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SJC-12795

COMMONWEALTH vs. XAVIER E. RODRIGUEZ.

May 15, 2020.

Controlled Substances. Practice, Criminal, Appeal by Commonwealth, Interlocutory appeal. Supreme Judicial Court, Superintendence of inferior courts.

The Commonwealth appeals from a judgment of the county court denying, without a hearing, its petition for relief under G. L. c. 211, § 3, from an order of the Boston Municipal Court. We affirm.

Background. The defendant, Xavier E. Rodriguez, stands charged with possession of a class A substance (fentanyl) with intent to distribute and possession of a class B substance (suboxone) with intent to distribute. He was charged with these offenses after a confidential informant, working under the direction of the Boston police department, carried out three controlled purchases of a substance believed to be heroin. Using the information gleaned in these controlled purchases, the police applied for and obtained a warrant to search the defendant's apartment, averring that there was probable cause to believe that the defendant was keeping heroin there. In the execution of the warrant, the police found and seized substances alleged to be fentanyl and suboxone, along with other items; no heroin was found. The charges against the defendant concern the substances seized in the apartment, not any substance sold to the confidential informant in the controlled purchases.

Pursuant to Mass. R. Crim. P. 14 (a) (1) (C), as appearing in 442 Mass. 1518 (2004), and Mass. R. Crim. P. 17, 378 Mass. 885 (1979), the defendant filed a "motion for rewards and promises" seeking certain information concerning the Boston

police department's dealings with the confidential informant (without disclosing the identity of the informant). The defendant requested generally that the Commonwealth be ordered to produce "[a]ny and all information available to the Commonwealth, or that by the exercise of due diligence can be ascertained by the Commonwealth, of promises, inducements, or rewards of any kind or nature made directly or indirectly to any Commonwealth witness or to the [d]efendant." More particularly, he asked that the Commonwealth be ordered to provide "a copy of all documents executed by a member of the Boston Police Department with regard to the recruiting or active participation of the [c]onfidential [i]nformant in this case on or at any time prior subsequent to the evening of [the date of the search] . . . and any and all other documents included in any Confidential Informant file with regard to the [c]onfidential [i]nformant in this case that does not identify that person, whether in the possession of an officer, a detective, a detective supervisor, or Chief of Bureau Investigative Services" (emphasis added). The defendant also requested that the police department be ordered "to answer in writing, through the officers involved in this case, whether or not the [c]onfidential [i]nformant was paid any money by them prior to, during, or within the hours following the events which are the subject matter of this complaint; and what occurred to the drugs allegedly purchased during this investigation (including any and all reports regarding same)." In support of his motion, the defendant argued that the search warrant affidavit did not provide sufficient information to test the credibility and veracity of the confidential informant. He also stated, as noted, that he was not seeking to have the Commonwealth reveal the informant's identity.

The judge allowed the motion in part¹ over the Commonwealth's opposition, finding that the requested information was relevant and necessary to prepare a defense. In doing so, the judge noted that the dates of the controlled purchases were not specified in the affidavit, that there was a discrepancy between the informant's description of the defendant

¹ The judge denied a further request that the Commonwealth provide the complete history of the informant's involvement with law enforcement, including, inter alia, a list of cases the informant had worked on, the results of those cases (including any cases in which the informer's tip turned out to be false or inaccurate), the names of all police agencies with which the informer had worked, and the dates of execution and return of any warrants based on information provided by the informant.

and his appearance at the time of his arrest, and that the controlled purchases had involved heroin whereas the search yielded only fentanyl and suboxone. The Commonwealth's G. L. c. 211, § 3, petition followed. In denying relief, the single justice ruled that the case did not present an exceptional circumstance requiring the exercise of this court's extraordinary power. See Commonwealth v. Fontanez, 482 Mass. 22, 25 (2019), and cases cited. He also noted that, if the Commonwealth believed that responsive documents would identify the informant, it could take steps in the trial court to prevent that, such as requesting from the trial court a protective order or redaction of certain information.

