

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

Appellee

v.

JOHN JOSEPH GALDO

Appellant

No. 1074 EDA 2011

Appeal from the Judgment of Sentence October 1, 2010  
In the Court of Common Pleas of Delaware County  
Criminal Division at No(s): CP-23-CR-0000824-2009

BEFORE: LAZARUS, J., OTT, J., and STRASSBURGER, J.\*

MEMORANDUM BY LAZARUS, J.

Filed: March 4, 2013

John Joseph Galdo appeals from the judgment of sentence imposed by the Court of Common Pleas of Delaware County following his conviction on two counts of possession with intent to deliver marijuana and methamphetamine.<sup>1</sup> We affirm.

The trial court summarized the facts of this case as follows:

On December 12, 2008 at approximately 10:03 a.m. a search warrant was executed at 16 Bennetts Lane, [Cheyney, PA]. [Galdo] was the only occupant of the home and upon entry the odor of burning marijuana was immediately apparent to officers. The residence was searched and in the course of that search officers found two large bags of marijuana and three smaller bags in Ziploc bags, [and] new and unused Ziploc bags in a "Home Depot" bucket that was located at the foot of [Galdo's]

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\* Retired Senior Judge assigned to the Superior Court.

<sup>1</sup> 35 P.S. § 780-113(30).

bed in the master bedroom. A yellow toolbox in the master bedroom closet contained a triple-beam scale, seven additional bags of marijuana, rolling papers and a bag containing methamphetamine, and [Galdo's] business card. A loaded .25 caliber magazine was discovered in a second closet in the master bedroom. Together 4.8 pounds of marijuana and 36.3 grams of methamphetamine was seized. Through expert testimony the marijuana was valued in excess of \$30,000.00 and the methamphetamine was assigned a value of between \$1,500.00 and \$3,600.00. A digital scale was seized from a bathroom adjacent to the master bedroom. In a nightstand next to [Galdo's] bed officers discovered a loaded semi-automatic handgun with a case, an empty magazine clip and cleaning materials. Two glass pipes and a small bag of marijuana were on a dresser in the bedroom. [Galdo's] passport and business cards were in the dresser drawer.

In addition to the controlled substances, paraphernalia and weapon, officers found large amounts of cash dispersed throughout the residence. Approximately \$21,000.00 was in a stack beneath sweaters in the master bedroom closet, and \$4,000.00 was rolled up and stuffed in a boot. Six thousand four hundred fifty one dollars was retrieved from a coat that was hanging in the kitchen. Bonds and personal checks, including a check made payable in the amount of \$13,050.00 to "John Galdo Ceramic Tile" were also seized. Finally, personal papers bearing [Galdo's] name from Apple Vacations, Citizens' Bank account statements and a folder containing funeral information and a Death Certificate for [Galdo's] aunt, Rita Hrecha were seized from the master bedroom.

[Galdo] testified at trial and also offered the testimony of several family members. He admitted he lived at 16 Bennetts Lane with his fourteen year-old daughter, eighteen year-old son and a granddaughter. In March of 2008, his aunt died and [Galdo], along with his brothers and his children, was a beneficiary under her will. [Galdo] was also the Executor. [Galdo] testified that the cash seized represented proceeds from the estate, payments for a tile installation job and cash intended for Christmas shopping. He testified further that his master bathroom and bedroom were under repair when the search was executed and that he was not using the bedroom during the construction. [Galdo] maintained that contractors and workers were in and out of his house during the repairs and that before the search he had

never seen and had no knowledge of the substances and paraphernalia that was seized.

Trial Court Opinion, 3/23/12, at 2-4 (citations omitted).

Prior to trial, the court denied Galdo's motion to suppress statements that he made to the police and evidence that they seized from his house. The Commonwealth filed a motion to introduce evidence that the week before the execution of the search warrant, Galdo sold controlled substances to a confidential informant (CI). The court granted the Commonwealth's motion and denied Galdo's motion for disclosure of the identity of the CI. In response to a motion filed by Galdo, the trial court agreed to reconsider admission of testimony regarding the controlled buy between Galdo and the CI.

