Kool" brand cigarette filter found in the black bag containing the cocaine, marijuana, and drug paraphernalia. The cigarette filter was not listed among the items found in the black bag in the search warrant inventory compiled after the warrant was executed. Appellant claimed the evidence is exculpatory because he did not smoke "Kool" cigarettes.

The trial court overruled Appellant's motion, pointing out that the seized evidence had been readily available for defense inspection in the police evidence room prior to trial, and that there had been no objection to the prosecutor's comments about the cigarette filter in the Commonwealth's closing argument.

Appellant alleges this ruling was error. He cites to Brady v. Maryland, 373 U.S. 83, 88 (1963), and United States v. Agurs, 427 U.S. 97 (1976), for the proposition that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." Brady, 373 U.S. at 88. He further cites to Kyles v. Whitley, 514 U.S. 419 (1995), alleging the Commonwealth had a constitutional duty to disclose this

information to him. Kyles, however, held that due process requires reversal whenever the Commonwealth fails to disclose any evidence which is material to guilt or to punishment, and which is favorable to the accused. Id. at 432. Evidence is considered "material" if it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. at 435. Appellant's argument, however, is misguided.

Brady, Agurs, and Kyles are not applicable because the "Kool" brand cigarette filter was not exculpatory evidence. Contrary to what Appellant argues, the record reveals that Appellant testified that *he smoked* "Kool" brand cigarettes. Moreover, defense witnesses, Duvall and Allen, testified that the "Kool" cigarettes belonged to Appellant and that he was smoking them on the night the search warrant was executed. Further, on cross-examination, Appellant was asked: "Do you recall Mr. Allen testifying that you smoked the "Kool" cigarettes that night? You were smoking a pack of 'Kools?'" Appellant responded: "Yeah, I smoke 'Kools.'"

Therefore, not only is the "Kool" cigarette filter not exculpatory, but the Commonwealth's Attorney was allowed to reference the cigarette filter in his closing statement because the cigarette filter goes to prove Appellant's ownership/possession of the black bag containing contraband. This is a proper argument regarding a reasonable inference for the jury to draw from record evidence. See Hunt v. Commonwealth,

466 S.W.2d 957, 959 (Ky. 1971). Because the black bag containing the incriminating contraband was readily available for defense inspection and because evidence of the "Kool" cigarette was not exculpatory, the trial court correctly overruled Appellant's motion for a new trial.

II. Motion to Suppress

Appellant next claims that the circuit court erred in overruling his motion to suppress the drug evidence seized during the execution of the search warrant because the search warrant affidavit was not specific to him. Specifically, Appellant contends, among other alleged defects, that the statements of the confidential informant relied upon by Schnelle in obtaining the search warrant were not verified by independent investigation and that the physical description of "Joe Willie" was too generalized and therefore untrustworthy. We disagree.

We begin with the standard for obtaining a search warrant. Police must, whenever possible, obtain judicial approval of searches and seizures through the warrant procedure. Katz v. United States, 389 U.S. 347 (1967). It is well-established that a search warrant may only be issued upon a finding of probable cause. U.S. Const. amend. IV, Vanhook v. Commonwealth, 247 Ky. 81, 56 S.W.2d 702 (1933), Dixon v. Commonwealth, 890 S.W.2d 629 (Ky. App. 1994).

In determining whether to issue the search warrant, the reviewing magistrate is required to determine whether the supporting affidavit contains probable cause to search the residence. Beemer v.

Commonwealth, 665 S.W.2d 912, 915 (Ky. 1984). We have previously held that the "issuing magistrate need only 'make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" Lovett v. Commonwealth, 103 S.W.3d 72, 77 (Ky. 2003) (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983)).

The duty of a reviewing court is to ensure that the magistrate had a substantial basis for concluding that probable cause existed. Gates, 462 U.S. at 238-239. Moreover, when reviewing a court's decision on a motion to suppress, findings of fact are upheld unless clearly erroneous, while conclusions of law are reviewed *de novo*. Adcock v. Commonwealth, 967 S.W.2d 6 (Ky. 1998); Welch v. Commonwealth, 149 S.W.3d 407, 409 (Ky. 2004).

Here, the record shows the circuit judge correctly adhered to the Lovett standard in reviewing the search warrant affidavit. At the suppression hearing, after hearing the evidence and arguments for the defense and prosecution, the court found that the affidavit established probable cause to support the issuance of the search warrant and that the warrant was facially sufficient.

