NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
YOHANSKY RODOLFO DIAZ-REYES a/k/a OVIDIO DIAZ-ENRIQUE,	:	
	:	
Appellant	:	No. 1279 MDA 2012

Appeal from the Judgment of Sentence June 25, 2012,
Court of Common Pleas, Berks County,
Criminal Division at No. CP-06-CR-0004148-2011

BEFORE: DONOHUE, ALLEN and OTT, JJ.

MEMORANDUM BY DONOHUE, J.: Filed: March 15, 2013

Appellant, Yohansky Rodolfo Diaz-Reyes a/k/a Ovidio Diaz-Enrique ("Diaz-Reyes"), appeals from the trial court's June 25, 2012 judgment of sentence imposing four to twenty years of incarceration for two counts of delivering heroin (35 P.S. § 780-113(a)(30)). We affirm.

The trial court summarized the relevant facts as follows:

> In the instant case, [Diaz-Reyes] was charged with two separate drug deliveries. On August 29, 2011, Trooper Charity Farrell of the Pennsylvania State Police parked her vehicle on North Fourth Street in the City of Reading, Berks County, Pennsylvania. After [Diaz-Reyes] entered the back, passenger side of the vehicle, Trooper Farrell said, 'I have $40.00.' In response, [Diaz-Reyes] placed four glassine packets marked 'John Doe' on the center console of the vehicle. The packets contained 0.16 grams of heroin.
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> On September 20, 2011, Trooper Farrell once again parked her vehicle in the 200 block of North

> Fourth Street. When [Diaz-Reyes] approached her car, Trooper Farrell stated that she 'wanted to order four again.' After [Diaz-Reyes] indicated that he only had three, Trooper Farrell gave him pre-recorded United States Currency in exchange for three packets that were marked 'Power.' After Trooper Farrell and [Diaz-Reyes] discussed the relative quality of 'John Doe' and 'Power' heroin, [Diaz-Reyes] stated that he had one more packet at another location and asked if she wanted to buy it. Trooper Farrell said that she did, and [Diaz-Reyes] then entered 230 North Fourth Street and returned approximately one minute later with a fourth packet marked 'Power,' which he sold to Trooper Farrell for $10.00. The four packets obtained by Trooper Farrell contained 0.19 grams of heroin.

Trial Court Opinion, 9/4/12, at 3 (record citations omitted).

On June 19, 2012, a jury found Diaz-Reyes guilty of the aforementioned offenses. The trial court imposed its sentence on June 25, 2012, and Diaz-Reyes filed this timely appeal on July 13, 2012. He raises three issues for our review:

> 1. Whether the lower court abused its discretion in denying [Diaz-Reyes'] request that the identity of the anonymous witness/confidential informant be disclosed?
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> 2. Whether the lower court abused its discretion in admitting hearsay evidence that the cell phone seized from [Diaz-Reyes] was the cell phone that was used to arrange prior drug transactions where the police testified that they were not present when the arrangements were made and that the information identifying the cell phone came from the 'confidential informant' and not from any personal knowledge?
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> 3. Whether the results of police testing of [Diaz-Reyes'] cell phone should have been suppressed

> where the cell phone was seized without a warrant and was thereafter submitted to testing by police in order to identify its number which was thereafter used to incriminate [Diaz-Reyes] and/or whether counsel for [Diaz-Reyes] was ineffective for failing to litigate the suppression?

Diaz-Reyes' Brief at 6.

Diaz-Reyes first argues that the trial court erred in denying his motion to compel the Commonwealth to disclose the identity of its confidential informant ("CI"). We review the trial court's decision for abuse of discretion. ***Commonwealth v. Roebuck***, 545 Pa. 471, 476-77, 681 A.2d 1279, 1282 1996); Pa.R.Crim.P. 573(B)(2)(a)(i).