A jury trial began on May 11, 2010. At the conclusion of Galdo's case, the Commonwealth renewed its request to present evidence of the drug sale between Galdo and the CI. The trial court granted the motion, and on May 14, 2010, the jury convicted Galdo of two counts of possession with intent to deliver.<sup>2</sup>

On October 1, 2010, the trial court sentenced Galdo to an aggregate sentence of seven to fourteen years' incarceration. Galdo filed a post-sentence motion and a motion to identify the CI, both of which the court denied on April 12, 2011.

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<sup>2</sup> The jury found Galdo not guilty of persons not to possess firearms, 18 Pa.C.S. § 6105.

Galdo filed a timely notice of appeal, and on June 16, 2011, in response to an order from the trial court, he filed a timely statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). On March 23, 2012, the trial court filed its Rule 1925(a) opinion.

Galdo raises the following issues for our review:

1. Whether the trial court erred in denying [Galdo's] motion in limine when [he] requested that the Commonwealth be precluded from introducing any testimony or evidence including hearsay testimony in any manner whatsoever regarding [an] alleged buy/sell of controlled substances between [Galdo] and an unknown individual on or about December 1, 2008.
2. Whether the trial court erred in granting the Commonwealth the right to introduce evidence/testimony of an alleged illegal drug sale/buy between [Galdo] and an unknown individual on or about December 1, 2008 pursuant to Pa.R.E. 404(b).
3. Whether the trial court erred in granting the Commonwealth permission to introduce evidence pursuant to Pa.R.E. 404(b) specifically the testimony of Detective Rosen of an alleged sale/buy occurring between [Galdo] and an unknown individual on or about December 1, 2008.
4. Whether the trial court erred in denying [Galdo's] motion for more specific discovery wherein [he] requested the name and address of all witnesses relating to the Commonwealth's proposed testimony under Pa.R.E. 404(b) including the identity of the unknown individual who was alleged to engage in a drug sale with [Galdo] on or about December 1, 2008 and whether or not the trial court's denial was a violation of [his] right to confrontation under the Sixth Amendment of the United States Constitution and Article I of the Pennsylvania Constitution and whether or not the trial court's denial of [his] motion was a violation of [his] right to a fair and just trial under the U.S. and Pennsylvania Constitutions.
5. Whether the trial court erred in denying [Galdo's] motion for more specific discovery, specifically when [he] requested the identity of any and all witnesses alleged to be [involved] in a

drug sale with [him] and for which [the] Commonwealth sought to introduce [evidence] pursuant to Pa.R.E. 404(b)[,] together with any and all criminal record[s] of said witnesses.

6. Whether the trial court erred in denying [Galdo's] post-trial motions alleging prosecutorial misconduct on the grounds the Commonwealth repeatedly represented to [Galdo] and [the] trial court in support of the Commonwealth's [Pa.R.E.] 404(b) motion that to reveal the name of the [CI] would result in serious bodily injury or death to said informant when, in making such representation, the Commonwealth knew that for all times relevant to the criminal proceedings said witness was deceased.
7. Whether the trial court erred in denying [Galdo's] post-trial motions on the grounds of prosecutorial misconduct when the Commonwealth failed to reveal [its] knowledge that the CI was deceased at all times relevant to the trial of [Galdo] and in doing so deceived the court and denied [Galdo] his right to confront witnesses and receive a fair trial.
8. Whether the trial court erred in denying a hearing on [Galdo's] motion to present testimony and create a record as to prosecutorial misconduct in support of [Galdo's] post-sentence motions specifically to introduce the testimony and evidence of similar misconduct by the office of the District Attorney of Delaware County regarding representations regarding the identity and availability of confidential informants in criminal prosecutions in Delaware County and further denying [Galdo's] right to present witnesses from the District Attorney's office to establish a record as to a pattern of misconduct and/or a pattern of misrepresenting the status of CIs to the extent that some, if not the individual in the instant case, existed.
9. Whether the trial court err in denying [Galdo's] motions to reveal the identity of the CI and denied a hearing on said motion, the purpose of which was to determine whether or not said informant ever existed and therefore whether or not said informant could have participated in the alleged drug transaction which was permitted under Pa.R.E. 404(b) and have given proper information to establish probable cause for a search warrant which led to [Galdo's] arrest.
10. Whether the trial court erred in denying [Galdo's] motion to present evidence and testimony from the Commonwealth

prosecutor to establish that said prosecutor and prosecutor's office had knowledge of whether or not the CI was deceased; when he learned of such knowledge, whether there was a conscious decision of not only the prosecutor but the prosecutor's office to mislead the court and [Galdo] regarding the identity of said informant.