To successfully attack a facially sufficient search warrant, Appellant must demonstrate that: "1) the affidavit contains intentionally or recklessly false statements; and 2) the affidavit, purged of its falsities,

would not be sufficient to support a finding of probable cause." Commonwealth v. Smith, 898 S.W.2d 496, 503 (Ky. App. 1995).

Although Appellant contends his physical description given by the confidential informant in the affidavit serves to undermine the trial court's finding of substantial evidence, we disagree. Appellant was not arrested on the basis of being mentioned in the search warrant; rather, Appellant was arrested because he was present in a residence where a search warrant was executed and contraband was found. Although the police had reliable information that Appellant would be present in the residence, the confidential informant's testimony about Appellant selling drugs out of 446 Hawkins Ave. and the presence of Appellant's truck outside the residence, the charges brought against Appellant were not based on any sale of drugs to the confidential informant, but rather upon his possession of drugs, paraphernalia, and other tools of the drug trade upon the execution of the search warrant. Consequently, the exactness of the informant's description of Appellant was immaterial to the sufficiency of the search warrant. Thus, there was no error.

III. Validity of Waiver of Counsel

Appellant next argues the trial court committed palpable error in allowing Appellant to represent himself without establishing that he knowingly, intelligently, and voluntarily waived his right to counsel as required by Faretta v. California, 422 U.S.806 (1975). The primary purpose of Faretta is to ensure a defendant is "made aware of the

dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" Faretta, 422 U.S. at 835 (citing Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942)). Because the record shows that the Appellant insisted upon representing himself and the trial court held *two* hearings to examine Appellant's decision to represent himself, and *cautioned him repeatedly* about the risks associated with such a decision, we find no palpable error.

In each instance, Appellant insisted that he was well-aware of, and voluntarily wished to assume such risks by representing himself with the assistance of stand-by counsel.

As we have previously held:

> In Kentucky, a trial court's Faretta duties manifest themselves in three concrete ways. First, the trial court must hold a hearing in which the defendant testifies on the question of whether the waiver is voluntary, knowing, and intelligent. Second, during the hearing, the trial court must warn the defendant of the hazards arising from and the benefits relinquished by waiving counsel. Third, the trial court must make a finding on the record that the waiver is knowing, intelligent, and voluntary. A waiver of counsel is ineffective unless all three requirements are met.

(internal citation omitted) Hill v. Commonwealth, 125 S.W.3d 221, 226 (Ky. 2004) (citing Wilson v. Commonwealth, 836 S.W.2d 872, 882-883 and Jacobs v. Commonwealth, 870 S.W.2d 412, 418 (Ky. 1994)). Here, the record reveals that all three requirements were met by the court in granting Appellant's request to represent himself and the trial judge took great pains to do so.

At a hearing on March 22, 2007, Appellant asked to be allowed to represent himself with his attorney assisting him. The judge told Appellant that he had that right, but advised Appellant to "think long and hard about doing so since he faced a possible life sentence if convicted." "I have, your honor," Appellant stated, "I have thought about and taken into consideration all the circumstances. That is my wish." The judge advised Appellant that he would not be able to pursue any RCr 11.42 action claiming ineffective assistance of counsel if he represented himself, and defense counsel advised that she and Appellant had discussed this, and Appellant stated he understood. Finding that Appellant understood the potential risks and consequences, the judge stated that he would allow Appellant to represent himself with his defense attorney acting as stand-by counsel.

A few days later, the court held a further hearing on the issue. The judge stated that he had set the matter for further hearing on his own motion to follow up on Appellant's desire to represent himself. Appellant stated that after having considered it for several days, it was still his desire to represent himself. Appellant indicated that he understood the potential consequences and pitfalls of representing himself as previously discussed. The court then reviewed each charge against Appellant to make sure Appellant understood all the potential penalties, including a possible maximum sentence of life in prison. The judge told Appellant that he (the judge) would not be able to advise Appellant how to present

his case. Appellant stated that he was somewhat familiar with the law, having no formal legal education, but having previously represented himself in civil cases. Appellant stated that he understood the burden of proof in a criminal case was upon the Commonwealth to prove guilt beyond a reasonable doubt. Appellant stated he was familiar with some of the rules of criminal procedure and the Kentucky Revised Statutes, but not the rules of evidence. The judge cautioned that if Appellant represented himself, he would be expected to know and adhere to the rules of procedure and evidence, and Appellant stated that he understood this.