> The Commonwealth enjoys a qualified privilege to withhold the identity of a confidential source. In order to overcome this qualified privilege and obtain disclosure of a confidential informant's identity, a defendant must first establish, pursuant to Rule 573(B)(2)(a)(i), that the information sought is material to the preparation of the defense and that the request is reasonable. Only after the defendant shows that the identity of the confidential informant is material to the defense is the trial court required to exercise its discretion to determine whether the information should be revealed by balancing relevant factors, which are initially weighted toward the Commonwealth.
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> In striking the proper balance, the court must consider the following principles: A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. 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. In these situations[,] the trial court may

> require disclosure and, if the Government withholds the information, dismiss the action.
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> [N]o fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

Commonwealth v. Marsh, 606 Pa. 254, 260-261, 997 A.2d 318, 321-22 (2010).

Diaz-Reyes relies on ***In re D.B.***, 820 A.2d 820 (Pa. Super. 2003). In ***D.B.***, this Court concluded that disclosure of the CI's identity was appropriate where the CI and a police officer were the only two witnesses to a drug transaction. ***Id.*** at 822-23. The police officer gave the CI pre-recorded money and watched from afar as the CI conducted the transaction. ***Id.*** at 821. Based on those circumstances, the ***D.B.*** panel believed a "reasonable possibility" existed that the CI's testimony would exonerate the defendant. ***Id.*** at 822.

This case is unlike ***D.B.*** in that Trooper Farrell personally conducted the drug transactions instead of watching the CI do it from afar. The drug transaction took place during daylight hours inside Trooper Farrell's automobile. Thus, Trooper Farrell had the opportunity to observe Diaz-Reyes up close. In addition, Trooper Farrell's car was under surveillance by

other police officers who testified at trial. The Commonwealth produced photographs of Diaz-Reyes at the scene of the transaction. In summary, the Commonwealth produced substantial evidence establishing Diaz-Reyes' identification as the perpetrator.[1] Under these circumstances, the trial court concluded that the CI's testimony would not be of any help to Diaz-Reyes' defense, and that the balancing factors weight in favor of protecting the CI's identity. We believe the trial court acted within its discretion, as the record fails to establish any reasonable possibility that the CI's testimony would have exonerated Diaz-Reyes. Diaz-Reyes' first argument fails.

In his second argument, Diaz-Reyes asserts that the trial court abused its discretion in admitting hearsay evidence. Specifically, Trooper Farrell testified that the CI told her Diaz-Reyes' cell phone number. The CI called that number to arrange the controlled buys. After Diaz-Reyes' apprehension, police retrieved his cell phone. An officer called the number the CI provided from Trooper Farrell's cell phone. Diaz-Reyes' cell phone rang while Trooper Farrell's number appeared on its screen. The Commonwealth introduced these facts at trial. Diaz-Reyes argues that Trooper Farrell's account of learning his cell phone number from the CI was inadmissible hearsay.

[1] Police did not apprehend Diaz-Reyes immediately after either of the controlled buys. At trial, his primary defense was misidentification.

"'Hearsay' is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Pa.R.E. 801(c). "Evidence that is relevant is nonetheless inadmissible if it violates the hearsay rule or any exclusionary rule of evidence." ***Commonwealth v. Rush***, 529 Pa. 498, 504, 605 A.2d 792, 795 (1992). "The basis for rejecting hearsay evidence is its assumed unreliability because the declarant is not before the trier of fact and cannot be challenged as to the accuracy of the statement." ***Id.*** at 504-05, 605 A.2d at 795. "Hearsay testimony also violates the right of the defendant to confront his accuser." ***Id.***

In ***Rush***, the defendant was convicted of aggravated assault for stabbing a bookstore employee. Prior to the stabbing, the defendant carried on a conversation with the victim during which he told her he made picture frames out of cigarette boxes. ***Id.*** at 500-01, 605 A.2d at 793. At trial, a police detective testified that he went to the defendant's mother's home and asked her if she had any picture frames that her son made. ***Id.*** at 504, 605 A.2d at 795. The defendant's mother produced a picture frame made out of cigarette boxes, and the trial court admitted the frame into evidence at trial. ***Id.*** The defendant's mother did not testify at trial. ***Id.*** The defendant objected to the admission of the picture frame because the foundation for its admission was his mother's implicit statement that the defendant made it. ***Id.***