Brief of Appellant, at 7-9.<sup>3</sup>

Because Galdo's issues on appeal relate to the CI, we set forth the following additional relevant facts, as found by the trial court.

On December 11, 2008, . . . Detective Edward Rosen of the Marple Township Police Department prepared an application for a warrant to search 16 Bennetts Lane, Cheyney, Delaware County along with [Galdo's] person. In the affidavit of probable cause attached to the application for a search warrant, Detective Rosen states that he has been a police officer for eighteen years and a member of the Delaware County Drug Task Force for ten of those years. He gives a brief synopsis of his training and education as a member of the Task Force and sets forth the following.

In November of 2008, Detective Rosen met with a confidential informant (CI1). Detective Rosen states *inter alia*, that CI1 wishes to remain anonymous for fear of retaliation. Detective Rosen wished CI1 to remain anonymous as well, because of safety concerns and to ensure CI1's future as a source of information regarding drug activity. CI1's identity is known to Detective Rosen. He or she has provided information in the past including the names and locations of drug dealers in the Delaware County and Philadelphia area. Information provided by CI1 has been reliable and accurate. Detective Rosen has corroborated its accuracy through other sources. CI1 has demonstrated a thorough familiarity with controlled substances, including marijuana and cocaine, and the methods by which these substances are processed, prepared, sold and ingested including the prices at which various weights of these substances

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<sup>3</sup> We have reordered the issues as raised by Galdo in his brief.

are sold. CI1 has made statements against his penal interest to Detective Rosen.

In November of 2008, CI1 told Detective Rosen that cocaine was currently being sold from 16 Bennetts Lane by John Galdo. CI1 described John Galdo and the property on Bennetts Lane. Within the past several months, CI1 saw Galdo sell marijuana at Bennetts Lane and watched as Galdo retrieved the marijuana from the residence. Peers of CI1 who CI1 has seen in possession of marijuana have told CI1 that they have purchased marijuana from Galdo. The description of the property was determined to be accurate through independent surveillance by Detective Rosen.

During the same month Detective Rosen spoke with a second confidential informant (CI2). CI2 and Detective Rosen have the same concerns as were set forth above as to CI1 regarding the revelation of CI2's identity. Additionally, CI2 has provided information that led to the seizure of controlled substances and assets that led to thirteen convictions in Delaware County and additional seizures in three pending investigations. CI2 has also made statements against his penal interests.

In November of 2008, CI2 stated that he knew John Galdo was selling marijuana from 16 Bennetts Lane and has personally seen Galdo sell marijuana retrieved from this location on prior occasions during the past few months. CI2 described both Galdo and the residence.

During the week of December 1, 2008, Detective Rosen set up a controlled buy with CI1 making the purchase. Detective Rosen met with CI1. CI1 called Galdo in Detective Rosen's presence. CI1 arranged to meet with Galdo to purchase marijuana. CI1 was searched and found to be free of any controlled substance or currency. Detective Rosen and CI1 went to the designated location which is in the vicinity of 16 Bennetts Lane. Detective [Rosen] gave CI1 currency and watched CI1 meet with Galdo at the prearranged location and return with marijuana. At the same time officers conducted a surveillance of 16 Bennetts Lane and watched Galdo leave the residence, go directly to the location of CI1 and return to the residence without stopping.

Within forty-eight hours of December 11, 2008, Detective Rosen met again with CI1. CI1 placed a call to Galdo in the detective's presence and inquired as to the availability of marijuana. In this

call Galdo told CI1 that he had marijuana for sale and that CI1 could call him at any time.