Moreover, the judge told Appellant that, by asking to represent himself, he was effectively claiming that he could do as well as an attorney trained in the law, and asked: "do you recognize the dangers that you present to yourself by doing that?" Appellant stated that he understood but felt that he could get the facts across "more adequately" than a lawyer would. The judge asked Appellant whether – if he broke his arm – Appellant would want to set it himself or have a doctor set it. When Appellant stated that he would set it himself if he didn't have the money for a doctor, the judge reminded Appellant that money was not a factor because the court would appoint an attorney if Appellant could not afford one. Nevertheless, Appellant insisted that he wished to represent himself.

The judge then asked Appellant again if – being aware of the

potential penalties he faced and the possible consequences he faced – Appellant still wanted to represent himself. Appellant answered, "Yes, sir, I feel after studying some of my files and knowing some of the evidence and I feel like I can, you know, attack it very adequate." Then, after checking with the prosecution and defense, the judge found that, based on Appellant's responses to the court's questions and comments, that Appellant had knowingly, intelligently, and voluntarily waived his right to counsel and permitted Appellant to represent himself.

Thus, having reviewed the record, we find the trial court properly ascertained whether Appellant's waiver of counsel was voluntary, knowing, and intelligent.

IV. Motion for a Mistrial

Next, Appellant argues the trial court erred in overruling his motion for a mistrial following the prosecutor's closing argument. We also disagree.

At trial, the prosecutor asked some of the officers involved in the search whether they heard Appellant make any statements while the search warrant was being executed. Appellant raised no objection. Only one of the officers, Sergeant Simmons, answered affirmatively. On cross-examination, Simmons testified that he related this statement to Schnelle who recorded the incident in his report, from which Simmons quoted, as follows: "As Byrd was being escorted to the wagon to be transported to the Fayette County Detention Center he told Sergeant

Simmons . . . that Duvall and Allen had nothing to do with it. Byrd, however, did not say who did have anything to do with it or that it was his." Asked on re-direct examination what he recalled of Appellant's statement, Simmons said, "I recall Mr. Byrd saying that the other two gentlemen didn't have anything to do with it and that he didn't admit that he specifically did but he admitted that they didn't have anything to do with it."

Thereafter, in his closing argument during the guilt phase, the prosecutor stated that while Appellant, in his statements at trial, seemed "shocked" that there were drugs in 446 Hawkins Ave., he made no such expressions of shock at the time of the search. Appellant's co-counsel immediately asked to approach the bench, objecting that the argument was not proper. The judge agreed, asking if the defense wanted him to admonish the jury. Defense counsel instead asked for a mistrial. When the judge overruled the motion for a mistrial, finding that the prosecutor's comment had been directed at the evidence and not Appellant's Fifth Amendment right, Appellant then requested an admonition. The admonition agreed upon, and given by the court before the prosecutor resumed his summation, was as follows:

> Ladies and gentlemen, I will admonish you at this time that you are to disregard the Commonwealth's comments in their close [sic] regarding Mr. Byrd not making any, any statements or comments to the police at the time of the search. He was under no obligation to make, make any such comments or statements.

In order for a trial court to grant a mistrial, there must be a

manifest necessity for one. Kirkland v. Commonwealth, 53 S.W.3d 71, 76 (Ky. 2001). Moreover, we review claims of prosecutorial misconduct to determine if the alleged conduct is so egregious, improper, or prejudicial as to have undermined the overall fairness of the proceedings. Brewer v. Commonwealth, 206 S.W.3d 343, 349 (Ky. 2006); see also Hood v. Commonwealth, 230 S.W.3d 596 (Ky. App. 2007). To determine if a prosecutor's arguments commented on a criminal defendant's right to remain silent, a reviewing court must consider whether the remarks were "manifestly intended to reflect on the accused's silence or [were] of such a character that the jury would naturally and necessarily take [them] as such." Bowling v. Commonwealth, 873 S.W.2d 175, 178 (Ky. 1993). The test for whether a prosecutor's comment implicated a defendant's right to remain silent is "whether the comment is reasonably certain to direct the jury's attention to the [Appellant's] exercise of his right to remain silent." Sholler v. Commonwealth, 969 S.W.2d 706, 711 (Ky. 1998) (internal citation omitted); see also Crowe v. Commonwealth, 38 S.W.3d 379, 385 (Ky. 2001).