Our Supreme Court ruled that the trial court erred in admitting the picture frame: "[Mother's] out-of-court, implied statement that appellant had made the picture frame was not subject to cross examination, and appellant did not have an opportunity to confront the witness. The implied statement was hearsay and did not fall into any hearsay exceptions." ***Id.*** at 505, 605 A.2d at 795. In ***Rush*** and in the instant case, the Commonwealth produced eyewitness testimony and physical evidence linking the defendant to the scene of the crime. Diaz-Reyes argues that ***Rush*** is on point in this case because the Commonwealth introduced an extra piece of identification evidence based on inadmissible hearsay.

The Commonwealth argues, and the trial court found, that the evidence of Diaz-Reyes' phone number was admissible to explain the course of the police officers' activity in conducting the investigation. In ***Commonwealth v. Estepp***, 17 A.3d 939 (Pa. Super. 2011), *appeal dismissed*, ___ Pa. ___, 54 A.3d 22 (2012), a police officer testified that a CI told him that a man named "Vern" was selling prescription drugs out of his house at a given address. ***Id.*** at 942, 44-45. The defendant, Vernon Lee Estep, lived at the address. ***Id.*** at 942. After observing the CI participate in a controlled buy, police obtained a search warrant for the residence. ***Id.***

The defendant argued that the officer's testimony regarding the CI's statement was inadmissible hearsay used as substantive evidence of the

defendant's guilt. ***Id.*** at 944-45. This Court disagreed, reasoning: "an out-of court statement offered not for its truth but to explain the witness's course of conduct is not hearsay and thus, is not excludable under the hearsay rule." ***Id.*** at 945. In ***Estepp***, the trial court instructed the jury that the CI's statement was relevant only to explain the police officer's course of conduct in commencing an investigation of the defendant. ***Id.*** The court instructed the jury not to evaluate the truth of the CI's alleged statements. ***Id.***

Similarly, in ***Commonwealth v. Dargan***, 897 A.2d 496 (Pa. Super. 2006), a CI provided police with the defendant's nickname, physical description, address, license plate number of his car, and his girlfriend's name. ***Id.*** at 499. At trial, a police officer testified to the facts he leaned from the CI, and the trial court admitted the testimony to explain the predicate for the police investigation. ***Id.*** The trial court instructed the jury that the officer's testimony was admissible only for explaining the officer's course of conduct leading up to the investigation of the defendant. ***Id.*** at 501-02. This Court concluded that the trial court properly admitted the evidence. ***Id.*** at 502. ***See also***, ***Commonwealth v. Underwood***, 500 A.2d 820, 822 (Pa. Super. 1985) ("This Court has repeatedly upheld the introduction of out-of-court statements for the purpose of showing that based on information contained in the statements, the police followed a certain course of conduct that led to the defendant's arrest.").

We agree with Diaz-Reyes' argument that the trial court erred in admitting inadmissible hearsay. Trooper Farrell did not use the cell phone number to describe the course of conduct that led to Diaz-Reyes' arrest. Police retrieved Diaz-Reyes' cell phone *after* his arrest. Evidence that the phone number the CI provided caused Diaz-Reyes' cell phone to ring did not explain any course of conduct. Rather, it helped confirm Diaz-Reyes' identification as the perpetrator. The record does not reflect that the trial court instructed the jury to consider this evidence only for explaining a course of police conduct.[2]

Though the trial court erred, we may still affirm the judgment of sentence if the error was harmless. "It is well settled that an appellate court has the ability to affirm a valid judgment or verdict for any reason appearing

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[2] The court did, however, sustain the following objection during the prosecution's closing argument:

> [Diaz-Reyes] also has a phone on him. The phone that the trooper used, the phone number of which was used to make the connections. And he calls that number. And he calls that number, and it rings. That phone is the same phone that was used to make the arrangements - -
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> [Defense Counsel]: Objection.
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> The Court: Objections is sustained. The jury is to disregard that portion of the last statement of the argument.