Trial Court Opinion, at 7-9 (citations omitted).

At trial, the court permitted the Commonwealth to call Detective Rosen to testify on rebuttal regarding the controlled buy that the CI made on December 1, 2008.

Galdo's first issues address the trial court's admission of evidence regarding the drug buy. We apply the following standard when reviewing a trial court's evidentiary rulings.

The admissibility of evidence is a matter of trial court discretion and a ruling thereon will only be reversed upon a showing that the trial court abused that discretion. An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous.

***Commonwealth v. Williams***, --- A.3d ---, 2012 WL 5992138 at \*3 (Pa. Super. 2012).

Pennsylvania Rule of Evidence 404(b) provides that while evidence of other crimes, wrongs or acts is not admissible to prove the character of the person, it may be admitted for other purposes. Pa.R.E. 404(b). In a criminal case, admission is dependent upon a showing that the probative value of the evidence outweighs its potential for prejudice. **See** Pa.R.E. 404(b)(4).

Evidence of other crimes may be relevant and admissible to impeach a witness or to rebut inferences favorable to the defendant. ***Commonwealth v. Saxton***, 532 A.2d 352, 357 (Pa. 1987). Before admitting such evidence,



the trial court must balance the Commonwealth's need for the evidence against its potential for prejudice to the defendant. ***Commonwealth v. Cascarardo***, 981 A.2d 245, 251 (Pa. Super. 2009).

"In order to prove the offense of possession with intent to deliver a controlled substance, the Commonwealth must prove beyond a reasonable doubt that the defendant possessed the controlled substance and had the intent to deliver." ***Commonwealth v. Carpenter***, 955 A.2d 411, 414 (Pa. Super. 2008). Where, as in this case, no controlled substances were found on the defendant's person, the Commonwealth must establish constructive possession, which is the power to control and the intent to exercise control over narcotics. ***Commonwealth v. Koch***, 39 A.3d 996, 1007 (Pa. Super. 2012) (citations omitted). Accordingly, the trial court was called upon to balance the Commonwealth's need to establish constructive possession through evidence of the controlled buy against the potential prejudice to Galdo.

At trial, Galdo testified that he had no knowledge of the drugs and paraphernalia found in his residence. Instead, he claimed that his home was undergoing repairs and was accessible to contractors who were storing the seized items in his home. He also presented testimony that the cash seized consisted of an inheritance, business receipts and insurance proceeds. In light of this defense, the Commonwealth established the need to present evidence of the drug sale to the CI.

As this Court noted in *Commonwealth v. Matthews*, 609 A.2d 204 (Pa. Super. 1992):

[An additional] issue to consider when evidence of a controlled buy is offered for the purpose of showing the defendant's intent is whether there was a sufficient quantum of proof linking [the defendant] with the uncharged criminal act so as to make it relevant to the question of [the defendant's] intent.

*Id.* at 206.

Here, Detective Rosen testified that he was with the CI when the call to Galdo was made and the location for the buy was selected. He searched the CI for controlled substances before and after the buy and provided him with cash to make the transaction. He drove the CI to Galdo's house, watched the CI meet Galdo at the door, and saw them enter the house. The CI returned to Detective Rosen's vehicle and handed him a bag of marijuana. Accordingly, the trial court properly concluded that the evidence of the controlled buy was admissible because it was sufficiently linked to the issue of Galdo's intent.

We agree with the trial court that the Commonwealth's need for the evidence outweighed potential prejudice to Galdo. As previously noted, evidence of the controlled buy was admitted only on rebuttal. At the conclusion of Detective Rosen's rebuttal testimony, the court instructed the jury about the limited purpose that the evidence served, and that it might only be relevant to show knowledge, intent and power to control the marijuana that was the basis for the offense charged. **See** N.T. Trial, 5/14/10, at 159-60. The court again included this instruction in its charge to

the jury immediately before deliberations, thereby minimizing the possibility of undue prejudice to Galdo. *Id.* at 226-27. It is well settled that we presume that the jury followed the court's instructions. *Commonwealth v. Natividad*, 938 A.2d 310, 326 (Pa. 2007) (citation omitted).