Here, there was no manifest necessity requiring a mistrial because the prosecutor's argument was not intended to comment on Appellant's right to remain silent, but, rather, to contrast his statements and arguments at trial with the record evidence of what actually went on at the time of the search. The prosecutor's comments were not calculated to direct the jury's attention to Appellant's right to remain silent; rather,

they addressed the jury's attention to Appellant's statements at trial, which were clearly at odds with the officer's testimony as to what was said during the search. Undermining Appellant's credibility is a proper avenue for closing argument.

Further, any possible error was cured when the trial court admonished the jury to draw no inference from the remarks in accordance with Ragland v. Commonwealth, 191 S.W.3d 569, 591 (Ky. 2006). We note that an admonition given by the trial court is presumed to cure the defect in the testimony for which it was requested. Combs v. Commonwealth, 198 S.W.3d 574 (Ky. 2000). Thus, the trial court properly denied Appellant's motion for a mistrial. There was no error.

V. Identity of the Confidential Informant

Lastly, Appellant requests palpable error review under RCr 10.26, arguing that the circuit court ruled incorrectly in overruling his motions to disclose the identity of the confidential informant (hereinafter, "CI").[2] For the following reasons, we disagree.

KRE 508 grants a privilege to the Commonwealth to refuse to disclose the identity of a confidential informant. "Exceptions to the privilege occur when the disclosure is voluntary, when the informant is a witness and when the testimony of the informant is relevant to an issue."

---

[2] Appellant's brief makes a passing reference to two witnesses, Melton and Flannelly, during his analysis of this issue in his brief. As the Appellant has failed to provide us with the facts of which he complains in regards to hindering his cross-examination of the Commonwealth's witnesses, "Melton and Flannelly" and has provided no citation to the record from which we could reasonably ascertain the parameters of his complaint, we will not consider this issue. See Sharp v. Sharp, 491 S.W.2d 639, 644 (Ky. 1973)

Taylor v. Commonwealth, 987 S.W.2d 302, 204 (Ky. 1998). "Our case law provides that a defendant who requests disclosure of the identity of an informant must first make a proper showing that an exception applies." Heard v. Commonwealth, 172 S.W.3d 372, 374 (Ky. 2005) (citing Schooley v. Commonwealth, 627 S.W.2d 576 (Ky. 1982)). Here, Appellant made no such showing.

The authority to which Appellant cites as support, Roviaro v. United States, 353 U.S. 53 (1957), is not implicated under the facts of the instant case. In Roviaro, the charges against the defendant were based directly upon his sale of narcotics to a CI. "This is a case where the Government's informer was the sole participant, other than the accused, in the transaction charged." Roviaro, 353 U.S. at 64. Here, however, the CI was not a witness to the charged offenses. The charges against Appellant were based upon the evidence seized pursuant to a validly issued search warrant, *not* upon a controlled drug purchase involving the CI. Thus, Appellant has articulated no legitimate basis for disclosure of the CI's identity and is therefore not entitled to such a disclosure.

Appellant further cites to People v. Garcia, 434 P.2d 366, 370 (Cal. 1967), for the proposition that the privilege of nondisclosure of a confidential informant must give way "when it comes into contact with the fundamental principle that a person accused of a crime is entitled to a full and fair opportunity to defend himself." Appellant notes the Garcia

court recognized that a non-participant informant can be a material witness regardless of the fact that he was not an eyewitness to the crime.

Under the facts of this case, however, Garcia does not require disclosure of the confidential informant. The Garcia court began by noting that the statute authorizing the privilege of non-disclosure of an informant operated in such a way as to "prevent application of the privilege in cases where disclosure 'is relevant and helpful to the defense of the accused, or is essential to a fair determination of a cause.'" Id. at 369. The Court then goes on to note "that for these purposes a 'mere informer' was to be distinguished from one who was or could be a material witness for the defense." Id. at 370. The Garcia court explains the difference as follows:

> A mere informer has a limited role. 'When such a person is truly an informant he simply points the finger of suspicion toward a person who has violated the law. He puts the wheels in motion which cause the defendant to be suspected and perhaps arrested, but he plays no part in the criminal act with which the defendant is later charged.' His identity is ordinarily not necessary to the defendant's case, and the privilege against disclosure properly applies. When it appears from the evidence, however, that the informer is also a material witness on the issue of guilt, his identity is relevant and may be helpful to the defendant. Nondisclosure would deprive him of a fair trial. Thus, when it appears from the evidence that the informer is a material witness on the issue of guilt and the accused seeks disclosure on cross-examination, the [Commonwealth] must either disclose his identity or incur a dismissal.