N.T., 6/18-19/12, at 141. The trial court consistently overruled Diaz-Reyes' objections during the relevant testimony and after the prosecution rested. ***Id.*** at 68-69, 112-13.

as of record." ***Commonwealth v. Allshouse***, ___ Pa. ___, 36 A.3d 163, 182 (2012).

> [T]he doctrine of harmless error is a technique of appellate review designed to advance judicial economy by obviating the necessity for a retrial where the appellate court is convinced that a trial error was harmless beyond a reasonable doubt. Its purpose is premised on the well-settled proposition that [a] defendant is entitled to a fair trial but not a perfect one. This Court may affirm a judgment based on harmless error even if such an argument is not raised by the parties.

Id.[3]

As set forth above, the Commonwealth produced a substantial body of evidence implicating Diaz-Reyes. In addition to Trooper Farrell's account of participating in two hand-to-hand transactions with Diaz-Reyes and the surveillance photos, the Commonwealth introduced the testimony of other police officers who followed Diaz-Reyes from the scene of one of the controlled buys. N.T., 6/18-19/12, at 61-64. One officer observed a tattoo the size of a baseball on Diaz-Reyes' lower left leg. ***Id.*** at 99. Diaz-Reyes stipulated that he has a tattoo on his left ankle.

We are cognizant that the Supreme Court in ***Rush*** declined to find harmless error in a similar case. In ***Rush***, the victim and another eyewitness identified the defendant. ***Rush***, 529 Pa. at 501, 605 A.2d at

[3] The parties do not address whether the CI's statement of the cell phone number was testimonial or non-testimonial. Given our disposition on harmless error grounds, the distinction between a testimonial and non-testimonial statement does not matter here.

793. Police also retrieved the defendant's fingerprint from a book the victim handed him. ***Id.*** at 505, 605 A.2d at 795. Nonetheless, the Supreme Court concluded that the trial court's error was not harmless:

> While it may be true that the record is replete with evidence identifying appellant as the attacker, we cannot say, beyond a reasonable doubt, that the hearsay evidence did not contribute to the verdict. Appellant challenged the reliability of both [eyewitness] identifications. He also argued that his fingerprint, which was found on the heart ailment book from the bookstore, was obtained during his interrogation by police and not during the attack itself. The only corroborating evidence of identification that appellant was unable to refute was his mother's implied statement that appellant made the picture frame in question. Given that making picture frames out of cigarette boxes is a rather unusual hobby, the hearsay statement may very well have led the jury to believe that appellant was guilty.

Id. at 505-06, 605 at 795.

In the instant matter, however, Diaz-Reyes did not offer any substantial evidence refuting the Commonwealth's identification evidence. Trooper Farrell based her identification of Diaz-Reyes on two face-to-face encounters, and several other police officers and surveillance photographs confirmed her description of him. Given the overwhelming unrefuted evidence establishing that Diaz-Reyes was the perpetrator in this case, we conclude that the trial court's error in admitting hearsay evidence was harmless beyond a reasonable doubt.

In his third argument, Diaz-Reyes asserts that evidence concerning his cell phone should have been suppressed. Diaz-Reyes acknowledges that he

did not litigate this issue before the trial court, which results in waiver. Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."). Diaz-Reyes also asserts that counsel was ineffective for failing to litigate this issue, but that argument must await collateral review. ***Commonwealth v. Barnett***, 25 A.3d 371 (Pa. Super. 2011) (*en banc*).

Since Diaz-Reyes has not raised a meritorious argument in this appeal, we affirm the judgment of sentence.

Judgment of sentence affirmed.