Because evidence of the controlled buy was properly admitted, Galdo is not entitled to relief on this issue.<sup>4</sup>

Galdo next asserts that the CI was a material witness to the controlled buy, and that the court should have required the Commonwealth to disclose his identity.

The Commonwealth has a qualified privilege to withhold the identity of a CI. *Commonwealth v. Marsh*, 997 A.2d 318 (Pa. 2010). To overcome the privilege and obtain the CI's identity, the defendant must first establish that the information sought is material to the preparation of the defense and that the request is reasonable. *See* Pa.R.Crim.P. 772(B)(2)(a)(i). Only then "is the trial court required to exercise its discretion to determine whether the information should be revealed by balancing the relevant factors, which are initially weighted toward the Commonwealth." *Marsh*, 997 A.2d at 321-22. Relevant considerations include, but are not limited to "the crime charged;

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<sup>4</sup> In his brief, Galdo mentions in passing that the trial court erred by denying his motion *in limine* to preclude hearsay testimony regarding the controlled buy. Brief of Appellant, at 16. We have carefully reviewed the rebuttal testimony of Detective Rosen, and at no time during the testimony does he allude to statements made by the CI. *See* N.T. Trial, 5/14/10, at 124-55.

the possible defenses; [and] the possible significance of the informer's testimony." *Id.* at 322.

In this case, the CI was not an eyewitness to the crime. He was an eyewitness to a transaction that became relevant only when the defendant testified that he had no knowledge of the marijuana that police found in his house. More importantly, Galdo did not establish that the CI's testimony was material. Rather, the basis for his motion for more specific discovery was the vague assertion that he could not properly defend himself without disclosure of the CI's identity. In light of Galdo's failure to establish materiality, the trial court did not abuse its discretion in denying his request for the identification of the CI.

Galdo's final issues relate to the trial court's denial of his post-sentence motions alleging prosecutorial misconduct. In a post-sentence motion filed October 12, 2010, Galdo asserts that during the charging conference on May 14, 2010, he requested a missing/unavailable witness instruction with regard to CI1. At that time, the Commonwealth revealed that CI1 was dead. In his motion, Galdo specifically averred:

7. That the Commonwealth's actions were improper and deceptive in that they intentionally misrepresented the status of the unidentified witness as being alive and at risk of death and/or serious harm, and therefore, the Court was basing its decision on such deception and, further, knowing that the Court, in making its decision to permit the introduction of such highly prejudicial testimony, would attempt to offset said testimony by charging the jury on a missing witness charge.

Post-Sentence Motion, 10/12/10, at 2. In a Motion to Disclose Identity of [CI] and to Present Testimony, filed December 10, 2010, Galdo stated that he sought to present testimony “to establish that the misrepresentation that occurred was not an isolated incident but rather a consistent and approved practice employed by the District Attorney of Delaware County in cases involving [CIs].” Motion to Disclose, 12/10/10, at 4. The trial court held a hearing on the motions on December 17, 2010, and denied them by orders filed April 13, 2011.

Galdo argues that the Commonwealth was obligated to disclose CI1’s death prior to trial. The trial court recognized that Galdo essentially claimed that the Commonwealth violated ***Brady v. Maryland***, 373 U.S. 83 (1963), which established that suppression by the prosecution of evidence favorable to an accused, upon request, violates due process where the evidence is material to guilt or to punishment. To establish a ***Brady*** violation, the defendant must establish that: (1) the proposed evidence was favorable to him; (2) the evidence was suppressed by the prosecution either willfully or inadvertently; and (3) the defendant was prejudiced. ***Commonwealth v. Lambert***, 884 A.2d 848, 854 (Pa. 2005). “The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish materiality in the constitutional sense.” ***Commonwealth v. Chambers***, 807 A.2d 872, 878-88 (Pa. Super. 2002). Because Galdo failed to establish the materiality of

information regarding C11, the trial court properly determined that the Commonwealth did not engage in prosecutorial misconduct.

Judgment of sentence affirmed.

STRASSBURGER, J., files a Concurring Statement.