Discussion. The first step for a single justice, when acting on a G. L. c. 211, § 3, petition, is to decide, in his or her discretion, "whether to employ the court's power of general superintendence to become involved in the matter," or, in other words, "whether to review 'the substantive merits of the . . . petition.'" Fontanez, *supra* at 24 (citation omitted). "The single justice is not required to become involved if the petitioner has an adequate alternative remedy or if the single justice determines, in his or her discretion, that the subject of the petition is not sufficiently important and extraordinary as to require general superintendence intervention." Id. See Commonwealth v. D.M., 480 Mass. 1004, 1004 n.2 (2018) (discussing use of G. L. c. 211, § 3, petitions by Commonwealth in cases concerning confidential informants; "disclosure of information relating to confidential informants and witnesses does not in and of itself constitute exceptional circumstances"). The single justice in this case followed this approach and decided in his discretion not to review the Commonwealth's petition on its substantive merits.

Where, as here, the single justice exercises discretion not to reach the merits of a petition, the appeal to the full court "is strictly limited to a review of that ruling," Commonwealth v. Samuels, 456 Mass. 1025, 1027 n.1 (2010), and the full court asks only whether the single justice abused his or her discretion in making that decision. It is not for the full court to substitute its judgment for that of the single justice. L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014) ("An appellate court's review of a . . . judge's decision for abuse of discretion must give great deference to the judge's exercise of discretion; it is plainly not an abuse of discretion simply because a reviewing court would have reached a different result"). "An abuse of discretion occurs only where the judge makes "a clear error of judgment in weighing" the factors

relevant to the decision . . . , such that the decision falls outside the range of reasonable alternatives.'" Commonwealth v. Keown, 478 Mass. 232, 242 (2017), cert. denied, 138 S. Ct. 1038 (2018), quoting L.L., supra.

The Commonwealth has not shown that the single justice abused his discretion by denying relief on the ground that its petition did not present an exceptional circumstance requiring the exercise of our extraordinary superintendence power. The Commonwealth argues that the motion judge's decision was clearly erroneous, that it presents a novel question of law, and that a systemic issue has arisen, as shown by the issuance of similar orders in other cases.² Although "[e]xceptional circumstances might exist" in light of such considerations (emphasis added), Fontanez, supra at 25, the single justice was not obligated to find on this record that they did exist; not every new or recurring issue or allegedly erroneous ruling necessarily constitutes an exceptional circumstance requiring general superintendence review. Regardless of its merits, on which we express no view, the motion judge's order in this case was a discretionary discovery ruling, and one that the judge at least attempted to tailor to avoid disclosure of the confidential informant's identity. Certainly, there has been no showing that the judge's order seriously impairs the Commonwealth's ability to prosecute the alleged crimes, unlike in Fontanez, supra at 26, or that the judge considered the defendant's showing under the wrong standard, given the posture of the case, unlike in D.M., supra at 1006.

To be sure, the Commonwealth has a strong and legitimate interest in protecting the informant's identity. See D.M., supra at 1005, and cases cited (discussing Commonwealth's long-

² Regarding the claimed systemic issue, the Commonwealth has provided us with docket sheets, papers filed, and orders issued in several cases unrelated to this one and has discussed those cases in some detail in its brief. These materials were not before the single justice. Rather, the Commonwealth simply stated in a footnote in its petition that motions like the defendant's and orders like the judge's are frequent in the Boston Municipal Court. No less than on other litigants, it is incumbent on the Commonwealth not merely to make allegations but to substantiate them in the record before the single justice. See, e.g., Gorod v. Tabachnick, 428 Mass. 1001, 1001, cert. denied, 525 U.S. 1003 (1998), and cases cited. We cannot fault the single justice for not finding an exceptional circumstance based on information he did not have before him.

established privilege not to disclose identity of confidential informant). However, as the single justice pointed out, the Commonwealth has several remedial measures available to it in the trial court before resorting to G. L. c. 211, § 3. If the Commonwealth feels that any document would reveal the informant's identity, it can seek a protective order, move for reconsideration, request permission to make redactions, or, as the defendant suggested at oral argument, submit documents for in camera review. Where the Commonwealth has these alternative means of protecting the confidential informant's identity, it has not been placed in any untenable position requiring extraordinary relief.

In sum, the single justice was well within his considerable discretion to deny the Commonwealth's petition without reaching its merits.³

Judgment affirmed.

Monica J. DeLateur, Assistant District Attorney, for the Commonwealth.

Joseph R. Smith for the defendant.

³ As noted in the text, we express no view as to the merits of the judge's order, much less as to similar orders in other cases. We simply hold that the single justice was not compelled to find exceptional circumstances in this case.