Id. The difference, then, between a "mere informer" and a "material witness" is the informer's level of involvement in the charged criminal act. In examining the lines of precedent, the Garcia court observed that

"[m]ost cases in the latter category involve informants who were actual participants in the criminal act." Id. (citing People v. Lawrence, 308 P.2d 821, 830 (Ca. App. 1957) ("(W)hen an informant participates in the criminal act he is no longer simply an informer. He is a material witness to the criminal act, in fact, he is similar to a feigned accomplice.")) The Garcia court notes, however:

> Disclosure is not limited to the informer who participates in the crime alleged. The information elicited from an informer may be 'relevant and helpful to the defense of the accused or essential to a fair determination of a cause' even though the informer was not a participant. For example, the testimony of an eyewitness-nonparticipant informer that would vindicate the innocence of the accused or lessen the risk of false testimony would obviously be relevant and helpful to the defense of the accused and essential to a fair determination of the cause.

Id. at 370-371. Appellant, however, has produced no evidence that the confidential informant in this case either 1) participated in the criminal act for which Appellant was convicted, 2) was an eyewitness-nonparticipant informer that would vindicate Appellant's innocence, or 3) had evidence that would lessen the risk of false testimony. Id.

Appellant argues that because the identity of Appellant was at issue during the suppression hearing, the confidential informant should be considered an eyewitness for the suppression hearing. Appellant raised this same argument at the suppression hearing and the circuit judge stated:

> Under KRE 508, as far as the privilege is concerned, the court is not satisfied from the evidence and the argument that, that the concept of relevancy and helpfulness to the defendant has been satisfied sufficient to overcome the

> privilege as set forth in [KRE] 508. The record would indicate by the reading of the indictment both as to Mr. Byrd and Mr. Roberts' client, Mr. Duvall, that the charges are based not upon any, any involvement with or transaction with the confidential informant within the 28, 24, 48-hour time period prior to the actual ex-, obtaining and execution of the search warrant. And that each of those defendants are indicted, charged with trafficking under the provision of the trafficking statute wherein possession with the intent to distribute or sell, based upon the Commonwealth's theory of the case, qualifies it as, to come under the trafficking portion of the statute, that the charges nor the evidence involved, relate to any, like I say, any of the transaction or the occurrence between the confidential informant and that particular property on, within the 48-hour period prior to the execution of the search warrant. So, on that basis, I'm going to overrule the motion to suppress, find that the confidential informant was qualified and reliable and has provided accurate information in the past and therefore is qualified as a confidential informant in this particular matter and that also that there is no basis to identify the, the specific identity of the confidential informant at this point.

Thus, the informant's identity was as immaterial then as it is now. Kentucky courts have held that the identity of an informant does not have to be revealed unless the informant was a material witness to the guilt or innocence of the accused. Thompson v. Commonwealth, 648 S.W.2d 538, 839 (Ky. App. 1983); Commonwealth v. Balsley, 743 S.W.2d 36, 38 (Ky. App. 1987) ("In order for disclosure to be required . . ., the informant must witness material parts of the offense charged.").

Here, the Commonwealth did not rely on the facts of the confidential informant's controlled buy to charge Appellant with drug offenses; therefore, the informant was not a witness to any part of those offenses. Nor was any evidence offered that the informant had any relevant testimony regarding the facts of the charged crimes. The mere

fact that the informant participated in an earlier controlled buy which led to the issuance of the search warrant does not render the facts surrounding the controlled buy relevant to the offenses charged. Thus, Appellant was not entitled to disclosure of the identity of the confidential informant. Therefore, there is no error.

Conclusion

For the foregoing reasons, we affirm Appellant's conviction of first-degree trafficking in a controlled substance, trafficking in marijuana over eight ounces, possession of drug paraphernalia, subsequent offense, and being a first-degree persistent felon.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Lisa Bridges Clare
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Samuel J. Floyd, Jr.
Assistant Attorney General
Office of the Attorney General
Office of the Criminal Appeals
1024 Capital Center Drive
Frankfort, KY 40601